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Don't Be Suspicious, Don't Be Suspicious: New OIG Special Fraud Alert Warns About Suspect Payments in Medicare Advantage Marketing Arrangements

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The latest Special Fraud Alert from the U.S. Department of Health and Human Services Office of Inspector General (OIG) warns about marketing schemes involving questionable payments and referrals among Medicare Advantage plans, health care professionals, and third-party marketers, such as agents and brokers. Issued on December 11, 2024, this new Special Fraud Alert focuses on two types of problematic payments that implicate the Federal Anti-Kickback Statute (AKS) and have been the subject of recent False Claims Act (FCA) settlements:

- Payments from Medicare Advantage Organizations (MAOs), agents, brokers, and others to health care professionals (or their staff) in exchange for referring patients to certain Medicare Advantage plans; and
- Payments from health care professionals (or their employers or management service organizations) to agents, brokers, and others in exchange for referring Medicare enrollees to particular health care professionals.

The AKS prohibits knowingly and willfully paying or offering “remuneration,” which includes anything of

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value, whether in cash or in kind, to induce or reward referrals or the generation of business involving any item or service payable under a federal health care program, such as Medicare. The Special Fraud Alert points out that Medicare Advantage marketing schemes involving suspect payments could result in harms the AKS is intended to prevent — namely, Medicare enrollees being misled by individuals with improper financial incentives into choosing health plans or providers that do not meet the enrollees’ needs or that are more costly. The OIG is also concerned that these abusive marketing arrangements could lead to unfair competition favoring larger MAOs or healthcare provider organizations that can afford improper payments.

Payments from MAOs to Healthcare Professionals for Referrals to Medicare Advantage Plans

The OIG highlights that a “substantial area of risk” involves MAOs making payments to healthcare professionals or their staff in exchange for steering patients. Examples of such “payments” include gift cards or other in-kind payments that MAOs make to healthcare professionals and their office staff in exchange for steering patients to certain Medicare Advantage plans. Indeed, the Special Fraud Alert cites MCS Advantage’s July 2022 settlement with the federal government for \$4.2 million that resolved allegations that MCS Advantage violated the FCA and AKS by distributing gift cards to administrative assistants of healthcare professionals to induce the assistants to refer, recommend, or arrange for new Medicare beneficiaries to enroll in a Medicare Advantage plan offered by MCS Advantage.

The OIG notes that these tactics have resulted in individuals being enrolled in a Medicare Advantage plan that they did not want, sometimes without their consent. It is also concerned these arrangements facilitate cherry-picking Medicare Advantage plan enrollees in ways that could discriminate against

protected classes, such as individuals with disabilities, whose healthcare could be costly.

Although Medicare regulations allow healthcare professionals to engage in certain, limited, marketing on behalf of MAOs, the OIG stresses in the Special Fraud Alert that any MAO engaging a healthcare professional for marketing must ensure that the healthcare professional does not accept compensation from the MAO for such services.

The Special Fraud Alert includes a list of “suspect characteristics” of Medicare Advantage marketing schemes that could suggest an arrangement “presents a heightened risk of fraud and abuse.” Based on this list, it is suspicious for MAOs, agents, brokers, or other individuals or entities to make or offer payments with any of the following characteristics to healthcare professionals (or their staff):

- Payments (such as bonuses or gift cards) that are made in exchange for referring or recommending patients to a particular MAO or Medicare Advantage plan
- Payments that are disguised as payments for legitimate services but are actually intended to be payments in exchange for the referral of individuals to a particular Medicare Advantage plan
- Payments that are made in exchange for sharing patient information that may be used by the MAOs to market to potential enrollees
- Payments that are contingent upon, or that vary based on, the demographics or health status of individuals who are enrolled in, or referred for enrollment in, a Medicare Advantage plan
- Payments that vary based on the number of individuals referred for enrollment in a Medicare Advantage plan

Payments From Healthcare Professionals to Agents and Brokers in Exchange for Referrals

Another “area of risk” the OIG identifies is when health care professionals pay agents and brokers to steer or refer enrollees to such health care professional. The OIG states that, in some cases, a health care professional will pay agents or brokers to refer Medicare Advantage plan enrollees to the health care professional in order for such health care professional to be designated by the Medicare Advantage plan as the enrollee’s primary care provider. This designation can result in significant financial benefit for the health care professional. The OIG is concerned that an agent or broker who has an established relationship with a Medicare Advantage enrollee could be in a position to influence the enrollee to select a health care professional who is not the most appropriate for the enrollee’s particular health needs.

As an example, the Special Fraud Alert cites Oak Street Health’s September 2024 settlement with the Federal government for \$60 million to resolve allegations that Oak Street Health violated the FCA by paying illegal kickbacks to third-party insurance agents in exchange for recruiting seniors eligible for or enrolled in Medicare Advantage to Oak Street Health’s primary care clinics.

According to the OIG’s “suspect characteristics” list, it is suspicious for health care professionals to make or offer payments with any of the following characteristics to insurance agents, brokers, or other third parties:

- Payments that are contingent upon, or that vary based on, the demographics or health status of the individuals who are enrolled in, or referred for enrollment in, a Medicare Advantage plan;
- Payments to recommend/refer the health care professional to a Medicare enrollee

- Payments that vary with the number of individuals referred to the healthcare professional

Conclusion

According to the Special Fraud Alert, the presence or absence of any one of the “suspect characteristics” outlined by the OIG “is not determinative of whether a particular arrangement would be grounds for legal sanctions.” And certain types of marketing and communications related activities are permissible if certain requirements are met. However, in light of the potential for harm to Medicare Advantage enrollees, the OIG cautions parties to scrutinize marketing arrangements closely. Akerman stands ready to assist entities to ensure that marketing arrangements related to the Medicare Advantage program do not run afoul of fraud and abuse laws, such as the AKS and FCA.

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