UNFAVORABLE

OIG WATCH

11-11

Below-cost pricing on non-covered items swapped for exclusive Medicare Part B supply contract

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What OIG Said

OIG said if you're offering below-cost pricing on items a facility pays for to secure exclusive rights to bill Medicare for other items, that's swapping discounts for Federal referrals, not commercially reasonable pricing.

- A medical supply company proposed charging an SNF below-cost rates for non-covered items and related services to become the exclusive supplier of Medicare Part B covered items, with the supplier acknowledging that Medicare Part B payments would more than offset any losses from the below-cost pricing.

- OIG identified a clear nexus between the below-cost payment rates and referrals of Federal business: the SNF could direct covered item business to the supplier, both parties had obvious motives (SNF minimizes out-of-pocket costs, supplier secures exclusive Federal business), and the arrangement was structured through a single RFP linking both.

- OIG's key commercial reasonableness test: Prices below a supplier's total costs give rise to an inference of improper "swapping", trading below-cost rates on business the facility bears risk for in exchange for profitable Federal business the supplier can bill directly and potentially recoup losses through overutilization or abusive billing.

- Creating a separate company (Newco) to provide the below-cost non-covered items while the original company provides covered items doesn't change the analysis—it's substance over form, and the owners still benefit from both sides of the swap.

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Diligence Checklist

What you need to be ready to show in diligence

- ✓ Prove your pricing for any service or product line is commercially reasonable standing alone, not subsidized by or dependent on tied business, referrals, or other revenue streams that wouldn't exist without the below-market arrangement.
- ✓ Show that bundled service fees, management fees, or equipment/supply pricing can cover your actual costs plus reasonable profit margin without relying on recoupment from Federal program payments for separate items or services.
- ✓ Document the business justification for any below-market pricing: Is there a legitimate competitive, operational, or strategic reason that doesn't involve securing Federal referrals or billings from the same party?
- ✓ Have third-party fair market value analysis demonstrating that each component of a bundled arrangement or multi-product relationship is independently sustainable and not cross-subsidized by Federal program revenue.
- ✓ Avoid single RFPs or contracts that explicitly or implicitly link pricing on items the customer pays for with exclusive supply rights or preferential access to items you can bill Federal programs for directly.

If your pricing only works economically because you're offsetting losses with Federal program payments from tied business, this is exactly the "swapping" profile OIG said poses substantial anti-kickback risk and lacks commercial reasonableness.

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Structure not diligence-ready?

Cabra Consulting helps healthcare organizations make sure compensation and transaction structures are independently valued, clearly scoped, and defensible in diligence.

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