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CLIENT ALERT

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OIG REJECTS EHR LABORATORY TRANSMISSION FEE ARRANGEMENT AND REVERSES ITS POSITION ON ONLINE INFORMATION EXCHANGE SERVICES

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On April 1, 2014, the United States Department of Health and Human Services, Office of Inspector General (OIG) issued Advisory Opinion No. 14-03 addressing a laboratory's arrangement with an electronic health record (EHR) services vendor ("Vendor"). The Vendor's EHR service allows referring physicians (who are also customers of the Vendor) to generate and transmit orders to, and receive results from, a laboratory through a bi-directional interface. Under the proposed arrangement, a laboratory would pay the Vendor a per-order fee of up to $1 for each test order transmitted to the laboratory via the Vendor's bi-directional interface. In return, the laboratory would become designated as "in network" in the Vendor's interface and physician customers of the Vendor referring to that laboratory via the bi-directional interface would avoid a transmission fee when ordering tests. If the referring physician does not order tests from an "in network" laboratory, then the referring physician is charged the Vendor's transmission fee. The laboratory, which relies on referrals from office-based physicians for a significant portion of its clinical laboratory testing business, requested an advisory opinion from the OIG regarding whether or not this proposed arrangement would violate the Federal anti-kickback statute.

The anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program. Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-kickback statute is violated. <u>See §1128B(b)</u>.

In analyzing the proposed arrangement, the OIG noted that, in the context of patient referrals, the means to achieve the goal of efficient exchange of information between health care providers must withstand scrutiny under the anti-kickback statute. The OIG concluded that the proposed arrangement posed more than a minimal risk of fraud and abuse under the anti-kickback statute because physicians would be faced with a choice of paying a fee or not paying a fee based on which laboratory receives their referrals. The risk that this fee structure could influence the physicians' referral decisions is heightened because of the high-frequency nature of ordering laboratory tests. The OIG further found that there appeared to be no reason for the laboratory to pay the transmission fees to the Vendor under the proposed arrangement other than to secure referrals. "The Arrangement therefore appears to permit [the laboratory] to do indirectly what it cannot do directly; that is, to pay compensation to the [referring physicians], by relieving them of a financial obligation, in return for the [referring physicians'] laboratory test referrals."

Simultaneous with the issuance of Advisory Opinion No. 14-03, the OIG issued a Final Notice of Termination of Advisory Opinion No. 11-18, which was originally issued on November 30, 2011, with respect to an arrangement that was previously proposed by the Vendor ("Prior Arrangement"). The OIG reversed its formerly favorable opinion that an online service which facilitated the exchange of information between health care providers was structured to properly mitigate issues of fraud and abuse.

Under the Prior Arrangement, the Vendor provided access to an electronic database that identified health care providers for potential referrals. Providers interested in using the service to receive referrals could enter into an agreement with the Vendor and become "Trading Partners." Physicians who purchased the referral service package were given a discount on their monthly EHR subscription fees; however that discount would be reduced each time the physician used the service to refer to a non-Trading Partner. The OIG originally determined that while the structure of this Prior Arrangement could incentivize certain referral patterns, it would be unlikely to influence a physician's referral decisions in a material way.

In accord with its analysis in Advisory Opinion 14-03, the OIG now concludes that this Prior Arrangement poses "more than a minimal risk of fraud and abuse under the anti-kickback statute." While the OIG previously determined that the discount would not induce referrals to a particular person or entity because the per-referral reductions to the discount were low and capped to the aggregate amount of the discount, it has reconsidered this position based on the high-volume nature of laboratory testing services. Practices who refer frequently to laboratories would be essentially forfeiting the available discount if they did not refer to Trading Partners of the Vendor.

Although the OIG believes that "the efficient exchange of health information between health care providers, practitioners, and suppliers is a laudable goal," it has concluded that both of these arrangements potentially generate prohibited remuneration under the anti-kickback statute, and if the requisite intent exists, administrative sanctions would be imposed.

Should you have any questions regarding this matter or other arrangements among health care providers involving potential sources of referrals, do not hesitate to contact one of the health care attorneys at Schenck, Price, Smith & King, LLP.