

OIG ADVISORY OPINION: ONLINE REFERRAL MANAGEMENT

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PREPARED FOR THE AMERICAN ASSOCIATION FOR HOMECARE
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OIG Advisory Opinion: Online Referral Management

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The federal anti-kickback statute (“AKS”) is broad. Because of its breadth, health care providers entering into arrangements that generate referrals of patients covered by a federal health care program (“FHCP”) can find themselves in the proverbial gray area. How much risk is there that the arrangement will violate the AKS? Because the AKS is a criminal statute, finding itself in a gray area will likely make the provider uncomfortable.

A way to eliminate the gray area is to request an Advisory Opinion (“AO”) from the Office of Inspector General (“OIG”). Here is how it works:

- The parties to the arrangement (existing or proposed) will (i) submit a detailed description of the arrangement to the OIG and (ii) ask the OIG if the arrangement will constitute grounds for sanctions because of violation of the AKS.
- The OIG can decline to review the AO request. However, if the OIG elects to review the request, it will examine the arrangement and issue a decision on whether the arrangement will likely result in sanctions arising out of the AKS. Legally, the OIG’s decision is binding only on the parties to the arrangement. However, from a practical standpoint, other providers (that desire to enter into similar arrangements) can look at the AO decision for guidance.
- All of the OIG’s AO decisions can be found on the OIG’s website.
- A recent AO decision addresses the use by home health agencies (“HHAs”) of an online referral management platform. Although the AO focuses on HHAs, the opinion is equally applicable to DME suppliers that contract with an online referral management platform.

OIG Advisory Opinion No. 26-15), issued on June 25, 2026, states in part:

The Office of Inspector General (“OIG”) is writing in response to your request for an advisory opinion on behalf of [redacted] (“Requestor”), regarding its payment of remuneration to a vendor for the use of an online referral management software (the “Arrangement”). Specifically, you have inquired whether the Arrangement would constitute grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (the “Act”) or the civil monetary penalty provision at section 1128A(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act (the “Federal anti-kickback statute”).

...

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Arrangement would generate prohibited remuneration under the Federal anti-kickback statute, if the requisite

intent were present, which would constitute grounds for the imposition of sanctions under sections 1128A(a)(7) and 1128(b)(7) of the Act.

...

I. FACTUAL BACKGROUND

Requestor operates home health agencies (“HHAs”) that provide skilled and unskilled in-home care services to adults and children, including Federal health care program beneficiaries. Many of Requestor’s patients are referred by hospitals for post-discharge care. Medicare regulations require hospitals to provide patients who will be discharged home and referred for home health services a list of HHAs “that are available to the patient, that are participating in the Medicare program, and that serve the geographic area (as defined by the HHA) in which the patient resides....HHAs must request to be listed by the hospital as available.” Requestor certified that referrals from hospitals to HHAs are often determined on a first-come, first-served basis, so the speed with which the HHA responds to a hospital’s request for home health services for a particular patient post-discharge is determinative of securing referrals.

Under the Arrangement, Requestor pays a subscription fee to a health care technology and software company (the “Vendor”) that provides, as pertinent to this advisory opinion, an online referral management software (the “Software”). The Software connects hospitals with HHAs for the purpose of referring patients to an HHA in the course of discharge planning. Requestor pays a fee to the Vendor for subscriptions to the Software, which enables Requestor and other HHAs that subscribe to the Software to receive and accept electronic referrals from the hospitals soliciting HHA availability for individual patients who are being discharged. Requestor’s understanding is that the Software provides each participating hospital with a list of all HHAs in the region, without regard to whether the HHAs subscribe to the Software, but only those HHAs that pay to subscribe to the Software are able to receive electronic communications from the hospitals. Requestor understands that prices charged to HHAs for Software subscriptions vary based on a number of factors, such as the geographic location of the HHA or the number of jointly owned HHAs that purchase the Software (as the Vendor may provide a volume-based discount to HHAs with multiple locations). Based on its discussions with the Vendor, Requestor understands that the charge to the HHAs is not based solely on the Vendor’s cost to provide the referral service.

Requestor certified that, where a hospital has subscribed to the Software, but an HHA has not subscribed to the Software, a hospital would need to send a referral to the non-subscribed HHA via electronic facsimile, email, phone, or hand-delivery. If the HHA then wants to accept the referral, it must contact the appropriate person at the hospital directly by phone, whereas with the Software, HHAs can accept electronic referrals immediately through the Software. Requestor certified that, based on its experience, these alternative methods of receiving and responding to

requests for availability from hospitals create delays that, in practice, effectively exclude HHAs that do not subscribe to the Software.

II. LEGAL ANALYSIS

A. Law

The Federal anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of an individual to a person for the furnishing of, or arranging for the furnishing of, any item or service reimbursable under a Federal health care program. The statute's prohibition also extends to remuneration to induce, or in return for, the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item reimbursable by a Federal health care program. For purposes of the Federal anti-kickback statute, "remuneration" includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

The statute has been interpreted to cover any arrangement where one purpose of the remuneration is to induce referrals for items or services reimbursable by a Federal health care program ...

