PUBLICATION

OIG Advisory Opinion 18-01: Excluded Individual May Serve as Marketing Liaison to LTC Pharmacies

March 28, 2018

In OIG Advisory Opinion 18-01, published February 27, 2018, the OIG concluded a proposed employment arrangement between an excluded individual and a for-profit company selling discounted emergency medications to long term care pharmacies posed a "minimal risk" to federal health care program beneficiaries. Under the proposed employment arrangement, the excluded individual would serve as a marketing liaison for a company serving long term care pharmacies.

In reaching its favorable conclusion, the OIG relied heavily on (1) the narrowly defined scope of the excluded individual's proposed employment arrangement, (2) the fact that neither the excluded individual, nor his employer, would directly submit or have any control over the submission of claims to federal health care programs, and (3) the excluded individual's proposed compensation terms being independent of the volume or value of medications purchased by any long term care pharmacy customer he secured.

Factual Overview

The individual requesting the opinion (Requestor) was previously convicted of health care fraud and, pursuant to a civil False Claims Act settlement agreement, was permanently excluded from all federal health care programs.

The Requestor sought the OIG's approval of a proposed employment arrangement with a newly formed, for-profit corporation (Company) that intends to offer discounted rates for emergency medications to long term care pharmacies (LTC Pharmacies). The Requestor would serve as a Company marketing liaison, tasked with obtaining new LTC Pharmacy customer accounts. For his services, the Requestor would receive a fixed salary plus a commission based on the number of LTC Pharmacy accounts he secured.

The Company would negotiate with local retail pharmacies for discounted rates for emergency medications, which the Company would then make available to its LTC Pharmacy customers. An LTC Pharmacy would utilize the Company's discounted emergency medications when it could not meet the needs of its customers (e.g., if the LTC Pharmacy was closed at the time the medication was needed). The Requestor certified that while the Company would not itself submit claims to a federal health care program for the emergency medications, its LTC Pharmacy customers (or the customers of the LTC Pharmacy) would likely submit such claims to a federal health care program for reimbursement.

In addition, the Requestor certified that in all circumstances, the LTC Pharmacies and their customers would retain control over the volume, type, and frequency of any emergency medications ordered. Lastly, the Requestor certified that neither the Requestor, nor any of the Requestor's immediate family members or member of the Requestor's household, had any direct or indirect ownership or control interest in the Company, nor would they acquire such an interest during the course of the proposed employment arrangement.

Legal Analysis

An excluded individual who submits, or causes to be submitted, claims to any federal health care program for items or services furnished during the exclusion period is subject to civil monetary penalty liability. Accordingly, an excluded individual is barred not only from directly submitting claims to federal health care programs, but also indirectly submitting such claims (i.e., an excluded individual cannot submit a claim to a federal health care program himself and cannot provide items or services to another individual or entity who will in turn submit claim(s) to a federal health care program).

As applied to the Requestor's proposed employment arrangement, the OIG concluded the Requestor and the Company would be indirectly furnishing items reimbursable by a federal health care program. That is, despite the fact that neither the Company nor the Requestor would submit claims to a federal health care program for the emergency medications, its LTC Pharmacy customers (or the customers of the LTC Pharmacies) would potentially do so.

In its analysis, the OIG presumed that the amount the Company would charge the LTC Pharmacies would be the discounted rate the Company negotiated with the local retail pharmacies plus a markup to cover costs incurred by the Company, such as the expenses related to the Requestor's employment. The OIG went on to suggest that, because the reimbursement provided by any federal health care program to the LTC Pharmacies for the emergency medications would include an overhead factor designed to cover expenses such as the Company's general business costs, such reimbursement in turn would include expenses related to the Requestor's employment.

Notwithstanding the foregoing, the OIG concluded it would not subject the Requestor to administrative sanctions for the proposed employment arrangement because the Requestor's services would be "so far removed" from the emergency medications the LTC Pharmacies or their customers would provide to federal health care program beneficiaries (and for which claims would be submitted). In reaching its conclusion, the OIG highlighted the following factors:

Narrowly defined scope of employment: The Requestor's employment responsibilities would be limited to marketing the Company's services to LTC pharmacies, only.

LTC Pharmacy customers retain control over volume/value of drugs ordered: Neither the Requestor nor the Company would directly or indirectly have any role in the LTC Pharmacies' or their customers' submission of claims to federal health care programs. Rather, LTC Pharmacies and their customers would exercise complete control over the volume, type, and frequency of medications ordered from the Company.

Requestor's compensation not tied to volume/value of referrals: The Requestor's compensation would not be determined based on the volume, value, frequency, price, or selection of any medications by the Requestor's LTC Pharmacy customers; rather, the Requestor would receive a commission solely on the basis of the number of LTC Pharmacy accounts secured. In addition, the Requestor certified that neither he nor any immediate family or household member had any direct or indirect ownership or control interest in the Company or would obtain such an interest during the term of the proposed arrangement.

The OIG cautioned that its analysis was limited to the proposed employment arrangement and noted that it expressed no opinion regarding any ancillary agreements or arrangements potentially arising from the Requestor's employment.

Baker Donelson's Comments

OIG advisory opinions infrequently address exclusion, and more specifically, financial arrangements with an excluded individual. While this Advisory Opinion may indicate a willingness on the part of the OIG to permit employment arrangements with excluded individuals where such arrangements are "far removed" from the actual submission of claims, organizations considering similar arrangements should tread carefully. Penalties for employing an excluded individual absent approval through an advisory opinion could be significant.