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Health Care Bulletin

OIG ADVISORY OPINION CONCLUDES PROPOSED PAYMENT ARRANGEMENTS FOR MEDICAID TRANSPORTATION SERVICES COULD POTENTIALLY VIOLATE THE ANTI-KICKBACK STATUTE

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I. Overview

On December 20, 2010, the U.S. Department of Health and Human Services, Office of Inspector General (“OIG”) issued OIG Advisory Opinion No. 10-26 concerning two different proposed payment arrangements between a Medicare and Medicaid certified provider of emergency and non-emergency transportation services and a skilled nursing facility. In both arrangements, the transportation services company proposed charging the skilled nursing facility below-cost rates. The OIG indicated that below-cost pricing arrangements give rise to an inference that the transportation services company and skilled nursing facility may be swapping the below-cost business for other, more profitable business. Accordingly, the OIG concluded that both of the proposed payment arrangements could potentially generate prohibited remuneration under the Federal anti-kickback statute.

II. Factual Scenario

The OIG reviewed the two separate payment plans for Medicaid transportation services set forth below. Under both arrangements, by operation of law, the skilled nursing facility pays the Medicaid transportation services company because the payment is covered in the daily rate paid by the state to the skilled nursing facility. As noted below, both arrangements potentially included the payment of below-cost rates by the skilled nursing facility to the transportation services company.

Payment Plan #1: Capitated Rate Plan	Payment Plan #2: Fee-for-Service
<ul style="list-style-type: none"> • Rate: Transportation services company offers the skilled nursing facility a capitated rate per resident day for Medicaid transport services. • Utilization: The per resident rate is based on Medicaid resident days, regardless of whether transportation services are needed or utilized. • Dual Coverage: For dually covered residents, the transportation services company bills Medicare as the primary payer, and the capitated rate payment discharges responsibility for the Medicaid-covered copayment and deductible. • Impact on Profits – Medicaid Only: If all the payments were Medicaid only, the capitation amount <i>would be less than the transportation services company’s total costs</i> of providing the services. • Impact on Profits – Dually Covered Residents: Because some of the residents would be dually covered residents, the capitation amount plus revenues from the Medicare payment for dually covered residents would be greater than the total costs of providing the services. 	<ul style="list-style-type: none"> • Rate: Transportation services company offers skilled nursing facilities a contract under which the skilled nursing facilities would pay on a fee-for-service basis for any Medicaid transport services ordered for their Medicaid-only residents. • Impact on Profits: Fee-for-service amounts <i>would be set at below-cost rates</i> for providing the services. • Dual Coverage: These rates would not apply to transports for dually covered residents. For those transports, the requestor would bill Medicare as the primary payor, and the skilled nursing facility would be responsible for the copayment and deductible based on the Medicare allowable amount.

The skilled nursing facilities would also typically have patients who require ambulance services that are reimbursed to the ambulance supplier under Medicare Part B or by other payers. The parties indicated that the skilled nursing facilities would likely refer this business to the transportation company, particularly under the first payment arrangement.

III. Legal Standard

In analyzing the proposed payment arrangements, the OIG recited the Federal anti-kickback statute, stating that the anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit or receive any remuneration to induce or reward referrals of items or services reimbursable by a federal health care program. Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-kickback statute is violated. The term “remuneration” includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind. The anti-kickback statute has been interpreted to cover any arrangement where one purpose of the remuneration was to obtain money for the referral of services or to induce further referrals.

Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. Conviction will also lead to automatic exclusion from Federal health care programs, including Medicare and Medicaid.

Where a party commits a prohibited act, the OIG may initiate administrative proceedings to impose civil monetary penalties on the party whose conduct is at issue. The OIG may also initiate administrative proceedings to exclude such party from participation in Federal health care programs.

IV. OIG Conclusions

The OIG concluded that, based upon the facts presented, it was unable to exclude the possibility that the transportation services company was offering improper discounts to the skilled nursing facilities for their medical transportation services with the intent to induce referrals of more lucrative federal business. The OIG further concluded that it could not exclude the possibility that the skilled nursing facilities may be soliciting improper discounts on business for which they bear risk in exchange for referrals of business for which they bear no risk.

In reaching its conclusions, the OIG cited the 2003 Compliance Program Guidance for Ambulance Suppliers, which stated that “[a]ny link or connection, whether explicit or implicit, between the price offered for business paid out of the purchaser’s pocket and referrals of federal program business billable by the ambulance supplier will implicate the anti-kickback statute.” The OIG emphasized the fraud and abuse risks attendant with below cost arrangements, stating, “Prices offered to the SNF that are below the supplier’s total costs of providing the services . . . give rise to an inference that the supplier and the SNF may be ‘swapping’ the below-cost rates on business for which the SNF bears the business risk in exchange for other profitable non-discounted Federal business, from which the supplier can recoup losses incurred on the below-cost business, potentially through overutilization or abusive billing practices.” The OIG stressed that skilled nursing facilities are in a position to direct business to the transportation services companies that is not covered by the payment plans set forth above. Moreover, both parties stand to benefit from the arrangement – the skilled nursing facilities may minimize their losses and maximize their gains, and the transportation services company may secure business in a highly competitive market.

Though the OIG indicated that proposed arrangements pose a substantial risk of such improper swapping of business that may run afoul of the anti-kickback statute, the OIG was unable to definitively conclude the arrangements violate the anti-kickback statute. A definitive response would require a determination of the parties’ intent, which the OIG indicated was beyond the scope of the advisory opinion process.

Additional Information

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