[The] U.S. Department of Health and Human Services has promulgated safe harbor regulations that specify certain practices that are not treated as an offense under the Federal anti-kickback statute and do not serve as the basis for an exclusion ...

The safe harbor for referral services is potentially applicable to the Arrangement. It provides that, for purposes of the Federal anti-kickback statute, the term "remuneration" does not include payments or exchanges of anything of value between a referral service and a participant in the service, provided certain conditions are met. Among those conditions are requirements that referral fees: (i) be assessed uniformly against all participants; (ii) be based only on the cost of operating the referral service; and (iii) not vary with the volume or value of referrals of Federal health care program business.

B. Analysis

Under the Arrangement, Requestor pays a subscription fee to the Vendor in return for access to the Software, which facilitates electronically receiving and responding to hospital referral requests for home health services including for Federal health care program beneficiaries. The Arrangement implicates the Federal anti-kickback statute because Requestor is paying remuneration to the Vendor in return for the Vendor, through the Software, arranging for the furnishing of home health services for which payment may be made by a Federal health care program.

The Arrangement does not qualify for protection under the safe harbor for referral services. It fails to satisfy several of the safe harbor's requirements, including the requirement that referral fees be assessed uniformly against all participants. Because no safe harbor protects the Arrangement, we must determine whether, given all of the relevant facts, the Arrangement poses no more than a minimal risk under the Federal anti-kickback statute. For the following reasons, we believe the risk of fraud and abuse presented by the Arrangement is not sufficiently low under the Federal anti-kickback statute for OIG to issue a favorable advisory opinion.

The Arrangement poses a risk of inappropriate steering and unfair competition. Based on Requestor's certifications, hospitals often discharge patients to HHAs on a first-come, first-served basis, which means that, based on Requestor's experience, HHAs with the ability to electronically receive and respond to referral requests through the Software would have a significant competitive advantage over non-paying HHAs. According to Requestor, the delays caused by the alternative methods of receiving and responding to referrals may effectively eliminate HHAs that choose not to subscribe to the Software from any chance of receiving patient referrals under the Arrangement. This anti-competitive effect of the Arrangement is further exacerbated when an HHA cannot afford the Software subscription. Consequently, it appears that HHAs paying the Vendor's fees would get patients because they paid for the opportunity rather than on the basis of the quality of care they offer.

The Arrangement also poses a risk of overutilization or inappropriate utilization. HHAs that choose to participate in the Arrangement could face pressure to recoup the costs associated with participation. This pressure could create incentives to, among other things, bill for services that are not medically necessary, which could result in increased costs to the Federal health care programs.

...

In issuing an unfavorable decision, one of the factors the OIG considered is how subscription fees are calculated. The AO decision states: "Requestor understands that prices charged to HHAs for Software subscriptions vary based on a number of factors, such as the geographic location of the HHA or the number of jointly owned HHAs that purchase the Software (as the Vendor may provide a volume-based discount to HHAs with multiple locations). Based on its discussions with the Vendor, Requestor understands that the charge to the HHAs is not based solely on the Vendor's cost to provide the referral service."

If an arrangement complies with a "safe harbor" to the AKS, the remuneration arising from the arrangement does not constitute illegal remuneration under the AKS. If an arrangement does not comply with a safe harbor, it does not mean that the arrangement violates the AKS. Rather, it means that the arrangement needs to be analyzed in light of the language of the AKS, court decisions, and OIG guidance.

In rendering its decision, the OIG focused on the Referral Services safe harbor. According to the OIG: "Among conditions [to comply with the safe harbor] are requirements that referral fees: (i)

be assessed uniformly against all participants; (ii) be based only on the cost of operating the referral service; and (iii) not vary with the volume or value of referrals of Federal health care program business.” In pointing out that the arrangement does not satisfy the Referral Services safe harbor, the OIG states: “The Arrangement...fails to satisfy several of the safe harbor’s requirements, including the requirement that referral fees be assessed uniformly against all participants.”

Interestingly, there is no discussion of another safe harbor that might apply. It is called the Personal Services and Management Contracts (“PSMC”) safe harbor. Among other requirements, (i) the parties need to sign a written contract with a term of at least one year, (ii) the methodology for calculating the compensation must be set one year in advance, (iii) the compensation must be the fair market value equivalent of the services provided by the online referral management services, and (iv) the compensation cannot take into account the anticipated volume or value of the referrals to the provider.

The message to DME suppliers is that if they have entered into an arrangement similar to the arrangement described in the AO, they should have their health care attorney examine the arrangement to determine if it complies with...or substantially complies with...a safe harbor.

THIS WHITE PAPER DOES NOT CONSTITUTE LEGAL ADVICE. THIS WHITE PAPER WAS PREPARED ON A SPECIFIC DATE. THE LAW MAY HAVE CHANGED SINCE THIS WHITE PAPER WAS WRITTEN. BEFORE ACTING ON THE ISSUES DISCUSSED IN THIS WHITE PAPER, IT IS IMPORTANT THAT THE READER OBTAIN ADVICE FROM A HEALTH CARE ATTORNEY.