

PRACTICE MANAGEMENT NOTES

OIG Discusses Groupon-type Advertising Arrangement

By Deniza Gertsberg, Esq.

On March 20, 2012, the Office of the Inspector General (“OIG”) for the Department of Health and Human Resources (“HHS”) issued an Advisory Opinion (“Opinion”) that gave the green light to a specific social media advertising arrangement (“Proposed Arrangement”).¹ The OIG found that the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties for influencing individuals eligible for benefits under federal or state healthcare programs.² The OIG also found that while the Proposed Arrangement might generate improper payments if the intent was to induce the referrals of federal health care business, the OIG would not impose administrative sanctions under the anti-kickback statute.³

While the Opinion was limited to the requesting party, it nonetheless contains valuable insight as to what factors the government considers important when evaluating healthcare provider advertising on social media Web sites. The OIG requirements discussed in the Opinion are closely watched by providers, their advisors, and state medical boards as the medical community seeks to strike the right balance in online advertising.

The key take-away for providers appears to be their ability to structure advertisement arrangements in a way that closely approximates truthful traditional print advertisement because

“[c]ustomarily, accurate and non-deceptive print advertising in general circulation media (such as periodicals or broadcast media) does not raise anti-kickback concerns.”⁴

POPULARITY OF SOCIAL MEDIA ADVERTISING

The Proposed Arrangement analyzed in the Opinion resembles social media advertising on sites such as Groupon and LivingSocial. Advertising on these sites is increasingly popular because of the ease with which a company can reach a large number of potential customers.

For example, Groupon is a deal-of-the-day Web site on which companies advertise discount coupons for their goods and services.⁵ If the number of people who sign up for the offer meets or exceeds a predetermined minimum, then the coupons are issued and customers’ credit cards are charged.⁶ If the minimum is not met, then the day’s offer is rescinded.⁷ Groupon makes money by keeping approximately half the money a customer pays for the coupon.⁸ A seller’s remuneration depends on the volume or value of referrals from the Web site.

This business model, while suitable for most industries, creates problems for healthcare professionals who must comply with a host of state and federal laws and regulations and ethical obligations imposed by their professions.

SOCIAL MEDIA ADVERTISING BY HEALTHCARE PROFESSIONALS

Social media advertising in the healthcare profession raises legal concerns, including violation the federal anti-kickback statute,⁹ the Civil Monetary Penalties Law,¹⁰ state laws prohibiting fee-splitting,¹¹ specific state discount advertising regulations,¹² as well as ethical concerns and concerns about violating contractual obligations in insurance company contracts.¹³

The federal anti-kickback statute and Civil Monetary Penalties Law, in general, impose sanctions for provider conduct that involves fraud, waste and abuse aimed at inducing business reimbursable by the federal healthcare programs. The various state laws impose sanctions for violations of licensing requirements that exist to protect the public, including laws that forbid the offering or paying of any type of remuneration to a patient to induce the selection of a healthcare provider. Ethical standards, much like state licensing requirements, generally uphold the professional standards of the profession and serve to protect the public.

The ethical concerns with social media advertising include, for example, customers-would-be-patients paying for medical procedures upfront, without consulting a doctor, at the time of obtaining a coupon, as opposed to at the time of service. The upfront payment for coupons may also induce some patients to undergo medical

procedures even if they have second thoughts.¹⁴ The OIG also finds this pre-paid model questionable from the provider perspective as it carries the risk of overutilization when a provider feels obligated to render services even when not medically necessary.¹⁵

Sanctions for provider violations depend on the law or regulation. They range from fines, censure, suspension, and license revocation for violation of state law and regulations, to imprisonment up to five years, fines of up to \$25,000, or both, for violating the federal law.¹⁶ Administrative sanctions such as exclusion from participation in the Medicare and Medicaid program and other civil monetary penalties could also be imposed.¹⁷

STATE BOARDS AND MEDICAL SOCIETIES REACT

Several medical and dental societies have already issued warnings to their members about doctor-advertising on sites like Groupon. For example, in October 2011, the American Dental Association advised its members to seek legal advice before advertising on social media Web sites such as Groupon and LivingSocial because of “numerous legal issues for a dentist.”¹⁸

Some state licensing boards are also advising their licensees to steer clear of Groupon-type advertising arrangements to avoid violating the prohibition against fee-splitting and gift giving for referrals.¹⁹ The Oregon Dental Board, for example, advised its members in September 2011 that entering into a contract with Groupon could violate the Board’s fee-splitting rules.²⁰ Similarly, the Oregon Board of Chiropractic Examiners issued a statement on July 25, 2011, unequivocally advising its members that “Groupon-type fee splitting arrangements are [] prohibited for chiropractic physicians,”²¹ although the executive director of the Oregon

