



## OIG Issues Favorable Advisory Opinion About Online Health Directories and Advertisements

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Does your practice pay to advertise in online directories? Or do you contract with a website to allow patients to book appointments or look for services? If the answer to these questions is “yes,” you may be interested in a recent Advisory Opinion issued by the Office of Inspector General (“OIG”) -- Advisory Opinion No. 23-04.

On July 11, 2023, the OIG published a favorable opinion in response to a request about payments for advertising in online directories and the use of sponsored ads by health care providers. The request specifically sought an opinion from the OIG on whether such advertising could result in sanctions under the Federal Anti-Kickback Statute or the Beneficiary Inducements Civil Monetary Penalty provisions. Based on the facts presented to the OIG, such an arrangement would not subject the operator of the website to sanctions.[1]

[1] The Opinion does not address whether the arrangement is HIPAA compliant or analyze the arrangement from the health care provider perspective.

### **Background**

The opinion was requested by a technology company (the “Requestor”) that operates a website and mobile application that allows people to search and book medical appointments with a number of different types of practitioners such as physicians, nurse practitioners, dentists, chiropractors and other medical

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professionals (“Providers”). Those Providers contract with the Requestor to appear in the directory. Someone looking for services using the directory (a “User”) can enter search criteria such as geographic location, type of service needed and insurance accepted to find the type of practitioner needed and potentially book an appointment for services. The Requestor that operates the website is not a provider or supplier of any medical services and is not affiliated with any provider or supplier.

Providers who contract with the Requestor pay a fee based on new patients who book appointments using the website (“Per-Booking Fees”), but the fee has no correlation to the type of insurance the patient has. Additionally, the fee charged does not take into account the “value of the Federal health care program” or business generated by the website.

The Requestor provided, or was requested to provide, very specific data about how Providers appear in search results performed by Users. According to the Requestor, its proprietary algorithm lists search results using 180 different criteria. The algorithm does not filter by the amount Providers pay the Requestor or the volume of Federal health care program business generated for Providers through the website.

In addition to the Per-Booking Fee, Providers may also purchase banner advertisements, but these advertisements do not promote any particular item or service. These ads are visible to all Users and do not specifically target Federal health care program beneficiaries. The Provider pays the Requestor on a per-impression basis or per-click basis for these ads, neither of which depends on the insurance status of the User nor is it dependent on the volume or value of items or services the Provider furnishes to the User.

## **Analysis**

The Federal Anti-Kickback Statute makes it a crime to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of an individual to a person for the furnishing of, or arranging for the furnishing of, any item or service reimbursable under a Federal health care program. Remuneration includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind. Violation of the statute is a felony punishable by a maximum fine of \$100,000, imprisonment up to 10 years, or both, and a conviction can result in exclusion from Federal health care programs, including Medicare and Medicaid. In addition to potential criminal prosecution, civil monetary penalties (“CMPs”) may be imposed through administrative proceedings.

Under the Beneficiary Inducements Civil Monetary Penalty provision, any person who offers or transfers remuneration to a Medicare or Medicaid beneficiary that the person knows or should know is likely to influence the beneficiary’s selection of a particular provider, practitioner or supplier for the order or receipt of any item or service for which payment is made, in whole or in part, by Medicare or Medicaid may be subject to the imposition of CMPs. Remuneration under this statute is the “transfer of items or services for free or for other than fair market value.”

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The OIG determined that Requestor’s arrangement implicated the Federal Anti-Kickback Statute based on the following three facts: (1) Providers pay the Requestor to recommend them to Federal health care program beneficiaries; (2) Providers pay the Requestor to “arrange” for the provision of items and services through the appointment-booking feature of the website; and (3) Requestor provides remuneration to Users in the form of free use of the website which may lead to the User purchasing items or services reimbursable by a Federal health care program. Although the OIG determined that the arrangement implicated the Federal Anti-Kickback Statute (and no safe harbor applied), it performed an analysis based on the “totality of the circumstances” to determine whether it would impose sanctions. Those factors include: (1) amount and structure of compensation; (2) identity of the party engaged in the advertising and relationship to the target audience; (3) nature of the marketing activity; (4) item or service being marketed; (5) the target population; and (6) any safeguards to prevent abuse. Through this analysis, the OIG determined that the risk of fraud and abuse was sufficiently low, allowing OIG to issue a favorable opinion and state that it would not impose sanctions.

Similarly, under the Beneficiary Inducement CMP analysis, the OIG concluded that the free use of the website to Federal health care program beneficiaries could influence a User to select a Provider that would render services reimbursable by a Federal health care program, which would make the Requestor subject to potential CMPs. However, the OIG states in the opinion that it would exercise “its discretion” and not impose sanctions in connection with the described arrangement.

## **Takeaways**

As with all OIG Advisory Opinions, the Opinion states that it cannot be relied upon by any other person other than the Requestor. That being said, health care providers should be cautious of paying for referrals of any sort, including paying for listings on websites that might drive patients to make appointments or advertising.

The full opinion can be found [here](#).