

# OIG Approves Discount Medical Plan Referral Arrangement

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On June 26, the Department of Health and Human Services Office of the Inspector General (OIG) issued [Advisory Opinion No. 20-03](#) approving the payment by a discount medical plan organization (DMPO) of a five dollar (\$5.00) fee to chiropractors for the referral of new members to the DMPO. OIG determined that even though the arrangement could result in prohibited remuneration, it would not impose administrative sanctions or civil monetary penalties for violation of the federal Anti-Kickback Statute (AKS).

## Proposed DMPO Referral Arrangement

Discount medical plans are not insurers, but they establish networks of providers who will provide discounted services to cash-paying patients. Many, but not all, states license and regulate DMPOs. In its analysis of the proposed arrangement, OIG notes that the DMPO business model is “expressly recognized and permitted in several states” and “the fact that DMPOs are legal business entities is important background.” OIG seems to be suggesting that if an unlicensed or otherwise unregulated or unrecognized business entity proposed this type of referral fee arrangement, then they may have come to a different conclusion.

The requestor DMPO contracts exclusively with chiropractors who agree to reduce their fees by 10%-50% for services provided to the DMPO's members. The DMPO's members pay an annual membership fee in order to receive discounted rates from any chiropractor participating in the DMPO's network. The DMPO's members are typically uninsured, lack chiropractic benefits under their insurance plans, or have a high deductible insurance plan. The DMPO markets its services to chiropractors and the chiropractors may (but are not required to) explain the DMPO's services to patients and facilitate their enrollment in the DMPO. Under the proposed arrangement, the DMPO pays referring chiropractors five dollars (\$5.00) for each new DMPO membership processed. Importantly, Medicare covers only limited chiropractic services and Medicare beneficiaries may use the DMPO only for non-covered services because chiropractors participating in Medicare are legally required to submit claims to Medicare for Medicare covered services.

## OIG Analysis

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While the DMPO only requested that OIG opine on the five dollar (\$5.00) referral fee, OIG also considered the revenue streams represented by the membership fees paid by the DMPO members and the discounted rates offered by participating chiropractors to the DMPO. The OIG noted that they “believe it is important to look at the overall relationships between and among Requestor, the contracting chiropractors, and the members.” The need to consider the totality of financial arrangements among parties is an important point to remember in connection with any AKS analysis and the assessment of government enforcement risk.

## **1. DMPO Payment to Chiropractors – No Nexus to Medicare-Reimbursable Services**

OIG concluded that the five dollar (\$5.00) payment for each new membership that a chiropractor refers to the DMPO is a reward for a referral but does not implicate the AKS because the DMPO does not furnish or arrange for the furnishing of federally reimbursable items or services. Although the \$5 is remuneration, the DMPO pays it to the chiropractor to refer new members to the DMPO, not to reward or induce the chiropractor for providing Medicare-reimbursable services. The OIG acknowledged that the DMPO operates a network that could influence its members to choose a participating chiropractor who could in turn provide the member with federally reimbursable services, but, unlike a Medicare Advantage plan, the DMPO itself is not arranging for federally reimbursable services. Based on this analysis, the OIG took the position that the patient referral and the payment go to the same person – the chiropractor.

## **2. Discounted Rates Offered by Chiropractors and DMPO Membership Fees**

The OIG also identified the discounted rates offered by participating chiropractors to the DMPO as relevant to its AKS analysis and noted that these discounted rates in turn allow the DMPO to earn membership fees from members seeking access to such rates. In addition, by establishing the network and providing access to its members, the DMPO could be viewed as “recommending” its network chiropractors to members. OIG concluded, however, that these revenue streams present a low risk of fraud and abuse for the following reasons:

- **Services Not Covered by Medicare:** First, the discounted chiropractor rates apply only to services *not* covered by Medicare. Moreover, if a member’s insurance provider covered the service, the member would opt to use it and pay the cost-sharing amount, which may often be cheaper than paying a discounted cash price under the DMPO program. Accordingly, the arrangement does not induce or reward referral of Medicare-reimbursable services.
- **Membership Fees Expand Access to Chiropractors Rather than Limit It:** Second, the DMPO does not advertise to prospective members. A prospective member has already sought out chiropractic services by the time she may learn about the DMPO from her chiropractor. Because the DMPO contracts with any willing chiropractor, the arrangement results in members having access to an expanded, not limited, network of providers.
- **DMPO is an Intermediary, Not a Provider of Services:** Third, the DMPO is an intermediary that builds a network of any willing chiropractors. The DMPO does not provide items or services, does not bill federal programs or receive reimbursement from federal programs, and does not recommend particular items or services. OIG acknowledged that it is possible that a participating chiropractor may gain new patients who receive services or items reimbursable under Medicare, but for the reasons stated above, the risk of fraud and abuse is low.

Given the recent growth in high deductible health plans and concerns over rising consumer health care costs, the use and popularity of DMPOs and prescription drug discount programs has dramatically increased. This favorable opinion from OIG provides comfort regarding the compliant structuring of arrangements with referring providers and a welcome acknowledgment that in most instances such plans and programs operate outside the confines of federal health care programs. However, given the unique characteristics of the chiropractor services at issue in the opinion, DMPO and discount prescription drug program sponsors should continue to review arrangements for potential AKS risk.

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