Board of Chiropractic Examiners has indicated that the conversation is far from over as providers continue to ask the Board for input on variations of the social media advertising arrangement in the hopes that the proposals do not violate state rules.²²

Recently the attorney for the New York State Dental Association advised dentists that “[c]ertain payment arrangements are clearly illegal for the dentist to enter into, and the preferred payment method that Groupon uses—taking a percentage of the charges for the services it is advertising—is illegal fee splitting, a violation of both Section 6509-a of the New York State Education Law and Section 29.1(b)(4) of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York (8 NYCRR).”²³

Perhaps the most vocal opposition to Groupon advertisement came from the British Association of Aesthetic Plastic Surgeons.²⁴ Last year the association’s past presidents issued statements that “condemned the marketing of serious medical procedures such as breast augmentation and nose jobs via popular online discount Web site Groupon.”²⁵ Among the concerns cited were the “trivialisation and commoditisation of medical procedures” as well as ethical concerns related to quality of care.²⁶

Given such ethical and legal considerations, the parameters set out in the OIG’s Advisory Opinion provide an opportunity for providers to explore the acceptable boundaries of social media advertisement.

PURPOSE AND LIMITATION OF ADVISORY OPINIONS

The OIG enforces the anti-kickback statute which, among other things, seeks to prevent fraud and unnecessary waste of federal healthcare dollars that can occur when a provider’s decision-making is compromised by financial inducements.

The advisory process helps parties determine whether their conduct meets a statutory exception or the safe harbor provisions in the regulation.²⁷ Upon a party’s request, the OIG issues advisory opinions about the application of the agency’s “fraud and abuse authorities to the requesting party’s existing or proposed business arrangement,”²⁸ not a hypothetical situation. According to the OIG, “[o]ne purpose of the advisory opinion process is to provide meaningful advice on the application of the anti-kickback statute and other OIG sanction statutes to a specific factual situation.”²⁹

An advisory opinion, however, is only legally binding on the requestor and the OIG and applies only to the specific facts and circumstances presented by a requestor. The OIG unequivocally states that “no third parties are bound nor may they legally rely on these advisory opinions.”³⁰ The OIG also does not render opinions as to whether any proposed arrangement complies with the Stark laws, which is a series of laws and regulations prohibiting physician self-referral.³¹ An additional drawback of an advisory opinion is that a requestor’s information submitted for consideration may become publically available under the Freedom of Information Act request.

REQUESTER’S PROPOSED ARRANGEMENT

The Proposed Arrangement had sufficient safeguards that differentiated it from most Groupon-type Web sites and permitted the OIG to issue its favorable decision.

The Requestor proposed an arrangement whereby its two members, one of whom was a physician, would operate a Web site hosting coupons and advertisements for healthcare goods and services. The salient points of the arrangement between the Requestor and healthcare providers placing coupons on the Web site are as follows:

1) flat monthly fee without incurring per-coupon or per-click fee; 2) no free service offers; 3) coupon discounts limited to a specific percentage or a set dollar amount (e.g., \$20 or 5% off); 4) requiring that same discounts be given to any third party payor or insurance carrier that the provider offers to the patient (i.e., provider could not offer a coupon only aimed at a patient’s co-pay, co-insurance, etc).

Similarly, the terms of the Requestor’s agreement with healthcare advertisers (who may or may not offer coupons): 1) is set in advance, consistent with fair market value in an arms-length transaction; 2) does not take into account the volume or value of any referral; 3) requires providers to comply with the discount safe harbor requirement of the anti-kickback statute; 4) requires providers to give invoices that accurately reflect the discount provided to patients who submit their own claims and notify those patients in writing of the patients’ obligation to advise the federal healthcare program to which they submit the claims of the discounts they received.

The Proposed Arrangement would allow coupons for items or services that are reimbursable by federal healthcare programs if such discounts comply with all the applicable laws, regulations, and guidance.

Customers—would-be—patients pay no fee to access the Web site, can navigate it anonymously and do not pay an upfront fee for a coupon. The Web site would also advise patients who submit their own claims for reimbursement of their obligation to report any discounts when submitting the claim.

OIG ANALYSIS OF THE PROPOSED ARRANGEMENT

The OIG dispelled any doubts that some may have as to whether offering coupons online is advertising—it is.

