Proskauer

Payment by MCOs to Encourage Preventive Screenings Not a Kickback

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On October 11, 2018, the Office of the Inspector General ("OIG") for the Department of Health and Human Services ("HHS") issued an advisory opinion clarifying that an arrangement between a managed care organization and its network providers wherein the providers are incentivized to increase existing beneficiary participation in a preventive program would not violate the Anti-Kickback Statute ("AKS").

The Proposed Arrangement

The requester of the advisory opinion, a Medicaid managed care organization (the "Requester" or "MCO"), contracts with providers and clinics ("Network Providers") to provide health care services to the MCO's Medicaid beneficiaries ("Enrollees"). Such health care services include Early and Periodic Screening, Diagnostic, and Treatment ("EPSDT") services to Enrollees 21 years old or younger. The EPSDT benefit is designed to ensure that children receive comprehensive and preventive health care screenings and services. When a Network Provider provides EPSDT services to an Enrollee, the MCO pays the Network Provider a capitated payment, which the Network Provider is obligated to accept as payment in full.

Under the proposed arrangement, Requester would provide per-Enrollee incentive payments ("Incentive Payments") to Network Providers that meet certain benchmarks for increasing the amount of EPSDT services they provide to Enrollees (the "Proposed Arrangement"). The goal of the Proposed Arrangement is to increase Enrollees' utilization of EPSDT services which, in turn, would help Requestor lower its costs by detecting Enrollees' health conditions earlier.

Network Providers would be eligible to receive one of three different levels of Incentive Payments, which would be determined based on the percentage increase of EPSDT services provided to Requestor's existing Enrollees ("Existing Enrollees") from one year to the next. As described in the advisory opinion, if a Network Provider increased EPSDT services to Existing Enrollees in 2019 by at least 10 percent from 2018, the Network Provider would receive a $1 Incentive Payment per Existing Enrollee who received EPSDT services during 2019. If the increase in EPSDT services from 2018 to 2019 were at least 20 percent, the Network Provider would receive a $2 incentive payment per Existing Enrollee, and a 30 percent or greater increase in EPSDT services would result in a $3 incentive payment per Existing Enrollee.

Because the Incentive Payments are based solely on the percentage change in the volume of EPSDT services provided to Existing Enrollees from one year to the next, Incentive Payments would not be used to recruit new Medicaid beneficiaries.

OIG's Analysis

In Advisory Opinion No. 18-11, the OIG determined that the Proposed Arrangement would not generate prohibited remuneration under the AKS because it would qualify for safe harbor protection. According to the OIG, the Proposed Arrangement meets the elements of the safe harbor for eligible managed care organizations ("EMCOs") at 42 C.F.R. § 1001.952(t), which include the following:

1. As a Medicaid MCO, the Requester qualifies as an EMCO and the Network Providers are "first tier contractors" because they contract directly with the MCO.
2. The Incentive Payments under the Proposed Arrangement were intended to increase EPSDT services, which are considered health care services.
3. The MCO certified that it would enter into a signed, written agreement with its Network Providers, and such agreement would have at least a one-year term. The agreement also would specify that the services covered by the Proposed Arrangement are EPSDT services, and that the Network Providers could not claim payment from a Federal health care program for the EPSDT services. The MCO also certified full financial responsibility for the cost of providing the EPSDT services to Enrollees, and the incentive was limited to increasing participation in EPSDT services for Existing Enrollees, which meant providers were not induced to acquire new enrollees.

4. The Proposed Arrangement would not increase or shift costs to federal health care programs in the future, but any increase realized would likely be an appropriate reflection of an increased cost of care stemming from increased utilization of the EPSDT services, a result which would be consistent with the Medicaid Program's goal of diverting chronic health problems by having more children receive early detection and care.

While this advisory opinion is limited in scope to the Requestor's specific arrangement, as is always the case, it appears that EMCOs may make incentive payments to participating providers to promote the use of health care services that are reasonably believed to lower overall program costs and improve health care outcomes. Importantly, this advisory opinion requires safeguards against inappropriate use of these incentives, such as using the payments to recruit new Medicaid beneficiaries, by restricting their use to existing members/patients only.