

OIG Disapproves of Lab's Provision of Free
Blood Collection Supplies and Payments for Specimen Collection

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The Department of Health and Human Services, Office of Inspector General ("OIG") recently rejected a proposed arrangement between a laboratory and its referring physicians as potentially violating the Federal Anti-kickback Statute and the Federal False Claims Act. In Advisory Opinion No. 05-08, issued on June 6, 2005 and posted on June 13, 2005, the OIG rejected a laboratory's proposal to provide free blood collection supplies to physicians and pay those physicians for the collection of blood samples.

The physicians told the laboratory that they wanted to draw their patients' blood during office visits, rather than send their patients to the laboratory for blood draws. Under the proposed arrangement, the laboratory would provide blood drawing supplies at no cost to the physicians, and pay the physicians a per-patient fee for the physicians' services in collecting the blood specimens.

The OIG reviewed the arrangement under the Federal Anti-kickback Statute and the Federal False Claims Act. The OIG noted that it is a criminal offense under the Anti-kickback Statute to give or receive remuneration to induce or reward referrals of items or services reimbursable by federal health care programs. It found that the proposed arrangement by which the laboratory would provide free blood drawing supplies and payments for blood drawing services, would clearly implicate the Anti-kickback Statute. The OIG stated: "Where a laboratory pays a referring physician to perform blood draws, particularly when the amount paid is more than the laboratory receives in Medicare reimbursement [i.e. \$3.00 per patient encounter for specimen collection fees], an inference arises that compensation is paid as an inducement to the physician to refer patients to the laboratory." The OIG emphasized that there were no safeguards in the proposed arrangement to rebut the inference or reduce the risk that the blood draw remuneration would be intended to induce referrals.

The OIG also determined that any specimen collection claims submitted by a laboratory to Medicare for blood draws performed by the referring physicians would violate the Federal False Claims Act and the Civil Monetary Penalties Law, noting that Medicare pays only the person or entity that actually extracted the specimen from the patient. As such, Medicare rules prohibit the laboratory from billing Medicare for blood collection services rendered by the referring physicians. In addition, the OIG noted that under certain conditions, physicians may bill Medicare directly for collecting blood samples. If a physician bills Medicare and also receives a fee from the laboratory for drawing blood, then the physician would be impermissibly "double dipping" according to the OIG.

The OIG concluded that the proposed arrangement posed a substantial risk of program fraud and abuse which would likely result in Anti-kickback sanctions and potential False Claims Act liability. Given the OIG's position, and the suspicion with which it views such arrangements,

providers and laboratories should carefully analyze their arrangements, contractually or otherwise, for compliance with the various fraud and abuse laws.

For more information on the OIG's Advisory Opinion, please contact Brian M. Foley, Esq. or any member of Schenck, Price, Smith & King's Health Care Practice Group.