

Re: **Recent OIG Advisory Opinion Concerning Free/Discounted Services**

Dear Sir or Madam:

The Department of Health and Human Processing Services' Office of Inspector General (OIG) recently published Advisory Opinion No. 04-16, which evaluates a proposed arrangement whereby a laboratory (the "Lab") would provide certain lab testing services to dialysis centers (the "Centers") free of charge. As briefly summarized below, the OIG found that the proposed arrangement may potentially generate prohibited remuneration under the anti-kickback statute.

### **The Proposed Arrangement**

The Lab sought to provide the services of its employed lab assistants, who would be based at the Centers, and would perform certain lab specimen processing services (the "Processing Services") in connection with lab tests conducted at the Centers. The Lab would provide all equipment and supplies necessary for its lab assistants to perform the Processing Services, all at no charge to the Centers. It is noteworthy that the Processing Services are an integral component of the lab tests and Centers ordinarily pay the Lab to perform the Processing Services. The composite rate reimbursement paid by Medicare to the Facility takes into account the costs that the Facility is expected to incur when it either provides, or arranges for, the Processing Services.

### **The Law**

The Federal "Anti-Kickback" Statute 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. For purposes of the anti-kickback statute, "remuneration" includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

### **The OIG's Analysis**

In its written Advisory Opinion, the OIG concluded that the proposed arrangement could potentially generate prohibited remuneration in violation of the Anti-Kickback Statute. Among its reasons:

- The Centers would be relieved of their responsibilities to perform the Processing Services and would incur no expenses in connection with the Lab's performance of the Processing Services, but would still receive the full composite rate from Medicare. This would result in the Centers receiving a tangible financial benefit and give rise to the inference that the free Processing Services and supplies are intended to influence the Facility's selection of a laboratory.
- The Lab's provision of free Processing Services and supplies may be viewed as a price reduction or discount on the Lab's composite rate tests. Ordinarily, the Lab would charge to the Facility a price that takes into account the Processing Services and specimen analysis. If the Lab performs both components of service, but charges for only one component of service, the result may be viewed as a discount. This gives rise to the inference that the Lab is providing the Processing Services for the purpose of inducing the Centers' referrals of both composite rate tests, and more importantly, non-composite rate tests, for which the Lab bills Medicare directly. The effect of this "swapping" is clear: the Centers would enjoy a greater profit under composite rate

reimbursements and the Lab could expect in return referrals of the more profitable non-composite rate reimbursements.

### **Practical Application of this Advisory Opinion**

If you provide or receive free or discounted services payable by a Federal health care program, you must consider the potential implications of your practices. The OIG observed that the proposed arrangement in Advisory Opinion 04-16 lacked any safeguards that might have rebutted the inference that the free goods or services were intended to induce referrals. Because the OIG did not elaborate on the factors that might have made the proposed arrangement less likely to violate the anti-kickback statute, it is difficult to predict what types of “safeguards” would suffice to protect this and other arrangements from scrutiny and possible prosecution, which could result in fines, program exclusion and incarceration.