Like any marketing activity, the OIG noted, advertisement is intended to induce the use of an item or service and therefore could implicate the anti-kickback statute if a federally funded program is involved.

In evaluating provider marketing or advertising activity, the OIG considers the following factors: 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.³²

The Proposed Arrangement received a favorable decision from the OIG for the following reasons:

1. Requestor is not a healthcare provider and although one of the Requestors is a practicing physician, his name would not be identified on the Web site thereby avoiding the concern of undue influence over the public for recommendation of a healthcare service by someone in a position of trust and power.
2. Providers posting coupons and advertisers enter into a flat fee agreement with the Requestor. In other words, the payments made to the Requestor are not related to the volume or value of any referrals made, which is paid in whole or in part by federal money.
3. Customer information is not shared with the providers posting coupons or advertisers.
4. The anti-kickback concern of overutilization of certain services is low in the Proposed Arrangement since customers make no upfront investment for the coupons. In fact, “the coupons in the Proposed Arrangement are more akin to those that come to consumers by mail...[thus] the risk that a

provider’s medical judgment would be improperly influenced to render medically unnecessary or inappropriate services based on the Customer’s possession of a coupon is low.”³³

In addition to approving the structure of the Proposed Arrangement, the OIG also noted that there were sufficient safeguards in the proposal to protect against problems that could arise from the content of the coupons. While the safeguards first and foremost protect the Requestor, they establish the parameters in which providers posting coupons and advertisements would operate. These safeguards include:

1. Fixed priced coupons or discounts. The coupons will be for a fixed price or an established discount amount; no free services will be allowed and the discount would inure the payor as well as the patient. The Customer’s cost sharing obligation would not be waived entirely.
2. The agreement between Requestor and providers and advertisers would require compliance with the anti-kickback discount safe harbor regulations.³⁴ Safe harbors were carved out by OIG’s regulations to protect certain legitimate and beneficial commercial activities that would have otherwise been made illegal by the broad sweep of the anti-kickback statute.

To qualify for the discount safe harbor provision, parties to a transaction—offeror, buyer, or seller—must appropriately disclose any rebates and discounts.³⁵
3. Under the Proposed Arrangement, the Requestor’s Web site would provide the notifications required of an “offeror”³⁶ SPELLING??? under the regulation.³⁷ In this case, this means that both the Web site and the coupon would explain to customers that discounts apply to

This is number 127 in a series of articles on practice management and marketing for oral and maxillofacial surgeons developed under the auspices of the Committee on Practice Management and Professional Allied Staff and AAOMS staff. Practice Management Notes from 2002 to present are available online at aaoms.org.

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the entire service or item, and not just the customer's cost-sharing obligation. Under the agreements that providers sign with the Requestor, providers also become obligated to inform any federal healthcare program beneficiaries who submit their claims for reimbursement of the beneficiaries' obligation to report such discounts.

CONCLUSION

The OIG's recent advisory opinion, which approved a specific social media advertising arrangement, provides some insight as to what factors the agency uses to evaluate provider advertising conduct on social media Web sites. Despite the favorable opinion regarding a specific arrangement, however, providers should still proceed with caution before signing up to offer discounts and coupons on any social media Web sites. It is important to consult with a qualified local attorney to determine whether a proposed arrangement and offer violates any federal or state laws and regulations and other professional obligations. ①

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REFERENCES:

1 OIG Advisory Opinion 12-02 (March 20, 2012), available at <http://oig.hhs.gov/fraud/docs/advisoryopinions/2012/AdvOpn12-02.pdf> (last visited May 8, 2012).

