OIG Advisory Opinion May Facilitate Provider Referrals and Use of Electronic Health Records

On December 7, 2011, the Office of Inspector General issued an advisory opinion approving a fee-based health care provider referral arrangement. Even though payments under the proposed arrangement implicated the federal anti-kickback statute, OIG concluded that the arrangement would not violate the statute. The requestor of the advisory opinion (the "Requestor") is a web-based provider of administrative services to health care providers. The Requestor traditionally provided billing, electronic health record ("EHR"), and patient communication services to physician practices. As part of a new service initiative, the Requestor proposed to offer a patient referral service to its physicians that utilized its EHR service. Using the referral service, Physicians could refer a patient to any health care provider within the Requestor's network. The provider network would be a database of physicians, laboratories, pharmacies, DME suppliers, and imaging providers compiled by the Requestor. The network would be comprised of the Requestor's existing physician customers, any providers suggested by its physicians, providers listed in other health professional databases, and any other provider that wished to be included in the network. Providers would be added to the network at no cost. Providers could also choose to enter into an agreement with the Requestor to become a "Trading Partner." Trading Partners could create a customized network profile and receive electronically transmitted, comprehensive referrals, which would include verification of the patient's insurance authorization and other information from the patient's EHR. Providers who chose not to become a Trading Partner would receive referrals without the extra services provided to Trading Partners. There would be no cost to become a Trading Partner, but Trading Partners would have to pay the Requestor several service-based fees for each referral received. The referring physician would pay no fee to refer a patient to a Trading Partner, but would pay a fee to refer to a Non-Trading Partner. Participating physicians would also receive a discount on their EHR services. To determine whether the proposed arrangement violated the anti-kickback statute, OIG considered two potential sources of unlawful remuneration: (1) the payments from Trading Partners to the Requestor for arranging referrals, and (2) the physicians' financial incentive to avoid a service fee by referring patients to Trading Partners rather than Non-Trading Partners. OIG first concluded that the arrangement did not satisfy the anti-kickback safe harbor for referral services. The referral service safe harbor contemplates a service that helps individuals make an initial contact with the health care system before a provider or supplier relationship is established. In contrast, under the proposed arrangement physicians would refer existing patients to other providers. OIG nevertheless concluded that, based on all of the facts and circumstances, the proposed arrangement would not violate the anti-kickback statute for the following reasons:

1. All health care providers would be eligible for inclusion in the Requestor's referral network at no charge, and the Requestor would have no influence over the referrals made.
2. The fees charged would reflect the fair market value of the actual services provided by the Requestor, and would not be tied to the value of services a provider might ultimately provide to a referred patient.
3. The fees would be charged regardless of whether the referred patient actually saw the provider to whom the patient was referred, and thus were not tied to the provider's financial results of the referral.
4. The physicians' incentive to refer patients to Trading Partners was minimal. The fee for a Non-Trading Partner referral was only $1.00, and the total fees payable were capped, so that a physician would pay no more than the maximum the physician would have paid to use the EHR service alone.
5. The arrangement was intended to facilitate information exchange and not to limit patient freedom

of choice.

6. Trading Partners would not have greater access to referrals than Non-Trading Partners.

While Advisory Opinion 11-18 cannot be relied upon by any party other than the Requestor, the opinion offers similar service providers a model to structure a fee-based health care provider referral service that does not violate federal anti-kickback law. Additionally, the opinion facilitates and encourages the use of EHRs to improve communication between health care providers. Please contact us if you have any questions about this Advisory Opinion.