

# CCH Health Care Compliance LETTER

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## On The Front Lines 4

**Telltale signs your executive compensation system may be ineffective**

by Paul R. DeMuro, CPA, MBA, JD

## HIPAA 1

■ Providers, payers lag on HIPAA security compliance

## Fraud and Abuse 8

- OIG addresses proposed arrangement to share hospital cost savings with cardiologist group
- OIG approves cost sharing program with safeguards

### Letters to the Editor

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## Providers, payers lag on HIPAA security compliance

by Susan A. Marks, Esq., Contributing Editor

Phoenix Health Systems and the Healthcare Information and Management Systems Society (HIMSS) have released their Winter 2005 HIPAA compliance survey results. The survey tracks the health care industry's progress in the area of HIPAA compliance and reports on percentages of providers and payers that have reached compliance in HIPAA security, transactions and code sets (TCS), and privacy. For most providers and payers, the road to compliance has been a difficult one. Implementation of the HIPAA security rule has been exceedingly slow even though the deadline is just one month away. Specifically, only 30 percent of payers and 18 percent of providers indicated that they are compliant with HIPAA security regulations. The objective of HIPAA has been to preserve patient privacy and encourage certain efficiencies through the use of standardized electronic submissions and other simplification programs. It is clear, however, that unless secure and protected servers are in place that can guarantee privacy and security of data, it will be impossible to accomplish these objectives.

There has been significant progress in other areas of HIPAA. Under TCS, providers, payers and vendors have made progress in implementing the standard transactions required for an electronic submission under HIPAA, with 90 percent of providers transmitting at least one standard transaction to their payers. However, full privacy compliance has not been achieved. Only 78 percent of providers and 90 percent of payers have indicated that they are compliant. Seventy-three percent of providers and 56 percent of payers reported that their organizations had experienced a privacy breach over the past six months.

**Roadblocks.** The number one roadblock to HIPAA compliance, according to the survey, was "achieving successful integration of new systems, policies and procedures across the enterprise." "Interpretation of HIPAA regulations" ranked second and "budget constraints" ranked third, with "time constraints" in fourth place. In their comments, many respondents stated that they were frustrated with the Centers for Medicare & Medicaid Services (CMS) because it has not provided adequate guidance regarding interpretation and implementation of the security regulations.

**Security.** The electronic data security rule describes how covered entities are to safeguard and protect the confidentiality, integrity, and availability of electronic protected health information. It is one of several rules required by the administrative simplification provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (PubLNo 104-191). Providers and payers have until April 21, 2005, to become compliant. Although the deadline is just one month away, the survey found that only 18 percent of provider organizations are compliant. The same percentage was reported during the Summer 2004 survey and seems to indicate little progress.

## HIPAA (cont.)

Among hospitals, 18 percent of hospitals with less than 400 beds are compliant, while only 9 percent of hospitals with 400 or more beds are compliant. Thirty percent of payers reported that they are compliant with security regulations, up from 13 percent in summer 2004.

The number of organizations that are not compliant but expect to be compliant has declined. In summer 2004, 87 percent of noncompliant organizations expected to be compliant by the 2005 deadline. In the latest survey, however, only 76 percent expect to be compliant by the deadline. Hospitals with more than 400 beds have indicated the lowest level of expected compliance at only 55 percent. The percentage of payers that expect to be compliant is 80 percent, while in the summer of 2004, 91 percent of payers expected to be compliant by April 2005.

Security compliance does not appear imminent; the average number of organizations that are currently compliant is only 24 percent. The survey results, however, demonstrate that organizations have been making progress in two important areas. Over 93 percent of providers and 98 percent of payers have designated an individual to be a security officer. Some providers (32 percent) and payers (37 percent) have conducted the required HIPAA security training. Additionally, 58 percent expect to finish training by the deadline.