- 2 Id.
- 3 Id.
- 4 Id.
- 5 See Wikipedia, at <http://en.wikipedia.org/wiki/Groupon> (last visited May 8, 2012).
- 6 Id.
- 7 Id.
- 8 Id.
- 9 See 42 U.S.C. § 1320a-7b(b). The federal anti-kickback statute, among others things, "makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program." There are criminal and civil penalties for violation of the statute. Id.
- 10 See 42 U.S.C. § 1320a-7a. The Civil Monetary Penalties Law ("CMP") is a comprehensive statute that proscribes various fraudulent and abusive activities and imposes, in addition to any other penalty that may be prescribed by law, civil penalties for, among other things, violations of the anti-kickback statute. The CMP also imposes civil monetary penalties against a person who "offers to or transfers remuneration to any individual eligible" for Medicare and/or Medicaid benefits, when that "person knows or should know" that the conduct "is likely to influence such individual to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part," by Medicare or a state healthcare program, such as Medicaid.
- 11 See e.g., NY Ed Law §6530(18) which prohibits providers from "[d]irectly or indirectly offering, giving, soliciting, or receiving or agreeing to receive, any fee or other consideration to or from a third party for the referral of a patient or in connection with the performance of professional services."
- 12 See e.g., Fla. Admin. Code Ann. R. 64B5-4.003.
- 13 See American Dental Association, Legal Issues In Marketing A Dental Practice: Referral Gifts and Groupon Discounts, October 7, 2011, p.8. The ADA warned its members that the provision of referral gifts or discounts may be problematic under the terms of a dentist's contracts with third party payors if the contract contains a "most favored nation" clause. This clause typically requires a dentist to grant the insurer the best price that the dentist charges for a particular service. "The insurer could invoke the clause to compel a dentist who has given a rebate or Groupon discount for a particular service to charge the reduced price for that service to all patients covered by the insurer, and even to rebate to the insurer amounts previously charged by the dentist in excess of the Groupon rate."
- 14 See e.g., The British Association of Aesthetic Plastic Surgeons, Time-linked incentives violate code of ethics, say surgeons, available at <http://www.baaps.org.uk/about-us/press-releases/885-surgery-online-coupons-slammed> (last visited May 8, 2012).
- 15 OIG Advisory Opinion 12-02, supra note i.
- 16 See 42 U.S.C. § 1320a-7b(b).
- 17 See 42 U.S.C. § 1320a-7(a) (mandatory exclusion) and (b) (permissive exclusion).
- 18 See American Dental Association, supra note xiii.
- 19 See e.g., 8 N.Y.C.R.R. 29.1(b)(3), prohibits chiropractors, dentists, dental hygienists, physical therapists and assistants, pharmacists, nurses and optometrists from "directly or indirectly offering, giving, soliciting, or receiving or agreeing to receive, any fee or other consideration to or from a third party for the referral of a patient or client or in connection with the performance of professional services." See also N.Y. Educ. Law §6530(18). Similar laws exist in New Jersey. See e.g., N.J.A.C. 13:35-6.10(c)(9).
- 20 See Olga Kharif, Oregon Dentist Board Says Groupon-Like Coupons May Break Rules, Bloomberg, September 1, 2011, available at <http://www.bloomberg.com/news/2011-09-01/oregon-dentist-board-bars-daily-deal-coupons.html> (last visited April 10, 2012); Patrick D. Paatz, Executive Director, Oregon Board of Dentistry, email correspondence confirming the Oregon Board of Dentistry's position on Groupons (April 9, 2012).
- 21 Oregon Board of Chiropractic Examiners, OBCE Decides Not To Amend Fee-Splitting Rule, July 25, 2011, available at http://www.oregon.gov/OBCE/pdfs/OBCE_Stmt_Groupon_and_Fee_Splitting_7_21_2011.pdf?ga=t (last visited May 8, 2012).
- 22 Dave McTeague, Executive Director, Oregon Board of Chiropractic Examiners, email correspondence (April 9, 2012).
- 23 Lance Plunkett, J.D., LLM, Getting on the Groupon Bandwagon, The New York State Dental Journal, March 2012.
- 24 See The British Association of Aesthetic Plastic Surgeons, supra note xiv.
- 25 Id.
- 26 Id.
- 27 See Office of Public Affairs, Office of Inspector General Department of Health & Human Services, Fact Sheet November 1999, Federal Anti-Kickback Laws and Regulatory Safeharbors.
- 28 The Office of Inspector General, Advisory Opinions, available at <http://oig.hhs.gov/compliance/advisory-opinions/index.asp> (last visited May 8, 2012).
- 29 Id.
- 30 Id.
- 31 Id.
- 32 OIG Advisory Opinion 12-02, supra note i.
- 33 Id.
- 34 See 42 C.F.R. § 1001.952(h).
- 35 Id.
- 36 The OIG clarified that while the Requestor's Web site would provide all of the notifications that would be required if the Requestor was an "offeror" the "Requestor is not the type of an entity that is intended by the term 'offeror' in the safe harbor. As explained in the preamble to the final regulation, '[a]n 'offeror' may be any individual or entity that provides a discount on an item or service to a buyer, but that is not the seller of the item or service.'" 64 Fed. Reg. 63,518, 63,528 (Nov. 19, 1999). The Requestor would not actually provide any discounts; the Requestor would operate a Web site where the discounts are displayed." (emphasis in the original). See OIG Advisory Opinion 12-02, supra note i, fn 8.
- 37 See 42 C.F.R. § 1001.952(h)(3).