Proskauer

OIG Releases Special Fraud Alert About Suspect Payments in Marketing Arrangements Related to Medicare Advantage and Providers

Health Care Law Brief on **December 17, 2024**

On December 11, 2024, the Office of Inspector General for the U.S. Department of Health and Human Services ("OIG") issued a special fraud alert warning about certain marketing schemes that involve questionable payments and referrals between Medicare Advantage ("MA") health plans, health care professionals, and third-party marketers (e.g., agents and brokers) and that can mislead MA enrollees into choosing specific health plans or providers that may not be in the MA enrollees' best interests or meet their needs ("MA Marketing Alert"). As we have previously advised, special fraud alerts are few and far between—OIG has only issued six in the past 20 years. The importance of the MA Marketing Alert, like its predecessors, should not be taken for granted because it may be instructive as to subsequent enforcement action taken by OIG and/or the U.S. Department of Justice ("DOJ").

In the MA space, historical enforcement actions taken by both OIG, under their administrative authorities, and DOJ, under the False Claims Act ("FCA"), have related to alleged MA risk adjustment payment inflation schemes. See, e.g., DaVita, Sutter Health, Beaver Medical, Martin's Point, and Cigna. While allegations of this nature continue to be a focus area (e.g., in OIG's work plans), a light is also now being shone on inappropriate marketing schemes that could violate the Federal anti-kickback statute ("AKS"). And, based on historical empirical data connecting DOJ's enforcement actions taken subsequent to OIG's issuance of special fraud alerts, that light may broaden and brighten.

For example, in July 2022, OIG issued a special fraud alert about arrangements involving telemedicine companies. In a footnote, OIG provided three enforcement actions resolved under the FCA as examples of allegedly problematic arrangements. After providing the footnote examples, OIG described bullet-pointed "Suspect Characteristics" that tracked the allegedly inappropriate characteristics of the footnote examples. Since the alert's issuance, DOJ has recovered millions under the FCA and also criminally charged and convicted many individuals and entities for allegedly submitting or causing the submission of more than $3.1 billion (in 2023 and 2024 pursuant to DOJ's nationwide takedowns) in allegedly fraudulent Medicare claims resulting from telemedicine schemes.

While the MA Marketing Alert provides footnotes of only two enforcement actions resolved under the FCA as examples of allegedly problematic arrangements, the bullet point list of "Suspect Characteristics" is broader than and reaches beyond the footnote examples. This may signal OIG's awareness of and current investigations into allegedly inappropriate arrangements relating to "Suspect Characteristics" that have yet to be settled or resolved.

It is possible that there may be forthcoming enforcement actions in these areas. And they may follow the same trend of enforcement actions taken by DOJ relating to telemedicine schemes after OIG's July 2022 special fraud alert. We also note that the MA Marketing Alert aligns with the Centers for Medicare & Medicaid Services' recently finalized regulatory updates relating to MA health plan marketing arrangements with agents, brokers, and Third-Party Marketing Organizations, which will be effective January 1, 2025, and prohibit such parties from creating direct or indirect incentives "that would reasonably be expected to inhibit an agent or broker's ability to objectively assess and recommend which plan best fits the health care needs of a beneficiary." Proskauer's Health Care Group will continue to monitor these developments in and provide updates about these areas of scrutiny and enforcement.

View original.

Related Professionals

- **David Manko**
  Partner

- **Matthew J. Westbrook**
  Senior Counsel
- **Vinay Kohli**
  Partner