Providers and payers differ only slightly in their designation of the most difficult HIPAA security standards to implement:

### Providers

- Audit controls (55 percent)
- Risk management/risk analysis (49 percent)
- Information system activity review (48 percent)
- Data backup plan/disaster recovery plan/emergency operation plan (29 percent)

### Payers

- Information system activity review (40 percent)
- Risk management/risk analysis (34 percent)
- Audit controls (32 percent)
- Data backup plan/disaster recovery

plan/emergency operation plan (29 percent)

The success of HIPAA and its health care simplification objective is heavily dependent on the relationship between the security of the data, the integrity of electronic health care transactions, and patient privacy. If those relationships fail it may be difficult for HIPAA to achieve its objectives. Patient data remains susceptible to inaccessibility, loss, damage, alteration, theft and intrusion. Providers and payers, it seems, cannot confirm that their systems and the data contained in them are secure. Since June 2004 both providers (40 percent) and payers (26 percent) have experienced at least one breach of data security. HIPAA standard electronic transactions may have turned into patient privacy and security breaches waiting to happen.

**Transactions and code sets.** October 16, 2003, was the original compliance date for HIPAA TCS regulations. Due to industry-wide difficulties in achieving TCS compliance, CMS implemented a temporary contingency plan on September 23, 2003, that allowed covered entities to transmit non-compliant transactions. On July 1, 2004, CMS issued a modification to the contingency plan that all non-compliant claims would require an additional 13 days to process. The contingency plan as modified remains in effect today. TCS compliance includes the implementation of all policies and procedures and testing processes used in the transmission of standard transactions.

The survey results showed that overall TCS compliance has improved, with 73 percent of providers and 70 percent of payers considering themselves fully compliant. Provider and payer organizations have indicated that they are now ready to accept/transmit the standard HIPAA transactions. Ninety percent of providers have submitted at least one standard transaction to their payers. Seventy percent of providers are submitting over one-half of the standard transactions. However, when compliant providers were asked if they are submitting standard transactions for their organizations, only 49 percent stated that they were. Seventy percent of payers consider themselves to be fully compliant, yet only 56 percent

indicated that they are submitting all of their required standard transactions. Providers stated that the reason for not submitting their standard transactions is that their payers cannot accept or transmit those transactions. Providers also recognized that the operational processes within their organizations are not able to handle the transactions. Payers claimed that they are capable of submitting standard transactions, but their providers cannot handle the format yet.

According to the survey, providers are confident that their information technology



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Unless otherwise noted, all paragraph references are to the CCH Health Care Compliance Reporter.

## HIPAA (cont.)

vendors are capable of supporting HIPAA standard transactions. They also reported that most payers have been forthcoming regarding the details of their HIPAA compliance plans. A majority of providers, 68 percent, plan to use a clearinghouse to submit their standard transactions. Eighty-eight percent of payers reported that they are able to accept claims directly from the provider or through a clearinghouse. Payers reported that 28 percent of their providers are transmitting at least one standard transaction, and 37 percent said most of their providers are doing so.

The obstacles to TCS implementation are the same as the survey reported eighteen months ago. The primary obstacle is that certain provider and payer organizations are not ready or able to process the standard transactions. Additionally, certain critical vendors have not supplied providers and payers with necessary HIPAA compliant software. Survey participants were asked to select the reasons for their lack of compliance. Providers selected the following reasons:

- Payers are not ready to accept standard transactions.
- Critical vendors have not provided compliant software.
- Clearinghouses are not ready to accept or transmit transactions.

Payers gave the following reasons:

- Critical vendors have not provided compliance software.
- Providers are not ready to accept standard transactions.
- Installation of critical software updates is not complete.

**Privacy.** Compliance with the privacy rules was required by April 2003. The survey continued to track the health care industry's privacy compliance progress to identify any remaining compliance gaps. Ninety percent of payers indicated that they are compliant. Only 78 percent of providers reported that their organizations are fully compliant. Small physician providers are the least compliant, with only 67 percent having reached compliance even though the deadline for compliance was two years ago. Small hospital providers were the least compliant within

the hospital provider group, with only 72 percent reporting compliance. Large health plans were the most compliant at 100 percent.

