

PUBLICATION

OIG Advisory Opinion 19-04: OIG Approves Health Care Directory's Per-Click Fee Structure

September 20, 2019

In Advisory Opinion 19-04, published September 10, 2019, the Office of Inspector General (OIG) approved an online health care directory operated on a per-click or per-booking fee arrangement. The proposed directory will be visible to the general public, including federal health care beneficiaries. The OIG determined that the proposed arrangement did not implicate the civil monetary provisions related to beneficiary inducements (Beneficiary Inducement CMP) and while the arrangement implicated the Anti-Kickback Statute (AKS), it posed a low risk of fraud and abuse under the AKS.

The Proposed Arrangement

Under the proposed arrangement, federal health care program beneficiaries, along with the general public, would have free access to an online directory made available by a technology company through its website and mobile application (collectively, the Platform). The Platform allows users to search and book medical appointments with health care professionals based on search criteria such as the appointment time available, the geographic location, and the providers that accept the user's medical insurance. The Platform, using an algorithm, then generates a list of providers that meet the user's search criteria. The algorithm does not prioritize the providers displayed in the search results based on how much they pay or any non-user-centric criteria. In addition, federal health care program beneficiaries are provided nothing of value, except the use of the Platform.

Fees Structure Under the Proposed Arrangement

The company offers three different fee structures for health care providers who wish to be listed on the Platform. In most states, a provider can pay a flat monthly subscription fee. In other states, the company will charge a reduced subscription fee and either a per-booking fee for each new user appointment booked through the Platform, or a per-click fee for each user that clicks on the provider's name in the search results. The per-booking and per-click listing fees are based on an independent third-party valuation. Although the fees charged would vary based on the provider's specialty, geographic location, and other factors that affect fair market value, the fees will not be determined by the user's health insurance coverage. Furthermore, changes to the fees will not exceed fair market value.

In addition to the per-click and per-booking listing fees, providers may also purchase advertisements known as Sponsored Results. Sponsored Results are displayed at the top or the side of the search results on the Platform or on other third-party websites. Under the proposed arrangement, the Sponsored Results would not advertise any particular service or item, would be visible to all users including federal health care program beneficiaries, and would be clearly labeled as a paid advertisement. When a user is a federal health care program beneficiary, the Sponsored Results on the Platform would include more pronounced lettering and conspicuous coloration. The company proposes to charge a per-impression fee for each displayed advertisement viewed by a user or a per-click advertisement fee for each time a user clicks on a Sponsored Result. The company determines the per-impression advertisement fee, but allows a bidding process to determine the per-click fee. According to the company, the advertising fees would not (1) exceed fair market value, (2) vary based on the volume or value of items or services the health care professional provides users,

(3) depend on the user's insurance status, or (4) depend on whether the user books an appointment or becomes a patient of a provider.

The OIG's Analysis

Beneficiary Inducement

The OIG first determined that the proposed arrangement did not implicate the Beneficiary Inducement CMP because the remuneration provided to federal health care beneficiaries is just the functionality and convenience of the Platform. It determined that the mere access to the Platform is unlikely to influence a beneficiary's choice of a provider and other factors such as the existing relationship with the provider, the provider's reputation, the geographic location, and appointment availability are more likely to influence the beneficiary's choice.

Anti-Kickback Statute

The OIG determined that the arrangement implicated the AKS because the company would be "arranging for the furnishing of federally reimbursable items and services in exchange for the [p]rovider fees" and would be engaging in "advertising activities meant to induce" federally reimbursable items and services. The OIG also concluded that the arrangement would not comply with all of the elements of the referral service safe harbor because the fees are not limited to the costs of the referral service. Despite this, the OIG determined that the arrangement posed a low risk of fraud and abuse under the statute for several reasons.

First, although the per-booking fees and the per-click fees vary based on a variety of factors, including geography and physician specialty, the fees will be set in advance and the providers' aggregate listing fees will not exceed fair market value. The OIG emphasized that the per-click fees and the per-booking fees would not vary based on the volume or value of the federal health care program business generated through the Platform. The OIG further explained that the per-booking fees would (1) only apply when a new patient books an appointment, (2) apply to all users regardless of their insurance status, and (3) apply even when the user cancels the appointment, except in limited circumstances where the cancellation takes place within 24 hours of booking the appointment. Notably, the fees paid by a provider would not determine how frequently a provider appears in the search results or the placement of the provider in the search results.

In its analysis of the advertising fees, the OIG noted that the per-click and the per-impression advertising fees would not exceed fair market value. Although the advertising fees are expected to vary based on the amounts paid during the bidding process, the fees will not take into account a user's insurance or the volume or value of business generated through the advertisements.

Second, the OIG distinguished this arrangement from "white coat" marketing arrangements. Here, the company providing the marketing services is not a provider or a supplier of the items and services, it does not recommend any particular provider, and it is not affiliated with any active provider.

Third, the advertisements on the company's Platform and third-party websites do not target federal health care program beneficiaries and the Sponsored Results are conspicuously marked and identified as such.

Fourth, the marketing activities on the Platform and third-party websites do not promote any particular item or service. Each user's search result is based on the user's search criteria. The OIG explained that users are well aware that the Platform only provides a limited pool of providers because the company's website notifies users that the providers on the Platform pay a listing fee. Therefore, users are aware that they are not limited to the choice of providers on the Platform.

Fifth, the Platform is open to the general public. Although the Platform collects information about a user's insurance coverage, this is only requested as part of the user search criteria in order to appropriately match users with providers who accept their insurance.

Lastly, the OIG reiterated that the company provides nothing of value to federal health care program beneficiaries, other than the "inherent functionality of the Marketplace and the convenience inherent to using the Marketplace."

Given the above factors, the OIG determined that the proposed arrangement poses a low risk of fraud and abuse under the AKS.

Takeaway

The OIG appears to look at this arrangement holistically. While the government concludes that the per-click fees do not vary based on the volume or value of referrals, the government based its decision on a number of factors, including the transparency of the fee structure, the fact that the fees paid would not change the frequency at which a provider appears in a search result or a provider's placement in a search result, and the fact that the aggregate fees would not exceed fair market value. This holistic approach slightly differs from past OIG Advisory Opinions that have identified per-click or per-dispense fee structures as inherently reflective of the volume or value of referrals.