

the Great Northwest. And I need to also give a special thank you to AHRA Executive Assistant Sarah Murray— with so much going on right now she keeps us all on task without missing a beat.

Keep your eye on the lynx.

Luann

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Regulatory Review

OIG Views Favorably a Proposal to Operate Website Containing Coupons and Advertising

By Adrienne Dresevic, Esq., Carey F. Kalmowitz, Esq., and Stephanie P. Ottenwess, Esq.

On March 27, 2012, the Office of Inspector General (OIG) posted a favorable, but narrowly defined, Advisory Opinion (No. 12-02) pertaining to Requestor's proposal to operate a website that would display coupons and advertising from healthcare providers, suppliers, and other entities (the "Proposed Arrangement"). The Opinion touches upon a topic hotly debated recently in the healthcare industry – whether providers can legally and ethically offer discounts or coupons on "social coupon" websites. Although Opinion 12-02 is favorable, it does not translate into a green light for healthcare providers to use social coupon sites.

Under the Proposed Arrangement, Requestor, a corporation with two members, one being a practicing physician, would contract with physicians and other health care providers and suppliers (the "Providers"), who wish to post coupons for healthcare items or services. The coupons could include discounts on items or services that are reimbursable by federal healthcare programs, provided that such discounts comply with the applicable federal healthcare program rules and regulations. Providers would be required to give the same discount to any third party payor that the Provider offers a patient. Requestor would also offer banner and pop-up advertising on the website.

Requestor also certified that it would not be in a position to make any referrals to Providers using the site. Moreover, the practicing physician member's name would not appear on the website, he would not post any coupons for his own services, and he would not have any financial interest in the Provider. Five membership levels would be offered, one of which is a free "basic" membership; the rest would require a monthly fee which would be set in advance, for fair market value, and would not take into account the volume or value of any referrals or business otherwise generated between the parties.

The potential customers (healthcare consumers) would pay no fees to access the website and would simply print or download a coupon without pre-paying for the discount. Instead, the discount would be applied only if the customer receives the service. Importantly, the website would advise patients who submit their own claims of their obligation to report any discounts to the payor.

The OIG determined that the Proposed Arrangement involved two advertising activities which implicate the federal anti-kickback statute ("AKS"): the selling of advertising space and the posting of Providers' coupons. In evaluating advertising, the OIG considers a number of factors, including the identity of the party engaged in the marketing activity and the party's relationship with its target audience; the nature of the marketing activity; the item or service being marketed; the target population; and any safeguards to prevent fraud and abuse. The OIG found that the Proposed Arrangement is sufficiently low risk under the anti-kickback statute for the following reasons:

- ◆ Requestor is not a healthcare provider or supplier and would simply operate a website hosting advertising and coupons;
- ◆ payments from Providers do not depend on the coupons being used by customers to obtain services, the fee is set in advance and does not take into account the volume or value of any referrals;
- ◆ advertising on the website would not be directed at the customer visiting the site and was akin to print media; and the structure of the coupons decreases risk under the AKS because a customer does not pre-pay for the coupon. This fact, according to the OIG, significantly lowered the risk that a Provider's medical judgment would be improperly influenced to render medically unnecessary or inappropriate services based upon the fact that the customer purchased a coupon.

The OIG also indicated additional risk existed due to the content of the coupons, which may offer discounts on items or services that are reimbursable by federal healthcare programs. However, the OIG concluded that the Proposed Arrangement included sufficient safeguards to mitigate the risks including:

- ◆ Any discount would result in reduced costs benefiting patients as well as payors, including federal healthcare programs, as the discount would apply to the entire item or service, not only to the patient's cost-sharing obligations; and
- ◆ the website's Terms of Use require the Providers to comply with the discount safe harbor, which requires that buyers and sellers report any discounts to ensure the discounts are shared with federal healthcare programs; the coupons themselves would explain that the discount must apply to the entire item

or service and not just a customer's cost-sharing obligation.

Notably, the OIG (without making specific references) differentiates the Proposed Arrangement from a health care provider's relationship with a "social coupon" website where the customer pre-pays for the discounted service and the fee is generally split between the provider and host of the website. The OIG noted that by not paying up front for the coupon, there is less risk that a Provider would feel pressured to render a non-medically necessary service.

The OIG ultimately concluded that the payments from the Providers for Requestor's services would pose an acceptably low risk of fraud and abuse under the AKS and that Requestor's role in posting the coupons, operating essentially as a conduit to transmit advertising, did not rise to the level of a person or entity transferring remuneration to a beneficiary to improperly influence their choice of provider or supplier. However, the OIG does identify two areas of potential concern for which it expressed no opinion (1) Stark law issues in relation to the physician member and a person or entity with whom the Requestor would contract under the Proposed Arrangement; and (2) False Claims Act liability of Requestor if Requestor knows or should know that the Providers are not providing federal healthcare programs with their share of the coupon discounts.

Thus, although this ultimately was a favorable opinion, it was

narrowly focused, it contrasted the Proposed Arrangement from a "social coupon" website situation, and it identified potential other areas of concern/liability which fell outside the scope of the OIG's authority. As such, these types of coupon/advertising arrangements must be carefully considered before a healthcare provider decides to participate.

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Commentary

Mid-Term Update on ELM Program

By David J Waldron, ELM Program Facilitator

AHRA's 2011 Annual Meeting in sunny Grapevine, Texas seems much more than half a year ago! So much has happened since then, and so much continues to change in the world of diagnostic imaging.

It was a pleasant Sunday afternoon in mid-August 2011 when eight brave and rather apprehensive radiology leaders came together for the opening session of the first ELM program. With participants coming from all over the country (California, Arizona, New York, Illinois, Pennsylvania, Kentucky, and locally from Dallas), the group certainly brought different perspectives and experiences to the inaugural class!

Classroom sessions were spread over several days during the AHRA Annual Meeting, with four hours being dedicated to each of these five topics:

- ◆ Strategic planning, business planning, quality circles
- ◆ Financial management, investment decision support, balanced scorecards and dashboards
- ◆ Organization, operational management, process mapping, and lean six sigma
- ◆ Leadership, situational management, emotional intelligence, and staff development
- ◆ Marketing, branding, market communications, market

research, and market capacity

In addition to these five topics, the group worked to develop presentation skills, craft persuasive messaging, and utilize PowerPoint to deliver compelling presentations.

Each topic was addressed using a combination of classroom learning and discussion coupled with breakouts to work on problems. Breakout groups of four gave each person the opportunity to chair at least one breakout and to be presenter for at least one. The format we followed for each of the five topics was an initial group discussion, leading into a 15 minute breakout, followed by a deeper dive into the topic, and concluding with a 30 minute breakout. These longer breakouts required the groups to address real radiology leadership challenges as well as prepare a PowerPoint presentation with their conclusions. In addition to the depth of understanding that was achieved in each topic, there were three very notable areas where each group showed strong growth during the program:

1. As the program progressed, the person nominated to be chairman became much more focused on the problem being explored and much more adept at using the resources available – namely, the other group members. There deliberately