Citing Fraud Risk, OIG Terminates Prior Opinion on Referral Service Discounts
By Eric Topor

OIG Notice and Advisory Opinion on Online Physician Referral Service
Development: OIG terminates earlier advisory opinion approving of electronic referral service fee, issues new advisory opinion saying fee could generate improper referrals.

Takeaway: OIG says fee structure could steer physician referrals to providers with agreement with referral service, especially for high-volume services such as laboratory testing.

April 8 (BNA) -- The Department of Health and Human Services Office of Inspector General April 8 terminated a December 2011 advisory opinion (No. 11-18) that found a low risk of improper inducement of referrals from a fee arrangement in an electronically facilitated patient referral service.

The OIG previously said the requesting service provider's proposed fee discount of up to $1 for referrals to providers within its network (called “trading partners”) was too small to cause any improper referral inducement (22 MCR 1502, 12/9/11).

Although the OIG redacts its opinions, athenahealth Inc. announced separately it had requested the opinion.

The electronic referral service created by athenahealth allows physicians to make referrals directly through athenahealth's electronic health record (EHR) service, and receive patient results automatically through an EHR as well.

The OIG's notice of termination said it reconsidered its stance, saying the discount could create an improper incentive for physicians
to make federal health-care program referrals to athenahealth trading partners over non-trading partners for certain high-volume referral services such as laboratory testing.

Related Laboratory Service Opinion

The OIG also released a related advisory opinion (No. 14–03) concerning the fee arrangement that was requested by an unnamed laboratory testing company that entered into a trading partner arrangement with athenahealth. The OIG said the fee arrangement could potentially generate compensation prohibited under the anti-kickback law. The OIG said physicians referring laboratory testing work through athenahealth's service could avoid paying the fee if they referred service to a trading partner like the laboratory testing company that requested the opinion, but were responsible for the fee themselves if they referred the tests to a non-trading partner. The OIG said this fee structure “could potentially influence” physician referrals “in a material way.”

The OIG said that the arrangement “appears to permit Requestor to do indirectly what it cannot do directly; that is, to pay compensation to the Referring Physicians” in the form of the fee discount in exchange for laboratory testing service referrals. The OIG said “there appears to be no reason for [the requestor] to pay the Per-Order Fees other than to secure referrals.”

The laboratory testing company said that it received feedback from some of its physician clients that explicitly stated they would only continue to use the requestor's services with their normal frequency if the laboratory testing company became an athenahealth trading partner. The OIG cited this feedback in reiterating its concern that the fee would prove to be an inducement of provider referral choice for
In an April 8 statement, athenahealth Executive Vice President and Chief Operating Officer Ed Park called the OIG's termination of its earlier advisory opinion a “setback” that “closes one promising path forward to a functioning, sustainable economic model for health information exchange.”

Dan Haley, athenahealth's vice president of government and regulatory affairs told Bloomberg BNA April 8 that the termination notice wouldn't have any immediate impact on providers using its referral service. He said athenahealth was working on modifications to its service that made sure “we and our clients comply with the letter and the spirit of the law.” He also said the changes were being made to minimize impact on clients and to preserve “the progress we've made toward building a national care coordination network.”

Haley took issue with the OIG's rejection of its prior analysis over physician inducement concerns, saying, “That concern was fully analyzed in the original advisory opinion,” and that the OIG's original analysis “remains valid and convincing.”

Referring specifically to the assertion made in the advisory opinion about physicians redirecting referrals from the requesting laboratory service, Haley said they were “anecdotal inputs from a commercially interested actor.”

He said athenahealth had not heard of any similar statements from physicians, and said while “we have no reason to believe those anecdotal representations are accurate,” athenahealth had no way to assess their veracity.

Park defended the fee discounts as simply the cost of facilitating the
exchange of patient information between providers. Park likened the fee difference for trading partners and non-trading partners to the fees some banks charge to ATM customers from other banks.

The OIG said in both its termination notice and newly issued advisory opinion that it believed “the efficient exchange of health information between health professionals is a laudable goal.” However, the OIG said the fee structure “includes potentially problematic financial incentives,” and has “more than a minimal risk of fraud and abuse under the anti-kickback statute.”

Legislative, Regulator Action

Haley told Bloomberg BNA that athenahealth's goal was to create a nationwide market that other actors could participate in as well, and that ultimately regulatory or legislative action would be necessary to achieve that goal.

“The safe harbor that the OIG opinion created for us [under the anti-kickback law] is precisely the same safe harbor that is applied by regulation and statute in any context where the goal is care coordination,” Haley said.

Haley said OIG's actions “handed us a really good argument for why it is that a fundamental paradigm shift can't come from an advisory opinion, because it's too uncertain a foundation on which to build a new model.”

He said there has been significant interest from legislators in both parties, and he “would not be surprised to see” some formal action this year in expanding the network model.

To contact the reporter on this story: Eric Topor in Washington at etopor@bna.com

To contact the editor responsible for this story: Ward Pimley at
For More Information

The OIG notice of termination for Advisory Opinion No. 11–18 is at http://op.bna.com/hl.nsf/r?Open=etor-9hyn7s.

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