



## **OIG Issues Favorable Advisory Opinion Regarding Proposed Ownership Structure of Group Purchasing Organization**

Neil W. Hoffman and Barbara J. Rogers

On May 2, 2016, the Department of Health and Human Services (HHS), Office of Inspector General (OIG) issued a favorable advisory opinion regarding a proposed arrangement, under which a group purchasing organization (GPO) would come to be wholly owned by an entity whose parent also wholly owns 800 of the 84,000 provider and supplier members of the GPO (the “Proposed Arrangement”).<sup>1</sup> Because of this ownership structure, the GPO administrative fees would not qualify for safe-harbor protection from prosecution under the federal anti-kickback statute. However, OIG concluded, as further discussed below, that the Proposed Arrangement would present “an acceptably low” fraud-and-abuse risk.

The GPO has over 84,000 members nationally, including both providers (such as hospitals and nursing facilities) and suppliers (such as equipment organizations). Following a series of corporate mergers and stock sales prior to July 2015, the GPO is now ninety-five percent owned by a nonprofit health system, with the remaining five percent owned by a holding company. Under the Proposed Arrangement, the health system would purchase the remaining five percent of the common stock owned by the holding company, resulting in the health system being the sole owner of the GPO.

The interested parties requesting the OIG opinion (“Requestors”) certified that the GPO would, with similar or improved results, continue to serve the same market and operate as it had done in the past, “including negotiating with vendors regarding products and pricing to be offered to the [GPO’s] members, and receiving administrative fees from vendors based on a small percentage of the value of sales to members.” Additionally, the Requestors certified that the GPO (i) has written agreements, including vendor fees, with each member; (ii) annually discloses and would continue to disclose to each member, and to HHS upon request, the amount received from each vendor for purchases made by or on behalf of the members; (iii) maintains, and would continue to maintain, records regarding price reductions and any portion of vendor administrative fees that are distributed to members; and (iv) provides, and would continue to provide, records to members to enable them to make all required discount disclosures to comply with the anti-kickback statute discount exception and the discount safe harbor. The GPO also certified that its approximately 800 GPO members that are owned by its health-system parent would be subject to the same GPO contract terms and conditions as the unaffiliated GPO members.

OIG’s analysis relied on the Requestors’ certifications, including that the GPO meets, and would continue to meet, all of the discount safe harbor requirements.<sup>2</sup> Specifically, the GPO would continue to provide members with the records needed to make their required disclosures, and the GPO would refrain from any activity that would impede the members from meeting their discount safe harbor obligations. However, OIG noted that even if the discounts and rebates received by the GPO members qualified for protection under the discount safe harbor, the same would not be true for the administrative fees obtained by the GPO from its vendors, which would need to be analyzed under the GPO safe harbor. The Requestors certified that, under the Proposed Arrangement, all GPO safe harbor requirements would continue to be met, except the requirement that the GPO members be neither wholly owned by the GPO nor subsidiaries of a parent that wholly owns the

<sup>1</sup> OIG Advisory Opinion No. 16-06, page 1, issued May 2, 2016, accessible at <http://oig.hhs.gov/fraud/docs/advisoryopinions/2016/AdvOpn16-06.pdf> (last accessed May 16, 2016).

<sup>2</sup> 42 C.F.R. § 1001.952(h).

GPO, since here the GPO would be wholly owned by the same entity that also wholly owns approximately one percent of the GPO's members.

Even though the Proposed Arrangement would not meet the GPO safe harbor, OIG concluded that the health system's acquisition of the remaining five percent common stock of the GPO would not increase fraud-and-abuse risk to federal health care programs. OIG noted that only approximately one percent of the GPO's total membership would consist of members wholly owned by the parent of the entity that would wholly own the GPO. Second, based upon the Requestors' certifications, the wholly owned members would be subject to the same GPO contract terms and conditions as unaffiliated GPO members, resulting in no "more (or less) favorable discounts" for any of the members.

Accordingly, although the Proposed Arrangement fell outside the GPO safe harbor, the OIG concluded that the arrangement presented "an acceptably low risk of fraud and abuse in connection with the anti-kickback statute," and thus the agency would not impose administrative sanctions. It is not clear, however, if OIG's analysis would have been the same if a larger percentage of the GPO's members were wholly owned by the GPO's parent.

## Authors and Contributors

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**Neil W. Hoffman**

Partner, Atlanta Office  
404.873.8594  
neil.hoffman@agg.com

**Barbara J. Rogers**

Associate, Atlanta Office  
404.873.8522  
barbara.rogers@agg.com

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**Atlanta Office**

171 17th Street, NW  
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Atlanta, GA 30363

**Washington, DC Office**

1775 Pennsylvania Avenue, NW  
Suite 1000  
Washington, DC 20006

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