

A Holiday Gift from the OIG



On December 12, 2012, the OIG issued an Advisory Opinion regarding a county

hospital's proposal to provide free access to an electronic interface to community physicians and physician practices that would allow those physicians and practices to transmit orders for certain services (including diagnostic and laboratory services) to, and receive the results of those services from, the hospital. Through a contractor, the hospital would also provide support services and software updates necessary to maintain the interface. The physician users would be responsible for all aspects of their own electronic records system, including all hardware and connectivity services that would allow them to communicate with the hospital.

Although the OIG indicated that providing free or below market goods or services to actual or potential referral sources are suspect, and depending on the circumstances, may violate the anti-kickback statute, the OIG has distinguished between free items and services that are integrally related to the offering provider or supplier's services and those that are not. The OIG concluded that the interface access was integrally related to the hospital's services, that the free access had no independent value to the physicians apart from the services provided by the hospital and therefore, the proposed arrangement would not generate prohibited remuneration under the anti-kickback statute, and would not violate the anti-kickback statute. The OIG also indicated that access to the interface would be a contemporary analog to the limited use computer described in the 1991 preamble to the safe harbor regulations (56 Fed. Reg. 35952, 35978; July 29, 1991) where the OIG indicated that a free computer that could only be used to print out lab tests would have no independent value, but a free personal computer that could be used for a variety of purposes would have independent value.

This opinion indicates why it is important to analyze such cases on a case by case basis, because there are instances in which free or below market items or services will not violate the anti-kickback statute.