Gaps remain in some areas of privacy compliance, but overall compliance has improved. In the area of "monitoring organizational compliance with the privacy regulations," compliance among providers has increased from 76 percent to 88 percent in January 2005. Providers have also improved in the area of required business associate agreements, with 88 percent of providers compliant in this area. Providers indicated that "managing the organizational process for accounting for disclosures" was the most challenging privacy requirement. For those providers that are privacy compliant, a majority reported privacy breaches, of which almost half reported they had five or fewer privacy breaches. A majority of both compliant providers and payers have had no formal complaint of privacy violation brought against them. Twenty-seven percent of providers and 31 percent of payers have had at least one formal complaint of privacy violation filed against them, either with the federal government or in a civil proceeding, since the privacy compliance deadline.

**Provider budgets.** Smaller hospitals, with less than 100 beds, anticipate in the survey that they will spend less than \$50,000 on HIPAA compliance activities in 2005. Moderate sized hospitals, with between 100-400 beds, anticipate

spending as much as \$250,000. The number of larger hospitals with over 400 beds that anticipate their spending to be in the \$1,000,000 range was on the rise. Only 23 percent of providers indicated a desire to implement Return on Investment (ROI) projects as a part of their HIPAA compliance efforts; however, many remained uncertain. Of those pursuing ROI benefits, all planned to expand the organization's use of electronic HIPAA standard transactions.

Phoenix Health Systems and HIMSS conducted the HIPAA compliance survey from January 4 to January 20, 2005. The survey was sent to 13,000 HIMSS members and nearly 16,000 HIPAAalert newsletter subscribers. Four hundred health care providers and payers responded and participated in the survey. Those who took the survey did so anonymously on the Phoenix website at HIPAAAdvisory.com. Survey participants were comprised of 80 percent provider organizations and 20 percent payers. Almost half of the survey takers were CIOs, senior managers, and department directors/managers. Eighty-four percent of total survey respondents reported that they had an official role within their organization relating to HIPAA compliance. Twenty percent of the survey respondents function as privacy officers and an additional 20 percent are involved in security compliance. ■

*US Healthcare Industry HIPAA Compliance Survey Results, Winter 2005, ¶500, 124*

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# Telltale signs your executive compensation system may be ineffective

by Paul R. DeMuro, CPA, MBA, JD

*Executive compensation is under the spotlight. The Internal Revenue Service (IRS) is focusing audits or reviews on healthcare providers' executive compensation. The IRS is particularly interested in compensation exceeding \$1 million per year for nonprofit hospitals and health system executives. Class action litigation has raised the question about whether executive compensation is too high. The media and unions also have echoed this sentiment. Finally, states attorney generals have become increasingly interested in this area.*

*This article sets forth some telltale signs a company's executive compensation system may be ineffective. Although the tenets of the Sarbanes-Oxley Act only apply to reporting companies, many of the Sarbanes-Oxley requirements represent best practices for all companies, even nonprofit entities not subject to Sarbanes-Oxley.*

### **1. The Compensation Committee or Board of Directors Making the Decision about Executive Compensation Is Not Independent**

The CEO and other executives in management should not be members of the Compensation Committee or if they are on the Board of Directors, they should not vote on the compensation packages. Any directors employed by the company should not participate in these decisions. In addition to employment by the company, certain directors may not be independent by virtue of their relationship with the company. For example, a lawyer or consultant who "sells" millions of dollars in legal or consulting work to the company likely will not be considered independent. A director might have a "special" relationship with the CEO or others because of social or other reasons and he or she might not be independent either.

Perhaps worse than having non-independent directors on the Compensation Committee would be having no compensation or other committee make recommendations on executive compensation and merely let the executive team make them or the entire Board of Directors with the non-independent directors voting. It may be best to have the Compensation Committee do the review and exploration in this area and recommend to the Board that the compensation packages developed be approved by the Board of Directors with only those independent directors voting.

