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OIG Takes Critical Look At Certain Joint Ventures

By Stuart J. Vogelsmeier, J.D.

Introduction: The Office of Inspector General of the Department of Health and Human Services (the "OIG") issued an Advisory Opinion, which analyzes two arrangements between a durable medical Equipment ("DME") supplier and various independent diagnostic Testing facilities ("IDTF"). Advisory Opinion No. 11-08 concluded that certain arrangements, one of which carves-out non Medicare/Medicaid patients, are potentially suspect.

Factual Background: The arrangements involve a DME supplier, which provides, among other things, continuous positive airway pressure blower units, masks, and supplies (CPAP). The CPAP may be prescribed by a physician for patients diagnosed with obstructive sleep apnea after such patients have undergone an overnight sleep study, which can be performed at IDTFs. A patient prescribed the CPAP must select a DME supplier to supply such equipment. The IDTFs involved are permitted to display and provide equipment from multiple DME suppliers, in a type of consignment arrangement. The IDTFs furnish patients with a written list of local DME suppliers, and advise them of their right to select any DME supplier.

In the first arrangement, if a non-Medicare/Medicaid patient chooses DME supplied by the DME supplier who is a party to the Advisory Opinion, a licensed IDTF staff member will perform services that include preparing the CPAP for the patient, and educating the patient on its use. In exchange for these services, the DME supplier pays the IDTF a per-patient fee, which the DME supplier has certified reflects fair market value for such services.

The second proposed arrangement was similar to the first arrangement, except for the following facts:

(1) the proposed arrangement would include Medicare/Medicaid patients;

(2) the IDTF would be paid for its services would be paid a flat monthly or flat annual fee, which DME supplier could not certify will be fair market value for the services provided; and

(3) the DME Supplier would have the right to terminate contract if unsatisfied with the number of patients receiving the services.

Legal Analysis: The OIG stared its analysis by repeating its "long-standing concern" with arrangements whereby parties "carve out" Medicare/Medicaid patients or business generated by such patients from "otherwise questionable financial arrangements." Even though the DME Supplier had has excluded Medicare/Medicaid patients under the first arrangement, the OIG determined that that there may still be a relationship between the payment under the first arrangement (dealing with non-Medicare/Medicaid patients) and the referrals by the IDTF of the Medicare/Medicaid patients to the DME supplier.

The OIG also expressed concerns because the IDTF staffs were health care professionals who were in a position to exert undue influence on patients. Furthermore, the OIG stated that the payments in the second arrangement were potentially above market rates. Additionally, the OIG noted the consignment arrangement can pose fraud and abuse risks. Finally, the OIG noted that the arrangements do not have safe harbor protection because the arrangements did not specify the exact schedule for services and the aggregate compensation.

Conclusion: Providers who have relationships which “carve-out” Medicare/Medicaid patients cannot assume that such relationships will avoid scrutiny. Such relationships may be linked to referrals of Medicare/Medicaid patients. Providers should proceed carefully when analyzing these types of ventures.

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