OBER | KALER
Attorneys at Law

Health Law Alert™

Subscribe | Health Law Group | Health Law Alert Archive

2011 Issue 5

www.ober.com

Online Referral Service Proposes to Charge for Services, Raises OIG Concerns

By: Christopher P. Dean

The Office of Inspector General (OIG) recently issued a negative advisory opinion that raises concerns about fees charged by some online referral services. Specifically, Advisory Opinion 11-06 analyzed a proposal by an online referral service to charge a startup and monthly user fee to post-acute care providers in exchange for the use of an electronic referral service used by hospitals. The OIG expressed concern that payments to potential referral sources for such services could potentially generate prohibited remuneration and present more than a minimal risk of violating the antikickback statute.

Proposed Arrangement

The requestor currently provides software, online tools and other discharge planning support to hospitals nationwide. The service includes the use of software by which hospitals could access a list of post-acute care providers (skilled nursing facilities, home health agencies, and assisted living facilities) that the requestor compiled from existing state databases of licensed post-acute care providers. The hospitals use these listings to identify resources and refer patients for post-acute care. The requestor advised that many hospitals initiate a referral request for a patient to many providers at once and make the referral for post-acute care to the first provider that responds to the referral request.

The requestor's costs associated with operating the system are paid for by the hospitals that use the system. Because the post-acute care providers are gathered from publicly available listings, they currently do not pay a fee. The requestor also advised that the hospitals currently pay a fee that is fair market value and is not tied directly or indirectly to the volume or value of referrals or other business generated between the parties.

The requestor proposed to change the post-acute care providers' access to the service by charging a one-time implementation fee and a monthly service fee. In exchange for these fees, the post-acute care providers would continue to have electronic access to the referral requests from the hospitals and would be able to use the software to respond electronically to the hospital. If a post-acute care provider chose not to pay the fees, the provider would remain in the electronic database but would receive the referral requests from the hospitals by facsimile and would have to respond to the hospital by facsimile or telephone. The requestor believed that those providers who did not pay the proposed fees would be at a significant disadvantage in responding to a hospital's referral request.

The requestor explained that the fees would not be tied directly or indirectly to the volume or value of referrals or other business generated between the parties. The fees reflected the requestor's market research about the value of the electronic system to the post-acute care providers. Based on the market research, the requestor determined that some providers would not be able to afford the fees. The requestor also noted that it would be more expensive to send referral requests by facsimile than it would be to transmit them electronically to providers paying the proposed fees.

The Referral Services Safe Harbor

The OIG noted that the referral services safe harbor, 42 C.F.R. §1001.952(f), was potentially applicable to the proposed arrangement. Relevant to Advisory Opinion 11-06, compliance with the safe harbor requires the following:

1. The referral service does not exclude as a participant in the referral service any individual or entity who meets the qualifications for participation.
2. Any payment the participant makes to the referral service is assessed equally against and collected equally from all participants, and is only based on the cost of operating the referral service, and not on the volume

or value of any referrals to or business otherwise generated by either party for the referral service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs.

OIG Analysis

The OIG began its analysis by stating that the proposed arrangement would not comply with the referral services safe harbor. The OIG observed that the fees would not be assessed uniformly against all post-acute care providers and that the fees would not be based only on the cost of operating the referral service. The OIG also explained that the proposed fees would not be based on the costs associated with operating the service because the hospitals aggregate fees already paid for the costs of the system.

The OIG then provided the following three explanations for the negative advisory opinion:

1. The OIG was uncomfortable with the notion that a hospital would make a referral to a post-acute care provider based on electronic access and not on whether a provider could provide superior care. The OIG concluded that a post-acute care provider that did not pay the proposed fees would effectively be eliminated from any chance of receiving the hospital referrals because it would have a significant disadvantage in receiving and responding to referral requests by facsimile. A provider who paid the proposed fees would have an equally commensurate advantage because it would use the electronic system to receive and respond to referral requests.
2. The OIG indicated that sending the referral requests by facsimile appeared to be designed to either penalize non-paying providers or provide paying providers with an unfair competitive advantage to obtain referrals. The OIG noted the requestor's costs to send the facsimile referral requests exceeded the costs to transmit the referral requests electronically.
3. The OIG expressed concern that the fees for the proposed service would create incentives for post-acute care providers to attempt to recoup the

> cost of the service and increase the cost of services billed to federal health care programs. The OIG warned that providers might prolong patient stays, provide separately billable and unnecessary services or upcode resident Resource Utilization Group assignments to recoup these costs.

For these reasons, the OIG concluded that proposed arrangement presented more than a minimal risk under the antikickback statute.

Implications and Outlook

While Advisory Opinion 11-06 raises concerns about referral services and, particularly, online referral services that require the post-acute care provider to pay a referral fee , it does not necessarily follow that all such arrangements violate the antikickback statute. As with all advisory opinions, it is limited to the specific facts presented to the OIG. In this case, we have learned that the requestor was Total Living Choices.

From a business perspective, it may seem perfectly logical to charge a fee to a user to (i) recoup the cost of implementing a service, and (ii) achieve a profit from that service. In a competitive marketplace, competitors who access information quickly, and can act on that information quickly, often gain an advantage.

However, in the health care marketplace, the OIG is concerned about costs to the health care delivery system, the costs' impact on federal health care programs, and the compliance issues arising over fee-based referral services. Part of the OIG's concern is based on its perception that the costs of the third-party service could result in increased costs to federal health care programs by less-than-scrupulous providers who might seek to pass on those costs through longer patient stays, upcoding, or billing for noncovered services. Accordingly, providers of fee-based referral services should be mindful of the OIG's position in Advisory Opinion 11-06..