PUBLICATION

OIG Revisits Clinical Laboratory Electronic Data Transmission Fees [Ober|Kaler]

December 01, 2014

Prior Opinion Rescinded and Negative Opinion Issued

The Office of Inspector General (OIG) recently issued a negative advisory opinion about an arrangement that offered relief of a $1 electronic data transmission fee to physicians using “in-network” clinical laboratories. Advisory Opinion 14-03 concluded that the laboratory's payment of a per-order fee for each laboratory test order, which relieved the physician of a financial obligation to pay a transmission fee, could be viewed as remuneration in exchange for the physicians' referrals to the laboratories and that the risk of fraud and abuse was more than minimal. Significantly, the OIG concurrently rescinded Advisory Opinion 11-18, a related prior favorable opinion. That three-year-old opinion approved an arrangement under which certain health professionals who received an electronic transmission of related health information paid the company for that service and related services. This is the first rescission of a published advisory opinion since the establishment of the advisory opinion process.

The Arrangement: Electronic Data Transmission Three Ways

The requestor, a publicly traded company operating clinical laboratories nationwide, generates a significant portion of its laboratory testing revenue from referrals from office-based physicians.

Clinical laboratories have recently relied increasingly on the electronic transmission of test orders and test results — to the benefit of both the laboratories and the ordering physicians. In fact, the OIG noted in Advisory Opinion 14-03 that clinical laboratories not offering electronic data transmission were at a competitive disadvantage.

The requestor offers physicians three electronic ways to order and retrieve test results. The first method is a free web-based order and result program. The majority of the referring physicians use this free software to order laboratory tests and to retrieve the laboratory's test results. This free program does not interact with the physician's electronic health record (EHR) system. The second method is a one-way electronic interface that allows the physician to receive and incorporate the test results directly into a patient's EHR. The third method is a two-way interface that allows the physician to order the tests from the EHR system and receive and incorporate the results into the patient's EHR.

Under the arrangement addressed by the OIG, the EHR software provider charges an electronic data transmission fee to either the clinical laboratory or the ordering physician for the two-way interface. Clinical laboratories that offer the two-way interface are listed by the EHR provider as "in-network" laboratories. Physicians are charged a transmission fee of up to $1 per order for tests ordered from a laboratory that is not an in-network laboratory. A physician is not, however, charged a transmission fee when he or she orders the test from an in-network laboratory. In-network clinical laboratories such as the requestor pay a fee for each order transmitted through the EHR software provider's service.

OIG Analysis: Relief from Transmission Fees Pose Risk of Fraud and Abuse

The OIG's analysis focused on an ordering physician's decision to order a laboratory test from a laboratory that is not an in-network laboratory and pay a transmission fee of up to $1, or to order a laboratory test from an in-network laboratory and not pay that fee. A physician's choice to avoid the fee was tied to which laboratory received the referral. The OIG concluded that this posed more than a nominal risk of fraud and abuse.

The OIG based its conclusions on the following observations. First, given that practices generally order laboratory tests at high volume, a real risk existed that the fee structure could meaningfully impact a physician's choice of laboratory. The OIG's position was supported by the requestor's certification that some physicians had stated that they would continue referring the same volume of laboratory tests only if the laboratory was in network with the EHR software provider.

Second, there was little value in paying the per-order fees for the two-way interface except for the purpose of securing referrals. No additional technological benefit arose from an ordering physician's use of the EHR provider's interface compared to the requester's free web-based program to order tests.

Termination of Favorable Advisory Opinion 11-18

By comparison, in Advisory Opinion 11-18, issued November 30, 2011, the EHR software provider had received a favorable advisory opinion with respect to charges to health professionals for receipt of health information and other services related to referrals transmitted using its electronic software. As part of the coordination services, the software provider would also offer a special “trading partner” status to potential referral recipients (i.e., the laboratories). Physician practices purchasing the referral coordination services received a discount on their monthly EHR subscription fees. That discount, however, was subject to a reduction each time the physician referred to a non-trading partner. The total penalty or reduction was capped at an amount equal to the original discount provided. No financial impact was felt when a referral was made to a trading partner.

At the time of review, the OIG concluded that the payment arrangements would be unlikely to influence ordering health professionals' referrals in a meaningful way. Through the termination notice, the OIG reconsidered and rescinded that conclusion, concluding instead that in light of the facts presented by Advisory Opinion 14-03 — in the case of services ordered with high frequency — it was possible that the previously approved structure could improperly influence referrals.