### **2. The Compensation Committee Does Not Have a Charter**

The Compensation Committee should have a formal charter setting forth its charges/missions. It should provide for the qualification of its membership, the frequency of its meetings, how they are conducted, and perhaps a budget and its authority to retain consultants and legal counsel. It should also provide for self-evaluation forms.

### **3. All Compensation in Whatever Form Is Not Considered**

Many healthcare systems have a tendency to obtain an opinion about the percentile for different forms of compensation from different compensation consultants. For example, one compensation consultant might specialize in and provide a percentile ranking for base salary, another for a long-term incentive program. Additional consultants might be used for different types of pension plans (e.g., defined contribution vs. defined benefit plan) and perquisites.

All compensation, whether it be base compensation, short and long term incentives, pension and perquisites, needs to be counted in the determination of overall compensation and the applicable percentile. All too often, no such analysis has been performed. In fact, many consulting firms appear unable to perform such analyses. The responsibility for ensuring that such analyses are conducted typically would lie with the Compensation Committee of the Board or the Director of Human Resources.

#### **4. The Compensation Committee Has Not Been Presented with a Spreadsheet Setting Forth All Compensation of the Executive Team**

The Compensation Committee and/or the Board of Directors should ensure that it is aware of all compensation which each executive is receiving, including base salary, short and long-term cash incentive payments, paid time off, SERPs, vacation pay and sick pay. In addition, all pension benefits should be accounted for including defined benefit, defined contribution plans and any top hat plans. Other benefits and perquisites such as health and dental insurance, prepaid legal plans, estate planning, company paid life insurance and disability insurance, stock options or grants and other benefits should be considered. Use of a company airplane, vacation properties, car allowances, and any tax gross-ups for such benefits will be particularly important to consider.

The inclusion of all such cash compensation, benefits, perquisites, etc., and tax gross-ups on a spreadsheet can be particularly revealing to the Compensation Committee and/or the Board of Directors. In fact, in some instances it can be quite surprising. Even more surprising is the fact that after all these forms of compensation, benefits and perquisites are scheduled, occasionally, the Compensation Committee and/or Board of Directors does not know at what percentile the executives' compensation is.

One form of compensation which is often overlooked is payments for spousal travel and/or expenses (e.g., where a spouse accompanies an executive on a board retreat, or when personal expenses are put on a master account or paid for by a company, such as horseback riding, tennis and other expenses to the extent that they are not business related). In fact, some payments may even be inconsistent with company policy.

#### **5. The Human Resource Director Is in Charge of the CEO's Compensation**

If the Human Resource Director (HR Director) or Vice President of Human Resources is in charge of determining the CEO's compensation, recommending the range of his or her compensation, or retaining the consultants to assist in such determination, there should be special scrutiny over other relationships where the HR individual reports to the CEO or to someone who reports to the CEO.

The natural tendency of the HR chief executive may be to ensure that the CEO and/or other executive to whom he or she reports are "satisfied" with their compensation. Obviously, the more highly compensated the CEO and other executives, the more "satisfied" they likely are to be. The Chief HR executive more than likely will be part of the

executive team. As such, certain executive compensation will apply to this individual, and how executive compensation is benchmarked, the percentile range of compensation, etc., often affects the HR Director. The higher the overall executive compensation is, the higher the compensation of the chief HR individual likely will be.

#### **6. The Compensation Consultants Do Not Report to the Compensation Committee or the Board of Directors**

The compensation consultants should report to the Compensation Committee or the Board of Directors where issues involving CEO compensation are concerned. The compensation consultants can report to the HR Director on certain issues of overall executive compensation, e.g., the design and implementation of executive benefits. However, those aspects of compensation and benefits which affect the CEO should be designed and implemented with the assistance of the consultants reporting to the Compensation Committee and/or the Board of Directors, not to the HR Director.

Such a process is a best practice because any potential bias or incentive of the HR Director to ensure that the CEO is "satisfied" with his or her compensation or that executive compensation is benchmarked at an "appropriate" percentile is minimized, such that there is no pushing the envelope with respect to compensation.

