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Health Information Compliance Alert

Software Management: Reconsider Your Online Referral Subscription

OIG gives thumbs down to referral software.

Home care providers feeling cornered by hospitals' use of online referral software that requires a subscription are happy to see a new OIG Advisory Opinion condemning the process as potentially generating kickbacks. But don't expect to see such software disappear overnight.

In an Advisory Opinion posted May 20, the HHS Office of Inspector General considers a situation where a company charges hospitals and post-acute providers including home care for "an online referral service ... whereby post-acute care providers would pay a fee to electronically receive and respond to referral requests from hospitals for post-discharge care."

In the particular case considered by the OIG, the software company is currently charging hospitals for the software, and plans to start charging the post-acute providers. If the providers don't pay to belong to the service, they will be listed in the company's system but wouldn't be able to receive or respond to electronic referrals from the hospital. That would effectively eliminate them from receiving the referral, "because they would not be able to communicate with hospital discharge planners and accept referrals in a timely manner," the opinion notes.

The arrangement doesn't pass the Anti-kickback Statute sniff test for three reasons, the OIG concludes. "Hospitals often discharge patients to Providers on a first-come, firstserved basis, which means that Providers with the ability to electronically receive and respond to referral requests through the System would have a significant competitive advantage over non-paying Providers," the OIG notes. "Providers that pay the Requestor's fees would be more likely to get the patients -- not because they provide superior care but because they paid for the opportunity."

Secondly, the company says it would fax requests to non-paying providers, even though it would be cheaper to electronically transmit them. Thus the system would "provide the paying Providers with a competitive advantage in obtaining referrals or, conversely, to penalize Providers that do not pay," the opinion points out.

Finally, under the proposed arrangement, providers "would be required to pay fees they cannot afford for services they require to remain competitive, or risk substantial loss of business," the OIG says. That would create pressures to recoup losses by prolonging stays, upcoding, or other behaviors that would cost the Medicare program money.

Background: "A variety of online post-acute referral service vendors have been operating for a number of years," notes the National Association for Home Care & Hospice. "Many of these services require post-acute care providers and hospitals to pay a fee to receive and respond to referral requests from hospitals electronically."

Some clients of **Tom Boyd** who have signed up for such services "feel threatened if they don't," says Boyd, with Rohnert Park, Calif.-based Boyd & Nicholas.

Some providers feel "shaken down" by hospitals and software companies in such arrangements, says attorney **Robert Markette Jr.** with Gilliland & Markette in Indianapolis. They perceive the message from hospitals to be "get on board" or lose out on its referrals.

NAHC "has long been concerned about charges for online referral system arrangements and the potential negative impact of such services on beneficiaries' freedom of choice of post-acute service providers," the trade group says in its member newsletter. "Although this decision is specific to the referral service of the requestor of the OIG opinion, the implications will be of concern to sellers and users of similar types of online referral services."

"They finally got one right," Markette cheers of the OIG's opinion. Basically the agency is saying, "We think it's a crime," he says.

It's Your Move

The question for agencies that subscribe to such services is what to do now? "The OIG's letter makes it clear that you'd better stop," Markette says.

It's "probably too risky to continue in light of " the opinion, notes attorney **Joel Hamme** with Powers Pyles Sutter & Verville in Washington, D.C.

However: The OIG opinion is clear that it applies only to the specific situation cited by the requestor, and that it can only assess the potential for kickback violations. If agencies would cut off a lucrative referral stream, they may want to think twice about pulling out. "The decision to discontinue is more difficult if there was a perceived benefit, especially in view of the OIG caveat that this is only a potential violation and that other matters, including the parties' intent, would have to be assessed," Hamme tells **Eli**.

Expect to see such referral software companies alter their business models to avoid the pitfalls the OIG lays out about this particular arrangement, the attorneys say. With reconfigured arrangements, "providers would have to weigh whether any remaining risk is acceptable," Hamme says.

"What this really means is that providers need to closely examine the arrangement and fees being proposed by referral services," advises attorney **Ross Lanzafame** with Harter, Secrest & Emery in Rochester, N.Y. "Clearly, anything that directly or indirectly favors one provider over another, particularly when linked to payments to be made by the provider, raises great concern."

If vendors change their arrangements, they'll still have to get around the "if you don't pay, you're out" aspect of the referral system to avoid OIG censure, Markette forecasts.

"It really was the fact that the system [in the opinion] created two-tiered referrals, where payment of a fee by the providers was the determining factor in whether you received the benefit of the electronic system, that created the insurmountable problem," Lanzafame notes.

Note: The opinion is at http://oig.hhs.gov/fraud/docs/advisoryopinions/2011/AdvOpn11-06.pdf.