



## OIG ADVISORY OPINION 23-04: ONLINE MARKETPLACE ARRANGEMENT

July 13, 2023

The Department of Health and Human Services Office of the Inspector General (“OIG”) issues advisory opinions about the application of certain fraud and abuse enforcement authorities to the requesting party’s existing or proposed business arrangements. In [Advisory Opinion 23-04](#), issued July 6, 2023, the OIG recently determined that an online healthcare marketplace arrangement whereby users may search and book medical appointments, and providers pay new-patient fees when booked implicates both the Federal Anti-Kickback Statute and the Beneficiary Inducements CMP; however, the marketplace produces sufficiently low risk of fraud and abuse through its arrangement, thus being able to continue to operate.

### THE ARRANGEMENT

The party requesting the opinion is a technology company that operates a platform through its website and mobile app (“Marketplace”) which allows individuals (“Users”) to search and book medical appointments with medical professionals (“Providers”) who have contracted with the requestor to have individual profiles on the Marketplace. The Marketplace does not charge Users to use the platform, but requestor charges fees to Providers for certain bookings. When a User searches for a medical provider, the Marketplace generates personalized Marketplace results using a proprietary algorithm, filtering and prioritizing Providers based on multiple criteria.

The requestor only uses one fee model to charge Providers for its services, called the “per-booking fees.” The requestor charges these fees for each appointment booked through the Marketplace where the User identifies as a potential new patient of the Provider and has not previously booked an appointment with that Provider. The fees are set for each appointment booking in advance based on valuations from a third-party valuation firm. This fee model also allows for Providers to set spending caps that (1) limit the number of new-patient appointment bookings the Provider receives in a month and the corresponding fees a Provider pays for such bookings; and (2) reset every month.

In addition to Marketplace results, Providers may also purchase advertisements, called “sponsored results,” which sponsor the specific Provider but not any item or service. Sponsored results are displayed at the top or on

the side of the usual Marketplace results and are distinguishable and clearly labeled as a sponsored advertisement. In addition to being on the Marketplace results page, the sponsored results may also be featured on a third-party website in the form of an advertisement. These sponsored results are visible to all Users, including federal health care program beneficiaries. Requestor charges for sponsored results based on a per-impression advertising fee or per-click advertising fee.

In addition to the existing arrangement, requestor presented proposed changes to its existing arrangement:

#### 1. Marketplace Results Features

Under the current arrangement, Providers are removed from Marketplace results when the Providers have reached their spending caps.

The proposed changes would allow for federal health care program beneficiaries or Users who decline to provide their insurance coverage information at the time of search (“Non-Commercial Users”) to view Providers who have already reached their spending caps. When these results populate, there would be (1) language stating there is no availability for the specified criteria; (2) an icon to click or hover on which gives more context explaining the availability shown may not be the full availability, and Providers may be contacted directly for appointment requests; and (3) a “Notify Me” button for automatic notification when the Provider is available.

#### 2. Marketplace Results Ordering

Under the current arrangement, the algorithm attempts to order Providers in a manner, based on Marketplace engagement data, that most closely matches the User’s preferences. Engagement data is measured with Providers who are not subject to spending caps based on clicks on the Provider profile and the number of bookings. Additionally, the algorithm measures Users’ preferences for certain Provider characteristics, not the individual Providers themselves.

The proposed changes would make User engagement data include Providers with spending caps based on the number of clicks on the Provider’s profile and the “Notify Me” button. Additionally, the change would also make the algorithm consider how frequently users engage with spend-capped Providers. Requestor also noted that with the proposed changes, there is a possibility the algorithm could de-prioritize spend-capped Providers for Non-Commercial Users by way of the algorithm changes.

## ANALYSIS

### A. Federal Anti-Kickback Statute

While the OIG found that the arrangement constituted payment and remuneration to both Providers and Users, the OIG ultimately determined that the arrangement presented a low risk of fraud and abuse under the Federal Anti-Kickback Statute for the following reasons:

1. Requestor sets the per-booking fee amounts in advance, and requestor certifies that its fees do not, and any updates to such fees would not, exceed fair market value for the services requestor provides to Providers in connection with the Marketplace.
2. Requestor is not a provider or supplier of any medical items or services, so its relationship with the target population under the arrangement is distinguishable from potentially problematic arrangements involving marketing by health care providers and suppliers.
3. Requestor's advertising activities do not specifically target federal health care program beneficiaries.
4. The marketing activity under the arrangement would not relate to any specific items or services Users may obtain from Providers as a result of appointments booked through the Marketplace.
5. Requestor's potential User base is the general public.
6. Under the proposed changes, requestor would implement user transparency safeguards related to the appearance of spend-capped Providers in Marketplace results.
7. The algorithm attempts to order Providers in a manner that, based on Marketplace engagement data, most closely matches a User's preferences.
8. Requestor does not offer or give anything of value to federal health care program beneficiaries to induce them to use the Marketplace.

#### B. Beneficiary Inducements CMP

In its analysis, the OIG indicated that the arrangement implicates the Beneficiary Inducements CMP because the use of the Marketplace free of cost could influence federal health care program beneficiaries to select a Provider for the receipt of items and services that are reimbursable by federal programs. However, for the same reasons from the Federal Anti-Kickback Statute analysis, the OIG decided to not impose any sanctions.

## CONCLUSION

Even though the OIG found the arrangement implicated the Federal Anti-Kickback Statute and Beneficiary Inducements CMP, the OIG determined that the arrangement presented a sufficiently low risk of fraud and abuse. Significant in the analysis was the fair market value of all fees, the availability of information to the general public and not just to federal health care program beneficiaries, the transparency safeguards set in place for Marketplace results, and the requestor's sole position as a scheduling tool and not as a provider or supplier of medical items or devices. While OIG Advisory Opinions are not to be relied upon by any party other than the requestor, they are helpful in showing how the OIG may view similar arrangements. OIG Opinion 23-04 appears to show that the OIG may be increasingly receptive to technology tools designed to

support patient/consumer convenience, provided that those tools are properly tailored to protect the public and not to result in overutilization of federal health care program resources.

Please contact a member of Hancock Daniel's [Fraud & Abuse](#) team with any questions.

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