Ambulance Service Related Advisory Opinion #03-11
By: G. Christopher Kelly

In an Advisory Opinion, number 03-11, the Office of Inspector General ("OIG") has concluded that it would not impose sanctions against a non-profit, emergency ambulance service for accepting subscription payments in lieu of Medicare Part B cost sharing (co-payment) amounts. The OIG is the office designated by the Department of Health and Human Services ("DHHS") to serve as the watch-dog for violations of Federal law by healthcare providers. The OIG also issues Advisory Opinions to entities that request that the OIG state a position on a particular set of facts. Once the OIG issues their Opinion, the requesting entity can then rely on that decision in continuing the business activity without having to worry about whether their actions violate Federal law and the resulting civil and criminal penalties. One of the laws that the OIG is concerned with, and one that concerns many healthcare providers, is the Anti Kick-Back Act.

The Anti Kick-Back Act ("AKA") makes it a criminal offense to intentionally give, offer, or receive anything of value in exchange for the referral of Medicare (or other Government Insurance program) patient business. Violations of the AKA are criminal felonies punishable by a fine of up to $25,000 and/or imprisonment of up to five years. A conviction of an AKA crime can also lead to exclusion from the Medicare and Medicaid programs. There can also be civil monetary penalties levied under the AKA or through the False Claims Act ("FCA"), which would require all funds received as part of the illegal activity to be returned to the government, along with additional penalties ranging from $5,500 to $11,000 per violation. Waiving Medicare co-payments has long been considered an illegal inducement offered to individuals as an attempt to get them to choose one service over another.

The main issue in Advisory Opinion #03-11 is whether waiving co-payments is acceptable where the individuals for whom an ambulance service waives the payments are paying the service a "subscription fee" instead. In the case of this requesting ambulance service, they collected $20 per year from each subscribing individual, $30 for small businesses, and $50 for larger ones. For services rendered to these subscribers, the ambulance service did not collect cost-sharing (co-payment) amounts. The service did collect co-payments from non-subscribers through a billing agency.

The issue then becomes whether the service is giving any incentives to these subscribers to induce them to use their service. To answer that question, the OIG looked to the amounts received for subscriptions compared to the amounts due for co-payments. The OIG stated that its concern was whether, *in the aggregate*, 1) the subscription fees collected from subscribers reasonably approximate the amounts that the subscribers would expect to spend for cost-sharing amounts over the period covered by the subscription agreement, **or** 2) the amounts collected from subscribing Medicare Part B beneficiaries reasonably approximate the amounts that the subscribing Medicare Part B beneficiaries would expect to spend for cost-sharing amounts. The OIG went on to say that if the subscription amounts were not actuarially or historically reasonable in comparison to the uncollected cost-sharing amounts under one of those two alternatives,

then the OIG would view the subscription plan as a potentially illegal practice to disguise the routine waiver of Medicare Part B cost-sharing amounts.

In the case of the ambulance service that requested this Advisory Opinion, the subscription amounts collected from Medicare beneficiaries in the aggregate exceeded the amounts that the Medicare Part B beneficiaries would be expected to spend for cost-sharing amounts over the period covered by the subscription agreement. Therefore the OIG stated that they would not impose sanctions against the requesting ambulance service.

As with any Advisory Opinion, the OIG stated that the Opinion was based on the information given by the requesting ambulance service, and therefore was dependent on its full and truthful disclosure of facts. The Opinion can not and should not be relied upon by parties other than the one requesting the Opinion. The OIG, DHHS, and the federal government are not bound by this opinion and reserve the right to change their position in the future. Specific facts often lead to very different results (for example if the subscription amounts had be minimal in comparison to the amounts of cost-sharing/co-payments due, then the result would have likely been the opposite), therefore any ambulance service should consult an attorney before beginning any course of business that they have a question about or are not certain is in accordance with the law. For the same reasons, nothing in this article is intended to by the author to be legal advice.

However, for other services wishing to use a subscription program (or for those that are currently using one), the lesson to take from this Advisory Opinion is that the service **must** keep track of the amounts of money received from the subscribers **and** the amounts of the co-payments that were not collected, **and** the service must make sure that the subscription rates put your income in line with what the service should have collected in co-pays. Otherwise, it may appear that the "subscription program" is merely a method to cover an illegal waiver of co-payments done to induce individuals to use the service.

The Opinion can be found at:
http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2003/ao0311.pdf

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