OIG Releases Unfavorable Advisory Opinion on Intraoperative Neuromonitoring Arrangement

8/31/2023

On August 18, 2023, the Department of Health and Human Services Office of Inspector General (OIG) issued an unfavorable Advisory Opinion regarding an intraoperative neuromonitoring (IONM) arrangement. The OIG reviewed a proposed arrangement between an existing IONM provider (the Requestor), a physician practice which provides neurology services (the Practice) and surgeons who require IONM services for their patients (the Surgeons), where the Surgeons would establish, own, and operate a new company to provide IONM services (NewCo). The Requestor would assist the Surgeons in establishing and operating NewCo, but neither the Requestor nor the Practice would have an ownership interest in NewCo.

Under the existing arrangement between the Requestor and the Surgeons, when the Surgeons perform surgeries requiring IONM services, they engage the Requestor to provide those services. The Requestor bills for the technical component of the IONM services and the Practice bills for the professional component of the IONM services. Under the proposed arrangement, when the Surgeons perform surgeries requiring IONM services, they would refer the patients to NewCo to provide those services. The Requestor would provide NewCo with billing and other administrative services pursuant to a billing services agreement between NewCo and the Requestor and the Practice would provide neurologists and neurophysiologists (leased by the Requestor to the Practice) pursuant to a personal services agreement between Newco and the Practice. The Requestor would attempt to ensure that no referrals to NewCo would be made for patients enrolled in Federal health care programs in order to abide by the Federal Anti-Kickback Statute (AKS).

The OIG found that the proposed arrangement would generate prohibited renumeration under the AKS and thus be grounds for sanctions if the requisite intent is present. The AKS makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of an individual to a person for the furnishing of, or arranging for the furnishing of, any item or service reimbursable under a Federal health care program. The AKS has established safe harbor exceptions, which allow for certain arrangements even though they would on their face violate the AKS. The OIG determined that the proposed arrangement involves remuneration which would induce the Surgeons to make referrals to NewCo when payment could be made by a Federal health care program. Furthermore, the OIG found that the proposed arrangement does not fit squarely within any of the safe harbor exceptions.

In particular, the OIG found the proposed arrangement problematic under the AKS because it enables the Surgeons and the Requestor to do indirectly what they could not do directly: pay the Surgeons a share of the profits from their referrals for IONM services that could be reimbursable by a Federal health care program. The OIG emphasized that the proposed arrangement exhibits many attributes of problematic contractual joint ventures, about which the OIG has expressed longstanding and continuing concerns, specifically:

“A health care provider in one line of business (hereafter referred to as the “Owner”) expands into a related health care business by contracting with an existing provider of a related item or service (hereafter referred to as the “Manager/Supplier”) to provide the new item or service to the Owner’s existing patient population, including Federal health care program patients. The Manager/Supplier not only manages the new line of business, but may also supply it with inventory, employees, space, billing, and other services. In other words, the Owner contracts out substantially the entire operation of the related line of business to the Manager/Supplier—otherwise a potential competitor—receiving in return the profits of the business as remuneration for its Federal program referrals.”

Much like the OIG’s example above, the proposed arrangement would allow the Surgeons to profit from their referrals to NewCo for IONM services while taking little to no risk since the Surgeons control the flow of business to NewCo and the business operations are contracted out to the Requestor. Through the proposed arrangement, NewCo could effectively push the Requestor out of the market as an independent supplier

of IONM services. The OIG did not view the proposed arrangement’s carve out of Federal health care program beneficiaries as a way to eliminate the risk of fraud and abuse as the OIG has longstanding concerns about arrangements under which parties carve out referrals of Federal health care program beneficiaries from otherwise questionable financial arrangements.

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For more information, contact:
Isabelle Bibet-Kalinyak | 973.403.3131 | ibibetkalinyak@bracheichler.com
Edward Hilzenrath | 973.403.3114 | ehilzenrath@bracheichler.com
Erika Marshall | 973-364-5236 | emarshall@bracheichler.com