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**Payment for Referrals: It's Still Not a Good Idea**

**By**

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The old axiom “You can’t pay for referrals” is still alive and well. As most of the readers know, the Anti-Kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive “remuneration” to induce or reward referrals of items or services reimbursable by a Federal health care program. By its terms, the Anti-Kickback statute places criminal liability to parties on both sides of an impermissible transaction. Remuneration, for the purposes of the Anti-Kickback statute, includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

Recently, the Office of Inspector General of the Department of Health and Human Services (“OIG”) issued an Advisory Opinion (Advisory Opinion No. 14-06) under which it determined that a specialty pharmacy’s proposal to pay local retail pharmacies a fee for “support services” that the local pharmacies would provide in connection with the patient referrals to the specialty pharmacy could potentially generate prohibited remuneration under the Anti-Kickback statute. The proposed arrangement in the opinion indicated that in many instances, a patient is prescribed a specialty drug and may present it at the patient’s local pharmacy which does not have the capability to fill the prescription. In such cases, the specialty pharmacy proposed to enter into a contract with local pharmacies to help these patients obtain their specialty drugs from the specialty pharmacy.

Under the proposed arrangement, the local pharmacy would be required to provide various support services to the specialty pharmacy (i.e., gathering patient and prescriber demographic information, informing patients on specialty drug access at the specialty pharmacy, obtaining patient consent to forward the specialty drug prescription to the specialty pharmacy, transferring the prescription to the specialty pharmacy, and providing ongoing assessments on subsequent refills, including transmitting any changes regarding the patient’s medication regimens to the specialty pharmacy). The specialty pharmacy would pay the local pharmacy “fair market value” for these support services on the initial fill and each subsequent refill, including those situations in which the drugs were payable by a Federal health care program.

The OIG examined the arrangement and stated that the Anti-Kickback statute was implicated, and that the arrangement presented more than a minimal risk of fraud and abuse. The OIG stated that “per-fill fees” paid to the local pharmacy on the basis of each prescription for specialty drugs referred by the local pharmacy to the specialty pharmacy are “inherently subject to abuse”, because of the direct link between the referrals by the local pharmacy to the specialty

pharmacy. The OIG also noted that even if there are legitimate purposes involved in this type of arrangement, the Anti-Kickback statute is violated if one purpose of the arrangement is to induce referrals of Federal health care program business. “There is significant risk that the Per-Fill Fees would represent compensation for the Local Pharmacies generating business, including Federal health care program business, rather than solely compensation for bona fide, commercially reasonable services.”

Although an Advisory Opinion cannot be relied upon by parties other than those requesting the opinion, this Advisory Opinion is instructive for all health care providers because of the basic principles examined. If one purpose of an arrangement is to compensate a party for the referrals of Federal health care program business, that arrangement violates the Anti-Kickback statute. Additionally, the mere recitation of one or more “legitimate” services does not save an arrangement that is intended to induce referrals. This Advisory Opinion serves as a good reminder to health care providers that suspect arrangements cannot be “dressed up” to pass Anti-Kickback muster.

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