Special Fraud Alert: Suspect Payments in Marketing Arrangements Related to Medicare Advantage and Providers

OIG's Special Fraud Alert warns about certain marketing schemes involving the Medicare Advantage program. These schemes involve questionable payments and referrals between Medicare Advantage plans, health care professionals, and third-party marketers such as agents and brokers. These schemes can mislead Medicare enrollees into choosing specific health plans or health care providers that may not meet the enrollees' needs.

I. Introduction

The Office of Inspector General (OIG) is issuing this Special Fraud Alert to warn Medicare Advantage Organizations (MAOs), health care professionals (HCPs), agents and brokers, and others about certain fraud and abuse risks associated with:

- marketing arrangements between MAOs and HCPs; and
- arrangements between HCPs and agents and brokers for Medicare Advantage (MA) plans.

Through its enforcement work, OIG has identified abusive compensation arrangements among parties involved in MA plan enrollment and related selection of HCPs, including certain problematic payments made by and to HCPs. These arrangements implicate certain fraud and abuse laws, including the Federal anti-kickback statute, and we are concerned that they could result in harms against which the Federal anti-kickback statute is designed to protect. The potential harms of these arrangements include unfair competition and improper steering of Medicare enrollees to a particular MA plan or HCP based on lucrative incentives for the HCP or a third party rather than the most appropriate plan or HCP for the enrollee.

OIG has observed an increase in abusive marketing practices in recent years. In this Special Fraud Alert, we focus on two types of remuneration that have been the subject of recent settlements under the False Claims Act and that implicate the Federal anti-kickback statute: (1) payments from MAOs to HCPs or their staff relating to MA plan marketing and enrollment;[1] and (2) payments from HCPs (including payments from corporations that contract with or employ HCPs and payments from management services organizations with which HCPs contract) to agents, brokers, and others in

[1] *E.g.*, Press Release, U.S. Attorney's Office for the District of Puerto Rico, MCS Advantage Agrees to Pay 4.2 Million Dollars to Resolve Allegations that it Violated the False Claims Act and Anti-Kickback Statute (July 1, 2022), https://www.justice.gov/usao-pr/pr/mcs-advantage-agrees-pay-42-million-dollars-resolve-allegations-it-violated-false-claims.

exchange for referring Medicare enrollees to a particular HCP.[2] These two 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.[3]

II. Payments by MAOs to HCPs in Exchange for Referrals

A substantial area of risk involves MAOs, directly or indirectly, paying remuneration to HCPs or their staff in exchange for referring patients to the MAOs' plans. For example, MAOs have provided gift cards or in-kind payments to HCPs and their office staff in exchange for those HCPs or their staff referring or recommending individuals for enrollment in a particular MA plan. Centers for Medicare & Medicaid Services (CMS) regulations allow HCPs to engage in certain limited marketing or communications-related functions on behalf of an MAO.[4] However, MAOs must also ensure that HCPs acting on their behalf do not "[a]ccept compensation from the MA organization for any marketing or enrollment activities performed on behalf of the MA organization."[5] MAOs paying remuneration to HCPs or their staff in exchange for referrals or recommendations can result in individuals being enrolled in MA plans that fail to meet the enrollees' needs. In some cases, these tactics have resulted in individuals, sometimes without their consent, being enrolled in an MA plan when they wanted to stay in Original Medicare or another MA plan. Additionally, an MAO may use these payments to HCPs or their staff to selectively target individuals for enrollment who are expected to result in increased profits to the MAO or, conversely, avoid or discourage enrollment of individuals who are expected to be more costly. Such targeting may involve discrimination against protected classes of enrollees, such as individuals with disabilities.

III. Payments by HCPs to Agents and Brokers in Exchange for Referrals

A second area of risk involves payments from HCPs to agents and brokers, such as payments from an HCP to agents and brokers to recommend that HCP to a particular MA enrollee or to refer the enrollee to the HCP. In some cases, HCPs make these payments to refer Medicare enrollees to the HCP to become designated as the primary care provider for the enrollee at their particular MA plan, which can carry a substantial financial benefit for the HCP. Agents and brokers who have established relationships with Medicare enrollees may be in a position to influence those enrollees' HCP selections. Enrollees are often unaware of these financial arrangements and may rely on the

[2] *E.g.*, Press Release, U.S. Department of Justice, Oak Street Health Agrees to Pay $60 Million to Resolve Alleged False Claims Act Liability for Paying Kickbacks to Insurance Agents in Medicare Advantage Patient Recruitment Scheme (Sept. 18, 2024), https://www.justice.gov/opa/pr/oak-street-health-agrees-pay-60m-resolve-alleged-false-claims-act-liability-paying-kickbacks.

