

HEALTH CARE ALERT

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OIG advisory opinion re: Online "Marketplaces"



The Department of Health and Human Services (HHS) Office of Inspector General (OIG) issued an advisory opinion in response to a proposal by a company to make available to federal health care program beneficiaries its online health care directory for booking medical appointments. Health care professionals would pay per-click or per-booking fees to be listed in the directory. OIG responded that this particular arrangement (limited to the circumstances and parties described in the opinion) would not constitute grounds for the imposition of civil monetary penalties.

When the AKS applies.

The anti-kickback statute (AKS), among other situations, makes it a criminal offense to knowingly offer, pay, solicit or receive any remuneration to induce or reward referrals of items or services reimbursable by a federal health care program. For purposes of the AKS, remuneration includes the direct or indirect transfer of anything of value.

The proposed "Marketplace" arrangement.

The requesting company submitted a request for an advisory opinion regarding its proposal to make visible to beneficiaries: (1) its online directory for booking medical appointments (the Marketplace), where

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health care providers pay per-click or per-booking fees to be listed; and (2) sponsored advertisements on its directory, where health care providers would pay, per-impression or per-click fees, for such advertisements. The company inquired as to whether that arrangement would implicate the civil monetary penalty provisions of the Social Security Act, as those sections relate to the commission of acts described in section 1128B(b) of the Social Security Act, the Anti-Kickback Statute.



The requesting company's arrangement charges providers a per-impression advertising fee for sponsored results.

Charging per impression.

The requesting company's arrangement charges providers a per-impression advertising fee for sponsored results. When a user views a page on the Marketplace, that viewing constitutes an impression for each advertisement that is displayed on the page. As an alternative to the per-impression advertising fee, the company could charge providers a per-click advertising fee each time a user clicks on that ad. The company certified to OIG that the per-impression fee and the per-click fee would not: (1) exceed fair market value; (2) depend on a user's insurance status or whether a user books an appointment or becomes a patient of a provider; or (3) vary with the volume or value of items or services any provider furnishes to users.

Requestor not a provider.

The OIG noted that the company itself is not a provider, and that therefore its relationship with the target user population was distinguishable from problematic marketing arrangements by some providers and suppliers. For instance, "white coat" marketing by providers is subject to closer scrutiny, since health care providers and suppliers are in a position of trust and may exert undue influence when recommending health care-related items or services, especially to their own patients. Because the company is not a provider or supplier, is not affiliated with any provider listed on the Marketplace, and does not recommend any particular provider to users, this same concern was not present in the proposed arrangement.

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No AKS or civil monetary penalty violation.

The OIG's Advisory Opinion ruled that based on the facts certified in the request: (1) the arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Social Security Act because the convenience of the Marketplace likely would not influence a beneficiary to select a particular provider or supplier; and (2) while there was a "low risk" that the arrangement could generate prohibited remuneration under the AKS if the requisite intent to induce or reward referrals of federal health care program business were present, the OIG would not impose administrative sanctions on the company in connection with the proposed arrangement.

For more information, please contact [David Kelch](#), [Christina Hultsch](#) or any member of Porter Wright's [Health Care Practice Group](#).