#### **7. The Compensation Committee Does Not Meet in Executive Session**

The Compensation Committee should meet in executive session without any members of the executive team present, to ensure that the Compensation Committee can deliberate without any influence from management. The Compensation Committee should meet in executive session with the compensation consultants to ensure a free flow of information and that the discussion among its members is as candid as possible.

Where the Compensation Committee does not meet in executive session, it is not best practice. The Compensation Committee should be able to discuss all issues of executive compensation, particularly those affecting the CEO's compensation, in private and be comfortable discussing all aspects thereof.

#### **8. The CEO Interferes in the Executive Compensation Process**

The CEO should not participate in the determination of the design and implementation of his or her executive compensation package, except to the extent that his or her participation is necessary. There is often a fine line here,

## On the Front Lines (cont.)

particularly with respect to a CEO who is valued and whom the company is most interested in retaining. A Compensation Committee and/or Board of Directors will certainly want to know what a CEO's compensation expectations are and what it will take to retain him. Obviously, the compensation process needs to include the input of the CEO. Certain types of compensation benefits or perquisites can be more attractive to one CEO compared to another. An appropriate compensation package is one that seeks to maximize the benefit to the CEO while minimizing the cost to the company. Certain benefits are more attractive to certain CEOs than others.

The CEO should not put the Compensation Committee or Board of Directors in a situation where they feel they have to discuss his or her compensation while he or she is present and make certain decisions while in his or her presence. On the other hand, the Compensation Committee and/or Board of Directors should work with the Compensation Consultants in setting the parameters for the CEO's compensation with input from the CEO. The ultimate discussion with respect to what the CEO is offered, his or her raise and benefits, etc., lies with the Compensation Committee and/or the Board of Directors. The decision whether or not to accept such compensation lies with the CEO.

### **9. The Compensation Committee or Board Members Determining Executive Compensation Do Not Understand Financial Issues or Do Not Have a Financial Background**

Assessing executive compensation involves a basic understanding of certain financial issues. Where short- and long-term incentive compensation programs are part of executive compensation, understanding the underlying process for such compensation targets is particularly important. Those underlying processes likely will include meeting certain financial goals.

At least one member of the Compensation Committee should have some basic financial and/or accounting training. Members of the Committee without financial training or expertise in executive compensation should receive substantial assistance from retained consultants and might also consider seeking additional education in such areas through conferences, seminars or educational programs. A knowledgeable Compensation Committee understandably will make better, informed decisions about executive compensation.

### **10. The Compensation Committee Does Not Have Its Own Budget, Cannot Retain Separate Consultants and Counsel**

The Compensation Committee should be able to retain separate compensation consultants who will report to it. These compensation consultants might be different from those who may report to HR, thus minimizing the possibility

of bias. The Compensation Committee might even retain separate legal counsel to advise it with respect to executive compensation issues. Such legal counsel, if his or her firm does not provide other legal services to the company, should not be concerned whether the CEO and executive team including the General Counsel, if there is one, will continue to retain the services of such legal counsel.

### **11. The Compensation Committee or Board of Directors Requires or "Suggests" That the Compensation Consultant or Legal Counsel Conducting a Review of Executive Compensation Use the Company's Internal Audit, HR or Other Department and/or Company Resources in Its Review or Investigation to Save Money**

The advisors to the Compensation Committee should have the ability to provide competent, unbiased assistance to the Committee without undue influence from others in the company who may have differing agendas. Although saving money is certainly important, it is of paramount importance to ensure that the executive compensation system which is established and implemented is one that achieves its objectives of attracting and retaining competent executives in an unbiased atmosphere. Internal audit, HR and other company departments may have political or other objectives. To the extent that the consultant and/or counsel leading the review of compensation needs to use the assistance of certain internal company resources, the consultant and/or counsel should direct how those resources are utilized and they should primarily be used as information gatherers and not to make judgments or decisions. The consultant or counsel needs to be able to terminate the "assistance" of any internal resources or use others, if they are frustrating the process.

