



HEALTH CARE UPDATE

January 20, 2010

OIG Special Fraud Alert Targets DME Telemarketing

By Cynthia Marcotte Stamer

The Department of Health & Human Services (HHS) Office of Inspector General (OIG) recently issued a Special Fraud Alert discussing potential violations of the anti-kickback statute for Federal health care programs durable medical equipment (DME) suppliers making unsolicited telephone calls to Medicare beneficiaries prematurely based only on physicians' preliminary written or verbal orders or otherwise inappropriately. DME companies and their telemarketing providers should review their current practices in light of the Special Fraud Alert and tighten practices as necessary to comply with its guidance.

The January 14, 2010 [OIG Special Fraud Alert on Telemarketing by Durable Medical Equipment Suppliers](#) updates the Special Fraud Alert on Telemarketing by Durable Medical Equipment Suppliers originally issued in March 2003. Both the new Special Fraud Alert and the March 2003 focus on Social Security Act section 1834(a)(17), which prohibits DME suppliers from making unsolicited telephone calls to Medicare beneficiaries regarding the furnishing of a Medicare-covered item except in the following three specific circumstances.

- When the beneficiary has given written permission to the supplier to make contact by telephone
- When the contact is regarding a covered item that the supplier has already furnished the beneficiary;
or
- When the supplier has furnished at least one covered item to the beneficiary during the preceding 15 months.

Section 1834(a)(17)(B) also specifically prohibits payment to a supplier that knowingly submits a claim generated pursuant to a prohibited telephone solicitation. Accordingly, OIG takes the position that such claims for payment are false and violators are potentially subject to criminal, civil, and administrative penalties, including exclusion from Federal health care programs.

The January 14, 2010 Special Fraud Alert focuses on the continuing efforts by some DME companies to circumvent the telemarketing prohibits on Section 1834(a)(17) by using independent marketing firms to make unsolicited telephone calls to Medicare beneficiaries to telemarket DME based on preliminary written or oral DME orders of physicians. Noting that DME suppliers cannot do indirectly that which they are prohibited from doing directly, the January 14, 2010 Special Fraud Alert warns that OIG considers inappropriate telemarketing contacts made to Medicare beneficiaries based solely on treating physicians' preliminary written or verbal orders prescribing DME for the beneficiaries. According to CMS, such treating physician's preliminary written or verbal orders are not substitutes for the requisite written consent of a Medicare beneficiary.

Under CMS regulations, DME supplies are responsible for verifying that marketing activities performed by third parties with which the supplier contracts or otherwise does business do not involve prohibited activity and that information purchased from such third parties was neither obtained, nor derived, from prohibited activity. If a claim for payment is submitted for items or services generated by a prohibited

solicitation, OIG considers both the DME supplier and the telemarketer potentially liable for criminal, civil, and administrative penalties for causing the filing of a false claim, as well as criminal and civil penalties for using interstate telephone calls in furtherance of schemes to defraud.

DME companies and their telemarketing providers should review their current practices in light of the Special Fraud Alert and tighten practices as necessary to comply with its guidance. As part of these efforts, DME companies should ensure that telemarketing is only authorized or permitted as allowed by the Social Security Act, should review existing practices and documentation to ensure that the DME provider could demonstrate to HHS that telemarketing contact is not being made based on oral or preliminary written orders of physicians or otherwise in violation of the rules. Clear documentation of patient written consent or prior delivery that meets the requirements to fall within one of the applicable telemarketing prohibit exceptions should be captured and maintained as a condition to any telemarketing contact. DME and telemarketing companies also should consider auditing past practices within the scope of attorney-client privilege and if the audit uncovers potentially aggressive telemarketing conduct, discuss with counsel the advisability of self-correction, self-disclosure or other corrective actions.

Over the past year, HHS, the Department of Justice and other federal officials have significantly turned up the heat on health care fraud investigation and enforcement. During December, 2010 alone, the Department of Justice reported more than 15 criminal fraud enforcement actions. See [*Federal HEAT & Other Federal Health Care Fraud Efforts Score More Than 15 Successes As OIG Claims \\$20.97 Billion Saved From Enforcement Activities In December.*](#) These and other reports document the rising prosecution and enforcement risks that health care providers face for failing under federal health care fraud laws. In light of the growing enforcement and emphasis of federal prosecutors and regulations on the detection and prosecution of organizations and individuals participating in billing or other activities that violate federal health care fraud laws, health care organizations, their officers, directors, employees, consultants and other business partners should tighten practices and step up oversight to minimize the likelihood that they or their organizations will engage in activities that federal regulators view as federal health care fraud. Health care providers need to strengthen existing practices to withstand federal scrutiny, as well as to identify appropriate counsel, established plans and procedures and implement other arrangements for responding in the event the Department of Justice, HHS or other federal regulators audit or take other action regarding their practices or billings.

For More Information

We hope that this information is useful to you. If you found these updates of interest, you also be interested in other updates on HEAT activities such as the following:

- [*HEAT Initiative Snares Health Fraud Related Guilty Pleas of Physical Therapist, Money Launderer and Patient Recruiter In Detroit*](#)
- [*8 Miami-Area Residents Charged, Assets Frozen in \\$22 Million Home Health Medicare Fraud Scheme*](#)
- [*53 Doctors, Health Care Executives & Beneficiaries Indicted For Involvement In A \\$50 Million Alleged False Billing Ring*](#)

If you need assistance with these or other health care fraud, compliance, reimbursement, risk management, workforce and other health care concerns, please contact the author of this update, Curran Tomko Tarski LLP Health Practice Group Chair, Cynthia Marcotte Stamer, at (214) 270-2402, cstamer@cttlegal.com. Ms. Stamer has extensive experience advising clients and writes and speaks extensively on these and other health industry and other reimbursement, operations, internal controls and risk management matters. You can review other recent health care and related resources and additional information about the health industry and other experience of Ms. Stamer [here](#).

If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile at [here](#) or e-mailing this information [here](#) and/or by participating in the [SLP Health Care Risk Management & Operations Group](#) on LinkedIn. To unsubscribe, e-mail [here](#).

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