[3] OIG recognizes that other categories of remuneration, such as payments from MAOs to agents, brokers, and others, may also result in abusive arrangements that could implicate the Federal anti-kickback statute. OIG has received significant and credible reports of potential violations in these areas and will consider future guidance regarding payments from MAOs to agents, brokers, and others.

[4] 42 C.F.R. § 422.2266(d).

[5] 42 C.F.R. § 422.2266(d)(1)(ix).

recommendation of an agent or broker in making HCP selection decisions that may not best suit their particular needs.

IV. Harm to Enrollees

OIG recognizes that agents, brokers, and HCPs can play an important role in guiding individuals through the MA plan selection process, and individuals also may rely on agents and brokers when selecting an HCP. Importantly, OIG is aware of reports that enrollees, in some cases, find the MA plan selection process to be "confusing, difficult and overwhelming."[6] When individuals face a challenging and confusing enrollment or HCP selection process, there is the potential for unscrupulous agents, brokers, and HCPs to abuse their position of trust and to act based on financial incentives. When this occurs, numerous harms to enrollees can follow, including, among others, steering individuals toward particular MA plans or HCPs that may be inappropriate for the enrollees' health needs or more costly for the enrollees.

OIG is concerned that agents, brokers, and HCPs may skew the guidance they provide related to HCPs or MA plans based on their financial self-interest. When inappropriate steering is influenced by payments from MAOs to HCPs or from HCPs to agents or brokers, Medicare enrollees can face significant and detrimental consequences. For example, Medicare enrollees switching MA plans could find themselves unable to access preferred HCPs after being enrolled in a new plan, and enrollees may have higher out-of-pocket costs under a new plan.[7] These harms may be particularly insidious and unexpected if enrollees are unknowingly subject to MA plan enrollment or enrollment changes. Additionally, enrollees, on the recommendation of agents and brokers who receive the types of suspect payments described in this Special Fraud Alert, may inadvertently choose an HCP that provides low-quality care or is not the most appropriate for their medical needs. Moreover, there is a risk of unfair competition because the payments discussed in this Special Fraud Alert could encourage agents, brokers, and HCPs to direct enrollees to larger MAOs or certain HCPs that can afford to make such payments, when smaller MAOs or other HCPs may be more appropriate for an enrollee but may not have the resources to pay these improper amounts.

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[6] *See, e.g.*, Meredith Freed et al., *What Do People with Medicare Think About the Role of Marketing, Shopping for Medicare Options, and Their Coverage?*, Kaiser Family Foundation (Sept. 20, 2023), https://www.kff.org/medicare/report/what-do-people-with-medicare-think-about-the-role-of-marketing-shopping-for-medicare-options-and-their-coverage.

[7] *See, e.g.*, The Commonwealth Fund, *The Private Plan Pitch: Seniors' Experiences with Medicare Marketing and Advertising* (Sept. 12, 2023), https://www.commonwealthfund.org/publications/issue-briefs/2023/sep/private-plan-pitch-seniors-experiences-medicare-marketing-advertising; CMS, *Understanding your Medicare Advantage Plan's Provider Network*, CMS Pub. 11941 (Jan. 2023), https://www.medicare.gov/publications/11941-understanding-your-medicare-advantage-plan.pdf; Jeffrey Dong et al., *Turnover Among New Medicare Advantage Enrollees may be Greater than Perceived*, 28 American Journal of Managed Care 539 (Oct. 2022), https://www.ajmc.com/view/turnover-among-new-medicare-advantage-enrollees-may-be-greater-than-perceived; Joseph Burns, Association of Health Care Journalists, *How Seniors can Avoid Medicare Advantage Marketing Scams, Care Denials and Medical Underwriting* (Oct. 21, 2022), https://healthjournalism.org/blog/2022/10/how-seniors-can-avoid-medicare-advantage-marketing-scams-care-denials-and-medical-underwriting; Letter from National Association of Insurance Commissioners to Senators Schumer and McConnell (May 5, 2022), https://content.naic.org/sites/default/files/State%20MA%20Marketing%20Authority%20Senate%20Letter%20.pdf.

