

PUBLICATION

Website Coupons and Advertising from Health Care Providers Approved by OIG [Ober|Kaler]

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The Office of Inspector General (OIG) issued a favorable advisory opinion to a company that proposed to provide Internet-based coupons and advertisements to health care providers. Advisory Opinion 12-02 [PDF] concluded that the proposed arrangement would not constitute grounds for the OIG to exercise its civil monetary penalty authority for illegal inducements to beneficiaries and that the OIG would not impose administrative sanctions pursuant to the federal antikickback statute.

Proposed Arrangement

The requestor, a corporation partly owned by a physician, proposed to operate a website that would provide advertisements and coupons to consumers on behalf of health care providers (the Website Service). The requestor would enter into agreements with any willing physician or other health care provider or supplier that agreed to the requestor's terms of use. Health care providers that received referrals from the physician-owner would be prohibited from purchasing the Website Service.

The terms of use would limit the use of the coupons. Coupon discounts could be used for items provided by any payor, but use of a coupon to pay for items reimbursed by federal health care programs would have to comply with all federal health care program coverage and payment requirements. Coupon discounts would be applied equally to both the patient's cost-sharing amount and the amount submitted for reimbursement by any third-party payor. The terms of use also would prohibit free service coupons. Lastly, the requestor would review and remove any health care provider's coupon if that coupon was potentially noncompliant.

The coupons would be created by each health care provider from options limited by pull-down menus. The options would include discount amounts, the start and end date for each coupon, and the specific service types available.

Health care providers would be allowed to join the Website Service at one of five levels. Each level above the free level would be offered at a different flat fee. The lowest level would be the Basic, or free, level and would provide the health care provider with one coupon and website traffic tracking data. The highest level would be the Platinum level and would permit the health care provider to have five coupons, website traffic tracking data, website listing enhancement features, searchable keywords, the use of the health care provider's logo, a Google map locator feature and advertising.

Health care providers also would be able to purchase advertising (banners and pop-up advertisements). Although the advertising could include a link to the advertiser's home page, the requestor would not permit the advertisements to link to a health care provider's coupon on the Website Service.

The requestor also proposed to enter into contracts with health care providers and advertisers that would be consistent with basic health care compliance principles. The agreements would require that the aggregate compensation paid to the requestor would be set in advance, consistent with fair market value, and not take into account the volume or value of any referrals or other business generated between the parties. The

agreements would also require health care providers and advertisers to comply with the [antikickback statute discount safe harbor \[PDF\]](#), including its requirements to report discounts, as applicable.

Consumers would not pay a fee to access the Website Service and could access the website anonymously. Consumers could choose to download coupons anonymously or register with email addresses and receive alerts, announcements and newsletters by email. For those consumers who submit their own claims, the website would advise the consumer to enter the discount amount on each claim.

Analysis

The OIG analyzed the advertising and coupons and concluded that the advertisements and coupons in this instance would have a low risk of violating the antikickback statute. The OIG provided the following four factors to support this conclusion:

1. The OIG noted that the requestor was not a health care provider. Although one of the owners was a physician, the OIG explained that the Website Service would neither use the physician's name nor claim to be operated by a health care provider. The OIG explained that marketing by health care providers is subject to closer scrutiny.
2. The OIG explained that the payments to the requestor would be independent of whether consumers would actually use the coupons or obtain services as a result of the advertising. Health care providers at each level of provider membership would pay a flat fee that would be set in advance, be fair market value and not take into account the value or volume of referrals or business otherwise generated between the parties. The OIG also noted that health care providers who received referrals from the physician-owner would be prohibited from participating with the Website Service.
3. The OIG explained that the risk was also low because the advertisements would be limited to pop-up and banner ads on the website. Although consumers could choose voluntarily to receive email advertisements, the advertisements on the website would not be directed at specific consumers and the identity of the specific consumers who visited the website would not be shared with the health care providers.
4. The OIG also explained that the restrictions on the coupons reduced the risk of violating the antikickback statute because the coupons were freely available and "more akin" to those consumers would receive in the mail. The OIG noted that some types of coupons require the consumer to prepay for certain services. The "prepaid" coupons could improperly influence a health care provider to provide a service that was not medically necessary.

The OIG expressed additional concerns about the discounts offered by the coupons to consumers. After a more detailed analysis of these discounts, the OIG concluded that there were sufficient safeguards in place to mitigate against a violation of the antikickback statute. The OIG noted favorably the following two factors :

5. The coupons would be applied equally to the consumer's cost-sharing responsibilities and the bill submitted to federal health care programs. Additionally, the coupons would be limited in value and would not completely waive any consumer cost-sharing obligation.
6. The terms of use would require health care providers to comply with [the discount safe harbor of the antikickback statute \[PDF\]](#). Although the requestor would not certify that the health care providers would meet their obligations under the discount safe harbor, the OIG noted that the requestor would provide all of the information generally required of an "offeror" of a discount.

Implications and Outlook

The OIG noted the requestor would serve as an advertising medium for other health care providers and accordingly provided a favorable opinion regarding the Website Service.

While advertising theoretically may implicate the antikickback statute, "traditional advertising" generally has not been found to violate the statute. As advertisers look for different way to advertise, it becomes increasingly difficult to recognize what constitutes traditional advertising. Advisory Opinion 12-02 is helpful because it identifies various factors for distinguishing various types of advertising. The OIG tried to distinguish less-risky website advertising from riskier website advertising. The OIG noted that advertising resembling traditional general circulation advertising is less risky than individually focused advertising. Advertising that is free and does not require a consumer to prepay for access is also less risky than advertising for prepaid services. The OIG declined to speculate whether advertising that is prepaid by the consumer (such as services available at some social networking websites) would violate the antikickback statute.

The OIG also noted that the requestor's coupon program would require the health care providers to follow the discount safe harbor. Although strict compliance with all of the elements of a safe harbor is required in order to receive safe harbor protection, the OIG reiterated that structuring health care business models to come close to an existing safe harbor is more likely to receive a favorable advisory opinion.