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CLIENT ADVISORY

Office of Inspector General Issues Unfavorable Advisory Opinion on Supplier Arrangements with Nursing Facilities

The U.S. Department of Health and Human Services, Office of Inspector General, recently issued Advisory Opinion 11-11, concluding that two proposals (Proposals A and B) involving arrangements between a supplier of medical supplies, equipment, and services (Requestor) and skilled nursing facilities (SNFs) could potentially run afoul of the Anti-Kickback Statute and generate sanctions. The OIG response is a reminder to avoid vendor relationships that tie non-Medicare covered services at low cost to the exclusive provision of Medicare services.

The Proposals

Under both proposals submitted for OIG's review, the Requestor desired to submit a bid in response to an SNF's solicitation of bids to be the exclusive supplier of Medicare covered items and related services to the SNF. The Requestor proposed a contract with three essential elements:

- (1) The Requestor would serve as the SNF's exclusive supplier of Medicare-covered items (Covered Items)
- (2) The Requestor would furnish items not covered by Medicare (Non-Covered Items) at the pricing included in the bid if the SNF chose to purchase those items from the Requestor; and
- (3) The Requestor would furnish the related services in connection with all Covered Items and Non-Covered Items furnished under the contract.

In addition to these three elements of the proposed bid, the Requestor stated that the pricing of Non-Covered items under the contract would be listed at below-cost. The Requestor also explained that offering Non-Covered items below cost would be feasible because the Medicare Part B payments would offset any losses. Finally, the Requestor stated its belief that offering Non-Covered Items to the SNF at below cost would be an inducement for the SNF to select the Requestor as the exclusive supplier of the Covered Items.

Proposal B only differed from Proposal A by setting up a new company to submit a joint bid along with the Requestor.

OIG's Position

OIG's analysis first restated its position since 2008 that "if any direct or indirect link exists between the price offered by a supplier or provider to a nursing facility for items or services that the nursing facility pays for out-of-pocket and referrals of Federal business for which the supplier or provider can

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bill a Federal health care program, the anti-kickback statute is implicated.” (73 Fed. Reg. 56832, 56844 (Sept. 30, 2008)).

In this situation proposed by the Requestor, OIG found that there may be a nexus between below-cost payment rates offered to the SNF and referrals of other Federal health care program business for three reasons:

- (1) The SNF is in a position to direct business to the Requestor that is not paid by the SNF under Proposal A, i.e., Covered Items
- (2) The single request for proposals solicits pricing information for the Non-Covered items, together with service information related to the provision of both Covered Items and Non-Covered Items, suggesting a link between the two
- (3) Both parties have obvious motives for agreeing to trade below-cost payment rates for the Non-Covered Items and related services for referrals of other Federal health care program business: the SNF to minimize out-of-pocket payments for medical supplies and equipment, and the Requestor to secure business as an exclusive supplier of the Covered Items in a highly competitive market.

CMS further explained that prices offered to an SNF that are below the supplier’s total costs of providing the items and services – as the Request’s facts present – give rise to an inference that the supplier and the SNF may “swapping” the below-cost rates on business in exchange for other profitable non-discounted federal business. OIG suggests that such an arrangement could potentially lead to overutilization or abusive billing practices.

From the facts presented, OIG found that it is “unable to exclude the possibility that Requestor may be offering improper discounts to the SNF for the Non-Covered items and related services with the intent to induce referrals of more lucrative Federal business. OIG also found that Proposal B – which inserted a separate, but commonly-owned company as an intermediary – did not mitigate the risk of improper “swapping.”

Potential Penalties

Based on the above analysis, OIG concluded in the Opinion that the proposed arrangements could generate prohibited remuneration under the anti-kickback statute. Such a finding could lead to administrative sanctions, including civil penalties and exclusion from federal health care programs.

Conclusion

Any contracts between SNFs and suppliers that offer discounts to an SNF on Non-Covered items and related services may implicate the anti-kickback statute and its penalties. All providers or other Medicare providers and suppliers should review their contracts to ensure that no discounts are offered on Non-Covered items and services with the intent to induce referrals for other federally-funded business. If your organization needs assistance in further interpreting the new guidance or reviewing arrangements with suppliers of medical supplies or equipment, please contact Peter Mellette (peter@mellettepc.com), Harrison Gibbs (harrison@mellettepc.com), or Nathan Mortier (nathan@mellettepc.com).