### **12. The Compensation Consultants Do Not Have a Database which Permits Them to Determine the Percentile for Overall Compensation Including Cash Compensation, Pension, Benefits and Perquisites**

Some Compensation Committees are able to benchmark the percentile for compensation for base compensation, total cash compensation, pension plans, benefits, perquisites or some combination thereof. However, the Compensation Committee must ensure that the compensation consultants can benchmark total compensation, benefits and perquisites from all sources in determining the percentile for executive compensation. Without such information, the Compensation Committee and the Board cannot make effective decisions and/or recommendations with respect to executive compensation.

### 13. The Human Resource Director's Compensation Is a Significant Multiple of the Compensation Paid to His or Her Direct Reports

It may be important to consider the executive compensation package for the HR Director or the chief HR executive in comparison to his or her direct reports. Of course, it is important to consider the functionality of the positions, but the compensation of an HR Director which is four or five times that of his or her direct reports may be somewhat suspect. It may be of concern if the HR Director has retained all the compensation consultants and has been involved in the benchmarking for the executive management team, including his or her own compensation.

### 14. The Compensation Committee Meets Once Every Few Years and Does Not Periodically Review Executive Compensation

In today's world, executive compensation is a dynamic activity. There is a paucity of top executive talent. Attracting and retaining such talent is a priority for companies, but it is important to be able to justify such compensation, whether because of the nonprofit status of an entity or to the shareholders of an investor owned corporation. A thoughtful, knowledgeable, unbiased process leads to the best results with respect to executive compensation packages. Given the dynamic nature of the executive compensation in the marketplace, it may be necessary to recalculate executive compensation more frequently than originally thought, but if a Compensation Committee does not meet periodically, it will not know whether it is necessary to do so. Tracking and monitoring compensation trends will not necessarily result in recalibrating compensation yearly, but it will help ensure that if it is necessary to be competitive, it can be done.

### 15. For Nonprofit Organizations Exempt from Taxation under Section 501(c)(3) of the Internal Revenue Code, They Do Not Follow the Process to Obtain a Rebuttal Presumption That Executive Compensation Is Reasonable

Compensation data needs to be available for total compensation on a timely basis. The Compensation Committee and/or the Board or individuals who approve the compensation should be independent and free of any conflicts of interest.

The Compensation Committee should ensure that the appropriate comparability date has been compiled.

The minutes of the Compensation Committee and/or Board of Directors meeting should reflect the approval of the compensation packages and the fact that the Committee or Board members voting were independent and that they relied upon appropriate date. The Committee or Board should ensure that all forms of executive compensation are set forth in writing.

### Conclusion

All too often, Boards of Directors, particularly of nonprofit organizations, may not know the value of the total compensation package paid to their CEO or executive team. It is incumbent upon such committee or Board of Directors to know what their senior executive compensation plans are and their elements, and also to know at what percentile these place the executives. There is nothing wrong with paying a company's CEO at the 95th percentile if the company believes its CEO is doing an excellent job, the company is meeting its financial and operational objectives, and the CEO is managing in a manner consistent with the company's mission and culture. The Compensation Committee and the Board of Directors should

know at what percentile the executives are being compensated and make a conscious decision to compensate the executives at that level.

For nonprofit entities, exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, they will want to ensure that they avail themselves of the rebuttable presumption of reasonableness for executive compensation.

For public companies, they will not want to ensure that their executive compensation is defensible to their shareholders. The compensation process should be free from conflicts of interest and bias, thus making the process defensible both internally and externally. ■

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### **OIG addresses proposed arrangement to share cost savings with cardiologist group**

**by Gené Stephens, JD,  
Contributing Editor**

A proposed arrangement in which a hospital would share a percentage of its cost savings with a group of cardiologists to assist with the implementation of cost reduction measures would trigger the provisions of both the anti-kickback statute and physician self-referral laws. The OIG determined, however, that the arrangement contained several features, which, in combination, provided sufficient safeguards to avoid the imposition of sanctions and civil monetary penalties.

