

Discounting the Risk of Discounts?

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On March 9, 2026, the Department of Health and Human Services Office of Inspector General (“OIG”) posted an advisory opinion addressing a medical technology manufacturer and distributor’s proposal to offer ambulatory surgery centers (“ASCs”) a discount on (“IOLs”) and other surgical supplies used to perform cataract surgery, contingent on affiliated physician practices purchasing the company’s software product at full price. The OIG found that the proposed arrangement would constitute prohibited remuneration under the Federal anti-kickback statute if the intent to induce referrals were present, but the OIG stated it would not impose sanctions due to three factors that mitigate the risk of fraud and abuse. This is the first OIG advisory opinion to rely expressly in part on the rationale that a proposed arrangement “does not present an inappropriately high risk of steering or unfair competition.”



The proposed arrangement is structured as follows: the medical technology manufacturer and distributor “(the “Company”) would offer discounts to ASCs on supplies needed to perform cataract surgery contingent on a physician group practice with ophthalmic surgeons who perform cataract surgery at the ASC (the “Practice”) purchasing a subscription agreement for software that the Company sells. The Practice must purchase a license to the Company’s software at full price, and the ASC would then become eligible for discounts on the Company’s surgical supplies.

The OIG found that the arrangement was low risk under the Federal anti-kickback statute for three reasons:

1. The proposed arrangement “should not increase costs to Federal health care programs or result in overutilization.” This is due to the way that Federal health care

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programs reimburse for cataract surgeries – via set facility fees and professional services fees – such that the software and surgical supplies are not separately billable items. Because Federal health care programs would pay the same amount regardless of which software and surgical products are used, the proposed arrangement should not increase costs to Federal health care programs.

2. The proposed arrangement “presents a low risk of interference with clinical decision-making” because the discounted surgical supplies do not require the use of specific corresponding IOLs or supply packs, and the software will function the same regardless of the electronic health record, diagnostic equipment used, or brand or type of IOLs or supply packs chosen. The OIG recognized that surgeons with ownership in the ASC could receive an indirect benefit from the surgical supply discounts, but it noted that a discount of this nature is only one factor that a surgeon might consider when choosing surgical supplies. And because purchasing the software would present an additional expense for the Practice, the arrangement would not act as a financial incentive that would distort clinical decision-making.
3. Finally, the proposed arrangement “does not present an inappropriately high risk of steering or unfair competition” because the discount on IOLs and surgical supplies is only one of many factors that impact selection of IOLs, surgical supplies and software platforms. The OIG noted that because the referral source (the Practice) must purchase a full-price software license in order for the referral recipient (the ASC) to receive the supply discount, the risk is lower than if the referral source received the discount contingent on the referral recipient paying full price for other items or services.

This is the first time that the OIG has articulated this third rationale as, in part, a basis for issuing a favorable advisory opinion. The OIG’s analysis here indicates that while the OIG gives weight to potential steering or unfair competition, some steering and some potentially unfair competition may be permissible as long as that risk is low or not inappropriately high, respectively. In examining this arrangement, the OIG concluded that a discount that does not meet the discount safe harbor to the anti-kickback statute can be one factor impacting competition, but that may be acceptable so long as it is not the only factor or even a strong factor. And the OIG found that the relationship between the parties – who can refer to whom and which party pays full price and which party gets the discount – is an important consideration.

As always, OIG advisory opinions are only applicable to the requesting individual or entity and cannot be relied on by other individuals or entities. However, this advisory opinion may help clinicians, manufacturers and their legal counsel assess arrangements involving more complex discount arrangements that do not meet the discount safe harbor to the anti-kickback statute.

If you have questions or would like additional information, please contact the authors or any of your contacts in the Dorsey & Whitney health care practice group.