

LEGAL MATTERS

PRELIMINARY GUIDANCE FROM THE OIG TO INDIVIDUAL PHYSICIANS AND SMALL GROUP PRACTICES

By: Bruce A. Smith

The Department of Health and Human Services, Office of Inspector General ("OIG") has issued a number of sector-specific compliance program guidances including ones for clinical laboratories, hospitals, home health agencies, third party medical billing companies, the durable medical equipment, prosthetic, orthotics and supply industry, Medicare+Choice organizations, hospice and nursing homes. To date, no program guidance specifically directed at physicians has been issued, however several of the existing program guidances address issues that impact physicians. On September 8, 1999, the OIG published a notice in the Federal Register soliciting information and recommendations concerning the development of OIG compliance program guidance for individual physicians and small group practices.

On November 12, 1999 I attended a seminar at which an OIG representative discussed the status of the comments received by the OIG. As of November 8, the OIG had received 83 comments to its notice. The OIG expects to issue draft guidelines in February or March 2000 and final guidelines by the summer of 2000. In addition, the OIG has tentatively identified the following risk areas for physicians which would be addressed in the compliance program guidance:

- * Unbundling (e.g., billing multi-channel set of lab tests to appear as if individual tests were performed);
- * Soliciting, offering or receiving a kickback, bribe or rebate (e.g., paying for a referral of patients,

- getting a kickback for ordering diagnostic tests);
- * Routine waiver of copays and deductibles, regardless of need;
- * Billing for services not rendered ("no shows");
- * Upcoding;
- * Double-billing (Medicare and beneficiary/insurer);



- * Billing for physician services rendered by non-physicians/teaching physician requirements;
- * Medical necessity (documentation to support);
- * Misrepresenting diagnosis to justify services;
- * Completing certificates of medical necessity for patients not personally and professionally known by the physician;
- * Billing Medicare/Medicaid for investigation research, medica-

- tions and procedures without proper authorization; and
- * Billing for a non-covered service as if covered.

Noticeably absent from this list are several issues, which apply to and impact physicians' practices including:

- * Stark law; and
- * Discounts and "professional courtesy."

As most physicians now know, the investigation and prosecution of health care fraud is a top priority of the Justice Department and governmental funding for those agencies engaged in the detection and prosecution of health care fraud has increased dramatically. Consequently, it is incumbent on physicians to make sure that they are "paying attention" and not engaging in activities which may subject them, at best, to refunds and, at worst, to penalties or criminal prosecution.

The incidence of Medicare audits has increased and medical practices should assume that sooner or later they will be audited. We recommend that all practices begin to focus on compliance issues now, rather than waiting for the issuance of the OIG compliance guidance for physicians.

- Bruce A. Smith is a health care attorney with the Syracuse-based law firm of Wood & Smith, P.C.