Alerts and Updates

LONG-TERM CARE PHARMACY JOINT VENTURE MAY VIOLATE ANTI-KICKBACK LAWS: OIG ISSUES ADVISORY OPINION 11-03

April 20, 2011

On April 14, 2011, the U.S. Department of Health and Human Services Office of Inspector General (OIG) posted OIG Advisory Opinion No. 11-03, concluding that a pharmacy employee's joint ownership of a long-term care pharmacy with long-term care facility owners may generate kickbacks in violation of the federal anti-kickback statute.

In the proposed arrangement, the sponsoring pharmacy would be a long-term care pharmacy providing products and services to skilled nursing facilities, intermediate care facilities, assisted-living facilities and residential care facilities. The sponsoring pharmacy's employee would create a joint venture with one or more of the sponsoring pharmacy's long-term care facility owner customers ("Facility Owners") to own a new long-term care pharmacy. The Facility Owners would each receive shares in proportion to their capital investments. The employee would also receive shares for a nominal price, and the new long-term care pharmacy would pay dividends and distributions in proportion to ownership.

The sponsoring pharmacy intended to:

- make all decisions regarding operations and agreements with customers,
- provide office space,
- purchase supplies and equipment,
- supply noncontrolled substances and
- provide storage space for inventory and billing services.

In exchange for these management services, the new long-term care pharmacy would pay the sponsoring pharmacy $1.25 for each prescription and would be responsible for additional operating costs, including direct costs for pharmacy operations, billing and consultations, among others.

In concluding that the proposed arrangement may violate the federal anti-kickback statute, the OIG relied on several factors. First, the OIG noted that the Facility Owners would be expanding into a line of business that was dependent on referrals from the Facility Owners. Similarly, because the Facility Owners would not actually participate in the operation of the long-term care pharmacy, their financial and business risks would be minimal or nonexistent. In addition, the OIG expressed concerns that the sponsoring pharmacy could directly provide the services without the arrangement; the sponsoring pharmacy and Facility Owners would receive aggregate payment based on the volume of referrals; and the sponsoring pharmacy and Facility Owners would share the financial benefit of the new pharmacy. As a result of these factors, the OIG found that the joint venture may allow the sponsoring pharmacy to do indirectly what it was prohibited from doing directly: namely, paying the Facility Owners a share of their referrals and rewarding the Facility Owners for their referrals. Although a final determination about a violation of the federal anti-kickback statute requires a finding of the parties' intent, the OIG nonetheless found that the proposed arrangement could generate kickbacks in violation of the federal anti-kickback statute and may subject the parties to administrative sanctions.

For Further Information

If you have any questions about this *Alert*, please contact Frederick (Rick) R. Ball, any member of the Pharmaceutical, Pharmacy & Food industry group or the attorney in the firm with whom you are regularly in contact.