OIG Approves DME “Consignment Closet”

On April 26 the Office of Inspector General (OIG) of the U.S. Department of Health and Human Services released an Advisory Opinion permitting a so-called “consignment closet” arrangement between a durable medical equipment (DME) supplier (DME Supplier) and various providers.¹ The OIG closely scrutinizes arrangements between sellers and potential referral sources under the federal anti-kickback statute. Here, however, the OIG found no violation of the anti-kickback statute where (i) a signed, written agreement between the parties existed, (ii) no remuneration flowed from DME Supplier to its potential referral sources, and (iii) the arrangement preserved patient freedom of choice. As such, the OIG declined to impose civil monetary penalty or exclusion sanctions on the parties.

Recommendations for Health Care Entities

This Advisory Opinion suggests that simple “consignment closet” arrangements will not be viewed as Anti-kickback violations by the OIG. The OIG’s brief analysis looked only at whether remuneration was offered by DME Supplier to its referral sources in connection with the storage space/distribution arrangement. Because of the absence of remuneration and the existence of safeguards to protect patient freedom of choice, the OIG approved the arrangement.

We note that this Advisory Opinion does not address “consignment closet” arrangements where fair market value rent is charged. Previous OIG communications, however, have indicated that such arrangements may be permissible in cases where space is being rented for fair market value and other conditions are met.² We also note that the OIG’s analysis does not explicitly address the provider’s actions in the arrangement—providing free rent and free notification services to DME Supplier (e.g., such activities in certain circumstances may be viewed as a “reverse kickback”). Health care entities with existing or proposed “consignment closet” arrangements should consult with counsel to determine if the terms of their arrangements deviate from the simple model presented in this Advisory Opinion, if a separate Advisory Opinion should be sought, or if the arrangement should be restructured to comply with the federal anti-kickback statute or other pertinent law.

The “Consignment Closet”

Under the proposed arrangement, DME Supplier will place an inventory of its portable home oxygen equipment on site at certain local hospitals, clinics and physician offices (collectively, the “Distributors”), an arrangement commonly known as a “consignment closet.” DME Supplier will offer the proposed arrangement to all hospitals within its service area and also to clinics and physician offices within its service area that refer patients to DME Supplier for home oxygen systems. The on site DME will be available for distribution by Distributors to patients (i) who are bound for home, (ii) whose physicians have ordered portable oxygen equipment for home use,
and (iii) who have elected to obtain the equipment from DME Supplier. DME Supplier has also certified to the OIG that it will provide Distributors with a list of local DME suppliers and encourage Distributors to provide the list to patients to help preserve patient freedom of choice. Once DME is distributed, Distributors will notify DME Supplier, including providing patient’s name and insurance information. DME Supplier will then bill the patient and/or third party payor for the DME.

The proposed arrangement between DME Supplier and each Distributor will be memorialized in a signed, written agreement. DME Supplier has certified that it will not pay the Distributors for use of the space to store the DME (i.e., the “consignment closet”) and that no other remuneration will flow from DME Supplier to Distributors in connection with the proposed arrangement.

**OIG Will Not Impose Sanctions**

The broad language of the federal anti-kickback statute prohibits any remuneration offered, paid, solicited or received for the purpose of inducing or rewarding referrals of items or services reimbursable under Federal health care programs. Arrangements between sellers of items or services and potential referral sources are subject to heightened scrutiny to determine whether any remuneration flows that is intended to induce or reward referrals.

Here, the OIG looked only to whether the DME Supplier offered remuneration to Distributors with the intent, in whole or in part, to induce or reward referrals and concluded that because no remuneration flowed from DME Supplier to Distributors in connection with the proposed arrangement, no Anti-kickback violation occurred. As noted above, the OIG’s analysis did not address “consignment closet” arrangements where fair market value rent is charged. The OIG has previously indicated that such arrangements may be permissible in cases where space is being rented for fair market value and other conditions are met.

**Conclusion**

Based on the absence of remuneration here, the OIG concluded the proposed arrangement was not intended to induce or reward referrals. As such, it declined to impose civil monetary penalties or exclusion sanctions on the parties.

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3. 42 USC 1320a-7bb.