

OIG Approves "Per-Click" Payments for Transmission of Referral Information as Part of Integrated Electronic Health Record and Physician Office Support Service

December 9, 2011

On November 30, 2011, the U.S. Department of Health and Human Services, Office of Inspector General ("OIG"), issued a favorable Advisory Opinion relating to a set of services that includes the preparation and transmission of referral orders between health care providers in which part of the service fees, including fees paid by referral recipients, are determined on a "click-fee" basis. Historically, OIG has been wary of approving per-transaction fees because of the obvious connection between the payment and the referral of business.

The Requestor is a publicly traded company that provides Web-based business services to physician practices. Its services include: (i) billing and related services, including insurance authorization and appointment scheduling services; (ii) an electronic health record ("EHR") service; (iii) a secure messaging service; and (iv) a new service that permits the development and transmission of a "Formatted Order" (which is an electronic referral order that contains patient demographic information; the referring provider's identifying information; and, if available, insurance coverage information and authorizations, and accompanying clinical data that are appropriate for the referral) and the coordination of communications between referring providers and recipient providers, including test results and referral reports (the "Coordination Service").

Requestor clients who use the EHR service would be able to use the Coordination Service to transmit Formatted Orders. Any physician could receive a referral from a Requestor client, but if a physician enters into a "Trading Partner" agreement with the Requestor, the receiving physician can receive an electronic Formatted Order (as opposed to in the form of a fax or phone call, for example), and the Formatted Order would contain available insurance authorization and clinical documentation. In addition, Trading Partners are able to post on the Requestor's Network database (described below) additional information to facilitate referral coordination, such as insurance participation, availability for appointments or clinical information that should be prepared and transmitted with any referral. Any willing physician may become a Trading Partner without charge.

As a component of Requestor's services, the Requestor has developed a database of physicians and other providers (the "Network"). The Network database includes information such as physician contact information. The Network includes providers who are Requestor clients as well as data on other providers obtained through a variety of means, including publicly available databases, or entry by a Requestor client. A purpose of the Network is to enable Requestor clients to identify appropriate physicians to whom they may refer patients for care. The Trading Partner agreement enables physicians who are not otherwise Requestor clients to participate in the Coordination Service electronically. Non-Trading Partners may still be listed on the Network and receive referrals, but non-Trading Partners would not be able to customize their Network profiles and would not be able to receive electronic Formatted Orders.

Currently, the Requestor charges its clients a monthly fee for its services. If a Requestor client adds the Coordination Service, Requestor will discount the monthly fee by approximately 25-35%, and charge three types of transaction-based fees for referrals made and received: (i) a base fee for transmission capped at \$1.00 per referral (the "Transmission Fee"); (ii) for referrals made to Trading Partners, a fee for the work associated with building and customizing the Formatted Order and incorporating both referring physician and Trading Partner data (the "Functionality Fee"); and (iii) for referrals made to Trading Partners, a fee for the work performed to verify coverage (the "Service Fee"). If a Formatted Order is sent to a Trading Partner, the Trading Partner would always be responsible for paying all three fees. However, where a non-Formatted Order is sent to a non-Trading Partner, the referring physician would be responsible for paying the Transmission Fee, and the Functionality Fee and Service Fee would not be applicable. (If the receiving physician is not a Trading Partner, the Requestor has no contractual means to collect the Transmission Fee, so it must be paid by the referring physician.) The Transmission Fees paid by *referring* physicians would be capped at the total dollar amount of the discount that the physician receives on the Requestor monthly subscription fee. (However, the cap does not apply to fees a physician might pay in his or her role as the *recipient* of Formatted Orders.)

OIG began its analysis by pointing out the obvious connection between the payment of fees and referrals, but also pointed out a more subtle incentive. Since referring physicians must pay the Transmission Fee for referrals to non-Trading Partners, the structure of the fees could encourage referring physicians to direct their referrals to Trading Partners.

OIG then reviewed a number of factors that it found would reduce the risk that the remuneration provided would be an improper payment to induce referrals:

- The Requestor's Network would be comprehensive and open to any willing physician. The Requestor would not control or influence the decision as to which physician might receive a referral.
- The Requestor is providing *bona fide* services to create and transmit the Formatted Order, and certified that the fees reflect fair market value unrelated to the value of the medical services referred. OIG noted that the services have value that is unrelated to inducing referrals, and in a footnote contrasted this arrangement to arrangements in which a party pays for priority in receiving referrals. (See

discussion below contrasting Advisory Opinion 11-06.)

- The use of a transaction-based pricing model reasonably reflects the underlying work, and is charged whether or not the patient follows through with the referral, and without regard to whether any physician ever bills for any service.
- The size of the Transmission Fee (it is capped at \$1.00) and the cap on the aggregate Transmission Fees payable by the referring physician at the size of the monthly fee discount, make it unlikely that the fee structure would affect the referring physician's referral choices in a material way.
- The openness of the Network, including the ability of referring physicians to manually populate the Network database, would protect patient and provider freedom of choice.
- The ease of use of the electronic referral system might give Trading Partners some advantage over non-Trading Partners, but the OIG concluded that the non-Trading Partners would not be disadvantaged with respect to, or precluded from, the opportunity to receive and respond to referrals made through the Coordination Service.

Although the OIG did not mention Advisory Opinion 11-06, in issuing this favorable opinion the OIG implicitly drew a distinction between the Coordination Service and the referral service described therein. In that opinion, the requestor operated an electronic referral system for post-acute care services, in which (i) hospitals paid a fee to use the system; and (ii) post-acute providers could, but were not required, to pay a fee to use the system, but nonpaying providers could only communicate with hospitals by fax, and not electronically. Because the hospitals tended to send referrals to post-acute providers on a first-come, first-served basis, the nonpaying providers would be significantly disadvantaged in receiving referrals. OIG concluded that nonpaying post-acute providers essentially would be excluded from receiving referrals since the lower level of service would act as a barrier, and issued an unfavorable opinion.

This is an important advisory opinion because it opens the door to appropriately structured transaction-based pricing models for services that may include fees paid by the recipients of referrals. Transaction-based pricing models may help foster the implementation of electronic communication of health information.