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Insights

Office of Inspector General Clarifies Online Digital Platforms and Marketing Practices for Physicians

October 7, 2019

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The Health and Human Services Office of Inspector General ("OIG") recently published an Advisory Opinion ("AO 19-04") concerning the use of online platforms for finding and booking physician appointments and physician marketing. While the OIG determined that the platform and payment structure implicated the Civil Monetary Penalties Law ("CMPL") and the Anti-Kickback Statute ("AKS"), it determined that this particular platform presented a low-risk of fraud or abuse to a Federal health care program, thus allowing the platform sponsor to proceed.

There are new digital platforms emerging to streamline the delivery of health care services, at times without regard to fraud and abuse laws that could result in criminal and civil penalties for noncompliance. AO 19-04 more carefully describes the elements of the digital platform the OIG analyzed. In brief, the platform allowed any individual (including Medicare or Medicaid beneficiaries) to input search criteria to identify and book physician appointments. Physicians, in turn, would pay various fees both for participation and marketing. Although the platform is free to individual users, the OIG found that the platform did not provide anything of value that would influence an individual's choice of health care providers, and as such, did not violate the CMPL. The OIG then determined that the platform did not conform to the AKS safe harbor for referral services. However, the OIG concluded that the platform presented a low-risk of fraud or abuse to a Federal health care program based on several factors outlined in a 2003 OIG Compliance Guide for Pharmaceutical Manufacturers.

It is important to note that AO 19-04 is limited to its facts, and that some similar platforms may not be permissible under the AKS or the CMPL. For instance, the OIG noted that arrangements involving marketing by healthcare providers and suppliers are subject to closer scrutiny given their position of trust and influence and that marketing specific items or services may be impermissible under the circumstances. Still, the OIG's analysis in AO 19-04 provides a helpful roadmap to persons interested in starting or participating in similar platforms.

AO 19-04 underscores the complexity of designing health care business ventures in the digital realm. Please contact Brandon W. Shirley or Robert A. Greising if you have questions or need guidance with your health care business.