V. Federal Laws Implicated

The Federal anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of an individual to a person for the furnishing of, or arranging for the furnishing of, any item or service reimbursable under a Federal health care program. The statute's prohibition also extends to remuneration to induce, or in return for, the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item reimbursable by a Federal health care program.[8]

One purpose of the Federal anti-kickback statute is to protect enrollees from improper referrals or recommendations by individuals who may be unduly influenced by financial incentives. When a party knowingly and willfully pays remuneration to induce or reward referrals of items or services payable by a Federal health care program, the Federal anti-kickback statute is violated. By its terms, the statute ascribes liability to parties on both sides of an impermissible kickback transaction. Arrangements involving HCP compensation to an agent or broker could implicate the statute if the HCP offers or pays an agent or broker to refer enrollees to the HCP for the furnishing or provision of items or services that are reimbursable by a Federal health care program. Similarly, arrangements involving MAO compensation to an HCP or their staff could implicate the statute if the MAO offers and pays an HCP or their staff to refer enrollees to a particular MA plan to furnish or arrange for the furnishing of items or services that are reimbursable by Medicare.

Abusive arrangements involving MAOs, agents, brokers, and HCPs may also lead to criminal, civil, or administrative liability under other Federal laws including, for example, OIG's exclusion authority related to kickbacks,[9] the Civil Monetary Penalties Law provision for kickbacks,[10] OIG's authority to assess civil monetary penalties for contracting organization misconduct,[11] the criminal health care fraud statute,[12] and the False Claims Act.[13] MAOs, agents, brokers, HCPs, and others may be liable under these laws for improper referral arrangements.

[8] Section 1128B(b) of the Social Security Act (the Act). In this Special Fraud Alert, we use the term "referral" to include the full range of activities—including referring, arranging for, purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering—that fall within the scope of the Federal anti-kickback statute. In addition, this Special Fraud Alert uses the term "kickback" to refer to any remuneration prohibited by the Federal anti-kickback statute.

[9] Section 1128(b)(7) of the Act.

[10] Section 1128A(a)(7) of the Act.

[11] 42 C.F.R. § 1003.400.

[12] 18 U.S.C. § 1347.

[13] 31 U.S.C. §§ 3729-33.

VI. Suspect Characteristics

Based on OIG's experience, we have developed the below list of suspect characteristics related to arrangements involving the types of marketing activities described above. These characteristics, taken together or separately, could suggest that an arrangement presents a heightened risk of fraud and abuse. This list is illustrative, not exhaustive, and the presence or absence of any one of these factors is not determinative of whether a particular arrangement would be grounds for legal sanctions.

- MAOs, agents, brokers, or any other individual or entity offering or paying HCPs or their staff remuneration (such as bonuses or gift cards) in exchange for referring or recommending patients to a particular MAO or MA plan.

- MAOs, agents, brokers, or any other individual or entity offering or paying HCPs remuneration that is disguised as payment for legitimate services but is actually intended to be payment for the HCPs' referral of individuals to a particular MA plan.

- MAOs, agents, brokers, or any other individual or entity offering or paying HCPs or their staff remuneration in exchange for sharing patient information that may be used by the MAOs to market to potential enrollees.

- MAOs, agents, brokers, or any other individual or entity offering or paying remuneration to HCPs that is contingent upon or varies based on the demographics or health status of individuals enrolled or referred for enrollment in an MA plan.

- MAOs, agents, brokers, or any other individual or entity offering or paying remuneration to HCPs that varies based on the number of individuals referred for enrollment in an MA plan.

- HCPs offering or paying remuneration to an agent, broker, or other third party that is contingent upon or varies based on the demographics or health status of individuals enrolled or referred for enrollment in an MA plan.

- HCPs offering or paying remuneration to an agent, broker, or other third party to recommend that HCP to a Medicare enrollee or refer an enrollee to the HCP.

- HCPs offering or paying remuneration to an agent, broker, or other third party that varies with the number of individuals referred to the HCP.

These practices, alone or in combination, represent potentially abusive practices that could implicate the various fraud and abuse laws cited above. As described more fully herein, these types of suspect practices could result in various harms to Medicare enrollees and should be scrutinized closely by any parties to such arrangements.

For more information on issues relating to MA, please visit our website. If you have information about MAOs, brokers, agents, HCPs, or other individuals or entities engaging in any of the suspect activities described above, please contact the OIG Hotline at https://oig.hhs.gov/fraud/report-fraud/ or 1-800-447-8477 (1-800-HHS-TIPS).