

For Leaders In Medical Imaging Services



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## Advisory Opinion Muddies the Waters on Preauthorization

by Josh Kaye, Esq, and Jerry Sokol, Esq

After reviewing a proposed arrangement pursuant to which a company would handle the processing and submission of insurance preauthorizations for various imaging services for the benefit of multiple imaging centers, the HHS OIG concluded that it would not penalize the arrangement, even though it did not qualify under any safe harbor of the federal anti-kickback statute.

At first glance, the favorable opinion seems to provide a welcome reprieve for an imaging industry that has faced significant reimbursement cuts and ongoing health care regulation over recent years. The opinion, however, is likely to have limited value because it fails to provide the needed clarity to those radiology groups and imaging centers that are trying to comply with the anti-kickback law, but face the practical business issue of obtaining insurance preauthorization when a referring physician's office refuses (or otherwise fails) to do so.

*"The opinion will probably provide limited utility to the imaging industry because it does not address those arrangements among imaging centers and referring physicians that are becoming increasingly prevalent in the industry."*



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### Background

In Advisory Opinion 08-12, posted September 26, 2008, the OIG reviewed a proposed arrangement pursuant to which a newly formed company (Newco) would handle the processing and submission of insurance preauthorizations and other purely administrative functions on behalf of multiple imaging centers. In exchange for such services, each imaging center would pay Newco a per-service fee for each preauthorization that it handled. The fee would be consistent with fair market value and would be due from the imaging center to Newco, regardless of whether the insurance company approved the imaging study. Most of the preauthorizations would involve commercial payors, though some claims could involve a federal health care program payor.

The OIG commented that the proposed arrangement would not qualify under the anti-kickback law's safe harbor for personal services and management contracts because the fee structure to be paid by the centers to Newco would vary based on the number of services performed by Newco, as opposed to being fixed in the aggregate. Notwithstanding, the OIG determined that the proposed arrangement would not violate the anti-kickback law. The OIG's analysis relied primarily on four factors.

### Key Factors

First, Newco and its affiliates are not, and would not be, health care providers, practitioners, or suppliers, and are not, and would not otherwise be, affiliated with the health care industry, except as a provider of the administrative services under the proposed arrangement.

Second, Newco is not, and would not be, in a position to receive, steer, or influence referrals of items or services covered under a federal health care program.



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Third, the proposed arrangement is distinguishable from those arrangements involving the marketing or promotion of an item or service. Newco's services are purely administrative and did not promote any specific item or service. Each of the centers would be responsible with providing Newco with the patient information required for Newco to submit the preauthorizations. The centers would be Newco's only source of patient information. If Newco required additional patient information, it would obtain such information from the center. Newco would not be in contact with any private or public health care beneficiaries or referring physicians in the performance of the preauthorization services. Accordingly, Newco's services could not generate any federal health care business.

Fourth, the proposed arrangement is distinguishable from those potentially problem-causing arrangements where certain services are provided by, or on behalf of, an imaging company or imaging equipment manufacturer to an existing or potential referral source.

It is significant that the OIG cautioned that if a center or another third party (such as a manufacturer) paid Newco to provide the services for, or on behalf of, a referral source (such as a physician), and thus relieved the referral source of the cost of processing and submitting preauthorizations, then such center or other third party could be providing prohibited remuneration to the referral source, in violation of the anti-kickback law.

### Lessons Learned

Advisory Opinion 08-12 seems to be favorable to the imaging industry, as it permits a third party to perform insurance preauthorization services. Insurance preauthorizations are generally perceived as being a tedious and time-consuming necessity of rendering medical imaging services. Accordingly, the ability to outsource such a service to be performed by a third party without fear of legal recourse under the anti-kickback law is an important issue for an imaging center to understand.

The opinion, however, will probably provide limited utility to the imaging industry because it does not address those arrangements among imaging centers and referring physicians that are becoming increasingly prevalent in the industry. Historically, the referring physician's office performed the insurance preauthorization service. An ongoing trend has been developing, however, whereby imaging centers are trying to distinguish themselves, in the level of service that they provide to referring physicians, by performing the insurance preauthorization service. Moreover, an increasing number of referring physician offices are also unwilling to perform the preauthorization or otherwise fail to do so, even in those instances where the imaging center has made such a request to the referring physician's office.

Accordingly, it is becoming increasingly common for imaging centers to consider processing and submitting insurance preauthorizations for those patients undergoing imaging studies at their facilities. There are a number of methods by which such services could be performed. An imaging center may simply have its personnel perform the preauthorization service. Alternatively, the imaging center may reimburse a referring physician's office for all or part of the personnel cost incurred by a referring physician's office in performing the preauthorization service.

Unfortunately, the opinion does not address the critical issue of who, in the health care delivery system, is responsible for performing an insurance preauthorization: the referring physician, the imaging facility at which the study is performed, or another entity? The OIG indicated that it did not address this issue because the requestor of the opinion did not ask the question.

If obtaining an insurance preauthorization is the imaging center's obligation, then the OIG's response to such a question (had it responded) would have been of substantial benefit to those imaging centers and radiology groups that are considering the performance of preauthorization services for a patient who has been referred by a physician, particularly in the current economy, as physician practices and others try to find greater utilization of existing staff and avoid incurring unnecessary additional expenses. If, however, it is the referring physician's obligation, then the OIG suggests that an imaging center's performance of the preauthorization service could be a problem under the anti-kickback law.

Advisory Opinion 08-12 should not be interpreted as an opinion generally allowing imaging centers to perform preauthorization services for patients undergoing imaging studies at their facilities. Rather, each scenario should be analyzed carefully, with the assistance of experienced health care counsel and with a complete understanding of the underlying facts and circumstances.

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