

OIG ADVISORY OPINION 12-20: OIG PERMITS HOSPITAL TO PROVIDE FREE ACCESS TO ELECTRONIC INTERFACE TO PHYSICIANS

EXECUTIVE SUMMARY

On December 19, 2012, the Department of Health and Human Services Office of Inspector General ("OIG") posted *OIG Advisory Opinion 12-20* (the "AO") permitting a hospital (the "Requestor") to provide to physicians, free of charge, an electronic interface that would enable the physicians to transmit orders for lab and diagnostic services to the hospital and to receive the results of such services. The AO can be found at:

<https://oig.hhs.gov/fraud/docs/advisoryopinions/2012/AdvOpn12-20.pdf>.

PROPOSED ARRANGEMENT

The Requestor is a county government-operated hospital located in a health professional shortage area. Under the proposed arrangement, the Requestor would provide all requesting physicians, in any location, free access to an "interface" (i.e., a type of software that allows two different systems to communicate with one another) so that the physicians could electronically submit to the hospital orders for lab and other diagnostic services and receive results of those services. The Requestor also would provide, through a contractor, all necessary support services to maintain the interface. The physicians would be responsible for all costs associated with obtaining and maintaining their own electronic health record systems, including the cost of hardware and connectivity that would permit the physicians to use the interface. Of great importance to the *OIG's* opinion, the interface would be used *exclusively* for the transmission of orders and test results and for no other purpose. The Requestor solicited the *OIG's* opinion because it was concerned that the proposed arrangement, potentially, could implicate the Federal Anti-Kickback Statute ("AKS"), which makes it a criminal offense to knowingly and willfully offer, pay, solicit or receive remuneration of any type to induce or reward referrals of items and services payable by a federal health care program.

OIG'S ANALYSIS

The *OIG* reasoned that if no "remuneration" is offered, paid, solicited or received, the arrangement is outside the AKS. Relying on previously issued guidance, the *OIG* opined "free items and services that are integrally related to the offering provider's or supplier's services" do not constitute prohibited remuneration under the AKS. In contrast, items that have independent value, such as a free personal computer that a physician could use for a multitude of purposes, would constitute an illegal inducement.¹ The *OIG* ultimately concluded that the free interface access would not constitute remuneration because it would be closely tied to the Requestor's services and would hold no independent value for the physicians using it. Thus, the arrangement would be compliant and the parties to the arrangement would not be subject to administrative sanctions.

CONCLUSION/PRACTICAL TAKEAWAYS

The AO does not break any new ground. The *OIG*, however, points out that "access to the [i]nterface would be a contemporary analog to the [previously approved] limited-use computer" (e.g., a computer only capable of printing the benefactor lab's testing results) and that its "analysis reflects the application of the same underlying principles to the current state of available technology."

Health care providers and suppliers who provide referral sources with certain free items and services should ensure such items and services meet the parameters reiterated by this AO.

If you have any questions or would like additional information about this topic, please contact Adele Merenstein at 317.752.4427 or amerenst@hallrender.com or your regular Hall Render attorney.

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¹ 56 Fed. Reg. 35952, 35978 (July 29, 1991) (preamble to the 1991 AKS safe harbor regulations)