OIG Advisory Opinion on February 2018 Effect of Exclusion Case

By: Richard Kusserow, former Inspector General of the U.S. Department of Health and Human Services and CEO of Compliance Resource Center, LLC.
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Background

In February 2018, the U.S. Department of Health and Human Services Office of Inspector General (OIG) issued Advisory Opinion 18-01 in response to a request regarding the effect of the Requestor's recent exclusion from Medicare, Medicaid, and all other Federal healthcare programs. The Requestor was criminally convicted for healthcare fraud in accordance with a False Claims Act settlement, and agreed to be permanently excluded. After this ruling, the Requestor received a good faith employment offer from a new, for-profit company (the "Company") that provides long-term care pharmacies with discounted rates for emergency medications. The Company negotiates these discounted rates with local retail pharmacies and charges the long-term care pharmacies the discounted price plus a mark-up.

Under a Proposed Arrangement between the Requestor and the Company, the Requestor would be responsible for marketing the Company's services to long-term care pharmacies to get them to contract through the Company and receive the discounted emergency medications. The Requestor would be paid a fixed salary plus a commission based on how many accounts the Requestor could secure for the Company. Given this position, the Requestor inquired whether the Proposed Arrangement would violate the existing terms of exclusion and create grounds for imposing sanctions.

Conclusion

The OIG concluded that they would not impose sanctions in connection with the Proposed Arrangement. The OIG claimed, "…because [the Requestor's] marketing services on behalf of the Company would be so far removed from the emergency medications that the long-term care pharmacies or their customers would provide to program beneficiaries, we conclude that the Proposed Arrangement poses minimal risk to Federal healthcare programs and beneficiaries.."

While the OIG stated that the Proposed Arrangement *could* violate the Requestor's terms of exclusion, they ultimately decided against implementing sanctions given the following constraints on the Proposed Arrangement:

- Neither the Requestor nor the Company will submit claims to Medicare, Medicaid, or any other Federal healthcare program for items or services directly or indirectly furnished by the Requestor.

* Neither the Requestor nor the Company will directly or indirectly have any role in the long-term care pharmacies' or their customers' submission of claims to Federal healthcare programs.

* Neither the Requestor nor the Company will directly or indirectly have any control over the volume, type, or frequency of any medication that the long-term care pharmacies and their customers purchase through the Company.

* Neither the Requestor, nor any members of the Requestor's immediate family, nor any member of the Requestor's household, have any direct or indirect ownership or control over the Company or would obtain such ownership for the duration of the Proposed Arrangement.

* The Requestor's compensation would not be determined by the volume, value, frequency, price, or selection or any medications that the long-term care pharmacies or their customers order, including federally-reimbursable medications.

In Review

The OIG issued an Advisory Opinion regarding a case of good faith employment of a previously convicted and excluded individual. This individual requested the OIG's opinion on whether or not an arrangement made between him/herself and the company offering employment would violate the existing terms of exclusion, thus prompting imposing sanctions. Based on the terms of the Proposed Arrangement, which limited the individual's involvement in the Company and their submission of claims to Federal healthcare programs, the OIG concluded that the individual would not be violating the terms of exclusion and could work with the company as long as he/she met all requirements of the Proposed Arrangement for its duration.

About the Author:
Richard P. Kusserow is currently the President and CEO of Compliance Resource Center, Strategic Management Services' sister company. He served as the Inspector General of HHS for 11 years and brings decades of valuable experience from the government sector to Compliance Resource Center. His experience with implementation and enforcement of HHS exclusions enables Compliance Resource Center to provide screening services that meet the OIG's requirements and expectations.

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