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OIG issues updated fraud alert for telemarketing by DME suppliers

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Durable medical equipment (DME) suppliers recently received a new warning from the Department of Health and Human Services Office of Inspector General (OIG) related to illegal telemarketing calls to Medicare beneficiaries. On January 13, 2010, the OIG published a Special Fraud Alert (Updated Alert)¹ updating its 2003 Special Fraud Alert (2003 Alert)² on DME supplier telemarketing. The Updated Alert repeated the guidance found in the 2003 Alert, but included new guidance that raised concerns in the DME industry, leading to clarification from the Centers for Medicare & Medicaid Services (CMS).³ Because of this recent attention to DME telemarketing practices, DME suppliers should confirm that their practices comply with the Updated Alert and recent CMS guidance.

Similarities between 2003 and Updated Alerts

Both the 2003 and Updated Alerts highlight the federal prohibition on unsolicited telemarketing by DME suppliers, except in limited circumstances. Specifically, federal statute prohibits DME suppliers from making unsolicited telephone calls to Medicare beneficiaries, except in three specific situations:

- when written permission is given by the beneficiary to the supplier to make telephone contact;
- when the call is regarding a covered item that the supplier has already furnished the beneficiary; or
- the supplier has furnished at least one covered item to the beneficiary during the preceding 15 months.⁴

This legislation was enacted to eliminate high-pressure sales techniques, such as cold calls, made for the purpose of encouraging Medicare beneficiaries to purchase DME that they may not want or need.⁵ Federal statute makes clear that a provider cannot receive payment from Medicare for a claim stemming from a prohibited telephone solicitation.⁶ The Updated Alert reminded DME suppliers that claims resulting from a prohibited solicitation are considered false claims and can result in criminal, civil, and administrative penalties for submitting a false claim, as well as criminal and civil penalties for using interstate telephone calls to further the fraud scheme.⁷

The Updated Alert also reminded DME suppliers that they are responsible for the actions of third-party telemarketers who make calls on the DME suppliers' behalf. Prior to issuing the Updated Alert, OIG received information that some DME suppliers were using independent marketing firms to make unsolicited telephone calls to Medicare beneficiaries, in violation of the federal prohibition. Because of this conduct, OIG reminded

DME providers that “[s]uppliers cannot do indirectly that which they are prohibited from doing directly.”

New guidance and response by CMS

After reiterating information found in the 2003 Alert, the Updated Alert appeared to expand on what is considered an “unsolicited” call to a Medicare beneficiary. OIG stated that it had been made aware of DME suppliers who contacted Medicare beneficiaries by telephone, based solely on the ordering physician’s preliminary or written order. Under the Updated Alert, OIG warned that a physician’s preliminary written or verbal order alone “is not a substitute for the requisite written consent of a Medicare beneficiary.”⁸ A DME supplier must either have written permission from the beneficiary or one of the two other exceptions must apply, prior to the DME contacting the beneficiary by telephone.

This new language caused significant concern in the DME industry. DME suppliers often receive a physician’s order for a DME item and then follow up with the beneficiary by telephone to obtain delivery and other information necessary to supply the ordered item. The Updated Alert’s language appeared to prohibit this practice.

To address the concerns raised following the publication of the Updated Alert, CMS provided new guidance in February 2010 by publishing “Frequently Asked Questions” on DME telemarketing practices. CMS clarified that it would be inappropriate for a DME provider to contact a Medicare beneficiary by telephone based solely on the physician’s order, if the physician failed to first inform the beneficiary that the DME provider was being contacted.⁹ However, if a physician contacts the DME supplier on behalf of the beneficiary with the beneficiary’s knowledge, the DME

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supplier is free to contact the beneficiary by telephone without fear of violating the telemarketing restrictions. CMS has noted that “the beneficiary need only be aware that a supplier will be contacting him/her regarding the prescribed covered item, recognizing that the appropriate supplier may not have been identified at the time of consultation.”¹⁰

Compliance suggestions

Although CMS’ clarification should alleviate some of the concerns resulting from the Updated Alert, DME suppliers should be on notice that OIG is paying attention to their telemarketing practices. A recent example of the OIG’s focus in this area is seen in the reported settlement between OIG and the former owners and officers of Matrix Diabetics, Inc., a DME supplier.¹¹ OIG alleged that the supplier paid a telemarketing firm to make unsolicited telephone calls to Medicare beneficiaries on behalf of the supplier in violation of the federal statute. These unsolicited calls resulted in claims being improperly submitted to Medicare for reimbursement. The supplier paid \$260,000 to settle the alleged violations of the Civil Monetary Penalties Law.

Because of the significant exposure, as demonstrated by this settlement, DME suppliers should use the recent attention on telemarketing practices as an opportunity to check current practices for compliance with the telemarketing restrictions. In particular, DME suppliers should update their policies and procedures to reflect the recent guidance from OIG and CMS and educate their employees and third-party telemarketing vendors on the new guidance. DME suppliers also should work closely with their third-party vendors to verify that the vendors are conducting marketing activities in compliance with the telemarketing requirements.

DME suppliers’ compliance efforts also should include a process for confirming that a telephone contact can be made, prior to making the first telephone call to a Medicare beneficiary. This process should include confirmation that the ordering physician has informed the beneficiary that a DME supplier will be contacting him/her regarding the prescribed DME. Additionally, even though not required by CMS, DME suppliers should consider maintaining documentation reflecting that the ordering physician has contacted the DME supplier with the beneficiary’s knowledge.¹² Taking these steps should help DME suppliers to ensure that they do not run afoul of the telemarketing restrictions. ■

1. Available at http://oig.hhs.gov/fraud/docs/alertsandbulletins/fraudalert_telemarketing.pdf
2. Available at <http://oig.hhs.gov/fraud/docs/alertsandbulletins/Telemarketingdme.pdf>
3. Available at <http://www1.cms.gov/MedicareProviderSupEnroll/Downloads/DME%20Supplier%20Telemarketing%20FAQs.pdf>
4. Social Security Act § 1834(a)(17)(B), 42 U.S.C. § 1395m(a)(17) (2009).
5. See House Report No. 102-431, H.R. Rep. 102-431, 49-50 (1992).
6. Social Security Act § 1834(a)(17)(B), 42 U.S.C. § 1395m(a)(17) (2009).
7. OIG Updated Special Fraud Alert, Telemarketing by Durable Medical Equipment Suppliers (Jan. 2010). Available at http://oig.hhs.gov/fraud/docs/alertsandbulletins/fraudalert_telemarketing.pdf.
8. Id.
9. CMS, Medicare Provider and Supplier Enrollment Information. Available at <http://www.cms.hhs.gov/MedicareProviderSupEnroll/Downloads/DME%20Supplier%20Telemarketing%20FAQs.pdf>.
10. Id. (Emphasis in original).
11. Reported Settlement, OIG, False and Fraudulent Claims Archive, June 29, 2009. Available at http://oig.hhs.gov/fraud/enforcement/cmp/false_claims.asp.
12. CMS, Medicare Provider and Supplier Enrollment Information. Available at <http://www.cms.hhs.gov/MedicareProviderSupEnroll/Downloads/DME%20Supplier%20Telemarketing%20FAQs.pdf>.