Under the proposed arrangement, the hospital would pay the cardiology group a share of its first year's cost savings directly attributable to specific changes in the cardiology group's cardiac catheterization laboratory practices. The results of the cost savings would be summarized in a Practice Patterns Report that included twelve recommendations addressing ways to reduce the inappropriate use or waste of medical supplies in three categories. The proposed arrangement further established a "floor" beyond which savings could not accrue to the cardiology group for any given procedure or utilization of cardiac catheterization laboratory devices. In addition, compensation to the cardiology group would not exceed 50 percent of the projected cost savings identified in the Practice Patterns Report.

While the proposed arrangement, if properly structured, would serve legitimate business and medical purposes, the twelve recommendations regarding the standardization of devices and limitations on the use of vascular closure devices and products substitution would constitute an inducement to reduce or limit the hospital's medical practice. The OIG would not impose administrative sanctions, however, because the proposed arrangement contained restrictions and limitations on the amount of financial incentives provided to the cardiology group to prevent patient steering and included a procedure for

monitoring the level of patient referrals. The proposed arrangement also provided protections against inappropriate reductions in services by ensuring that individual physicians would still have the same selection of devices available after implementation of the arrangement. Finally, the proposed arrangement provided the additional safeguard of written disclosures to patients regarding the cardiology group's involvement in the arrangement, as well as provided patients with an opportunity to review the cost savings recommendations prior to their admission to the hospital.

*OIG Advisory Opinion 05-05, February 18, 2005, ¶500,127*

### **OIG approves cost sharing program with safeguards**

**by Susan A. Marks, Esq.,  
Contributing Editor**

An arrangement between a hospital and a surgical group to implement 27 cost savings recommendations would violate certain provisions of the Social Security Act because the remuneration received by the surgical group would constitute improper payments to reduce or limit services to Medicare beneficiaries and improper payments to induce referrals. The Office of Inspector General (OIG), however, would not impose any penalties or sanctions because the program includes several features that provide sufficient safeguards.

Under this arrangement the hospital would pay the surgical group a share of the first year's cost savings directly attributable to specific changes in the group's operating room practices, including standardization of certain cardiac devices. The practice report patterns identified 27 possible cost savings recommendations.

The OIG reviewed the 27 cost saving recommendations and found that, except for unopened surgical tray items and product substitutions, the recommendations would trigger civil monetary penalties (CMPs) but for the inclusion of several features that provided for sufficient safeguards. The safeguards include identification of the specific cost-saving actions and the resulting savings;

credible medical support that the recommendations would not affect patient care; payments under the program are based on all surgeries, regardless of the patient's insurance; protections against inappropriate reductions in services; and financial payments are limited in duration and amount.

The OIG reviewed the program and has found that it would trigger violations of the anti-kickback statute. The OIG determined, however, that penalties would not attach because based on the facts and circumstances of the program, it is unlikely that the program would be used to attract physician referrals. The arrangement, therefore, poses a low risk of fraud and abuse under the anti-kickback statute.

Although the recommended cost sharing actions under the program violate both CMPs and the anti-kickback statute, the OIG has chosen not to impose sanctions because of several features that provide for safeguards within the program. Importantly, the program sets forth the actions that will result in cost savings and then ties the surgical group's payment to the actual savings realized. This transparency allows an assessment of the likely effect of the arrangement on the quality of care and ensures that the identified actions caused the savings and not reductions in services to beneficiaries or additional referrals. The risks of patient and program abuse that are often found in gainsharing programs are not present in this program. Given the limited duration and scope of the arrangement, these safeguards provide sufficient protections against patient and program abuse. The 50 percent of cost saving payments under the program do not appear to be unreasonable given the nature of the actions required by the physicians to implement them, the specificity of the payment formula, and the cap on total remuneration to the surgical group. Other arrangements, including those that are longer in duration, more expansive in scope, with payments of 50 percent of cost savings could lead to a different result. ■

*OIG Advisory Opinion 05-06, February 18, 2005, ¶500,128*