New Advisory Opinions On Waiver of Co-Insurance by Municipalities.

By: G. Christopher Kelly

In a pair of related Advisory Opinions, numbers 04-12 and 04-13, the Office of Inspector General ("OIG") has concluded that it would not impose penalties against municipalities for two separate, but very similar, arrangements to waive co-insurance payments (i.e. "insurance-only billing"). The OIG is the office of the federal government that, among other duties, monitors healthcare providers for violations of the Anti Kick-Back Act. The advisory opinion was requested by two municipalities that each owned their own EMS service. It was noted that both of these services ran all of the emergency calls in their areas and ran no non-emergent calls. Also, these services did not sub-contract ambulance service to a third party. One municipality based its proposal to waive co-payments on the theory that revenue received from local income taxes satisfied payments for EMS services for residents of the city. Any individual who paid city income taxes was treated as a "resident". The other entity, a municipal Fire District, proposed to waive insurance co-pays under the theory that local real estate tax revenue was sufficient for payment of EMS services. For the purpose of this arrangement, "residents" included actual property owners as well as employees of a property tax-paying business while the employee was working on the premises. The OIG accepted both of these definitions for "residents".

The Anti Kick-Back Act ("AKA") generally makes it a criminal offense to intentionally give or receive anything of value in exchange for the referral of Medicare patient business. Under the Social Security Act, remuneration paid to patients/beneficiaries is also a violation. Any arrangement where *one* purpose of the remuneration is to obtain money for the referral of services *or* to induce referrals can be a violation. It has long been OIG policy that waiver of co-insurance premiums for reasons unrelated to individualized, good-faith assessments of financial hardship may be considered violations of the Act. Violation of the statute is a criminal felony punishable by a fine of up to $25,000 and/or imprisonment of up to five years. A conviction of an AKA crime can also lead to exclusion form the Medicare and Medicaid programs, meaning that the provider can no longer bill government insurance programs. There can further be civil liabilities which would require all funds received as part of the illegal activity to be returned to the government, along with additional penalties.

The OIG based its decision on a "special rule" in the CMS Medicare Benefit Policy Manual ("BPM")(formerly the Medicare Carrier's Manual ("MCM") and the Medicare Intermediary Manual ("MIM")). According to Chapter 16, section 50.3 of the BPM, a state or local government provider which reduces or waives its charges for patients unable to pay, or charges patients only to the extent of their Medicare and other health insurance coverage, is not viewed as furnishing free services and may therefore still receive payments from Medicare and other government insurance programs. Given this language, the OIG said that waiver of co-payments for *bona fide* residents would not be a violation of the Kick-back Act. While it appears that this section of the BPM only applies to an "ability to pay" analysis, the OIG did not discuss the need to determine ability to pay, but allowed for the municipalities to categorically waive co-pays for all residents who pay income or property taxes.

The Opinion went on to discuss a related issue regarding private services contracting with municipalities for the provision of ambulance services. The OIG stated that the policy of allowing waiver of co-pays does NOT apply to contracts with outside ambulance suppliers. For example, where a municipality contracts with an outside ambulance provider for services to the municipality's residents, the municipality can not require the ambulance provider to waive out-of-pocket co-insurance amounts unless the municipality pays the co-pays itself through some appropriate arrangement (this topic was discussed in another advisor opinion article published in the October 2003 issue of *EMS Magazine*). Thus, the OIG points out that there is a significant difference between a municipality's ambulance service waiving insurance co-pays for its tax paying residents and a municipality requiring (or a private service offering) waiver of co-pays as a condition of getting the municipality's ambulance business.

As with any advisory opinion, the OIG stated that the opinion was based on the information given to it by the requesting municipality, and therefore was dependent on its full and truthful disclosure of facts. The opinion can not and should not be relied upon by parties other than the one specifically requesting the opinion. The OIG and the federal government are not bound by this opinion and reserve the right to change their position in the future. Specific facts often lead to very different results (for example the difference between a municipality and a private company contracting with a municipality), therefore, you should consult an attorney before beginning any course of action that you have questions about. For the same reasons, nothing in this article is intended by the author to be construed as legal advice.

The opinions can be found at:
http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2004/ao0412.pdf, and
http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2004/ao04-13.pdf

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