

HHS-OIG warns against referral payments in Medicare Advantage

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On December 12, 2024, the Department of Health and Human Services, Office of Inspector General (HHS-OIG) published a Special Fraud Alert¹ (<https://bit.ly/3C4ObVt>) targeting Medicare Advantage (MA) marketing arrangements involving payments for referrals of MA beneficiaries (1) from Medicare Advantage Organizations (MAOs) to healthcare professionals (including individual physicians and physician groups) (HCPs) and (2) from HCPs to MA plan agents and brokers.

This Special Fraud Alert follows a growing wave of government enforcement activity under the False Claims Act (FCA) of the MA industry, in particular related to arrangements involving payment for referrals of MA beneficiaries. HHS-OIG rarely issues Special Fraud Alerts, signaling that these arrangements present particularly heightened enforcement risk.

Suspect arrangements

In the Special Fraud Alert, HHS-OIG specifically focuses on two types of suspect arrangements, which HHS-OIG noted it had identified through such enforcement activity:

- (1) Payments by MAOs to HCPs: Involves payments by MAOs to HCPs or their staff, such as “gift cards or in-kind payments,” in exchange for referrals of patients to the MAOs’ plans, allowing the plans to obtain capitated payments from the Centers for Medicare & Medicaid (CMS). HHS-OIG warned that MAOs may be using these payments to selectively target enrollees, which may further involve discrimination against protected classes of enrollees.
- (2) Payments by HCPs to MA plan agents and brokers: Involves payments from an HCP (individual physician or physician group) to MA plan agents and brokers in exchange for referring MA enrollees to the HCP generally to serve as the enrollee’s primary care physician and therefore receive subcapitated payments from the enrollee’s MAO plan.

HHS-OIG warns that arrangements involving these types of remuneration can result in “abusive arrangements that could lead to improper steering, anticompetitive conduct, and other harms to enrollees and to the Medicare program” and may implicate the federal Anti-Kickback Statute.

In relation to enrollees, HHS-OIG states that agents and brokers are in a “position of trust” with respect to Medicare beneficiaries, yet HHS-OIG fears that such arrangements provide brokers, agents, and HCPs the opportunity to act based on financial incentives rather than identifying the proper MA plan or HCP best suited for an enrollee’s health needs.

HHS-OIG states that although HCPs may engage in “limited” marketing on behalf of an MAO, HCPs cannot accept compensation from MAOs for such activities under CMS regulations.

This Special Fraud Alert follows a growing wave of government enforcement activity under the False Claims Act of the Medicare Advantage industry, in particular related to arrangements involving payment for referrals of MA beneficiaries.

Notably absent from this Special Fraud Alert is any reference to referral payments directly from MAOs to agents and brokers, likely because such payments are specifically authorized, in at least certain forms, by CMS regulation.

Suspect characteristics

HHS-OIG provides a list of suspect factors that it will utilize to examine these and similar types of arrangements in the future.

- **Remuneration for referrals.** Offering or paying remuneration (including bonuses or gift cards) in exchange for referring or recommending patients to a particular MAO or MA plan.
- **Remuneration disguised as legitimate payments.** Offering or paying remuneration disguised as payment for legitimate services but is actually intended to be payment for referrals to a particular MA plan.

- **Remuneration for patient information.** Offering or paying remuneration in exchange for sharing patient information that may be used by MAOs to market to potential enrollees.
- **Remuneration based on patient status.** Offering or paying remuneration that varies based on the demographics or health status of individuals enrolled in or referred for enrollment in an MA plan.
- **Remuneration based on volume or value of referrals.** Offering or paying remuneration that varies based on the number of individuals referred for enrollment in an MA plan.

This Special Fraud Alert signals HHS-OIG's continued interest in MA plan activity and provider marketing arrangements and mirrors ongoing interest among the broader healthcare law enforcement community. MAOs, HCPs, and agents and brokers that operate in the MA space should consider reviewing their arrangements in light of HHS-OIG's perceived suspect arrangements characteristics.

Notes

¹ HHS-OIG Special Fraud Alerts are nonbinding guidance used by the agency to notify the industry of certain practices of which it plans to pursue, or bring enforcement action, as appropriate.

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