UNFAVORABLE

OIG WATCH

12-19

Pharmacy providing free vs. FMV-priced software to community homes that influence referrals

CABRA CONSULTING

What OIG Said

OIG approved nominal-cost items and fair market value pricing, but rejected free technology with significant cost that creates data lock-in and referral lock-in.

- A pharmacy provided medication administration records and software to community homes that select which pharmacy serves their residents (many are Federal health care program beneficiaries). OIG reviewed four different arrangements with escalating cost and lock-in risk.

- OIG approved providing pre-populated forms at nominal cost (Arrangement A), limited software access with no independent value beyond the pharmacy's services (Arrangement B), and selling full software licenses at fair market value that was not below the pharmacy's cost (Arrangement C).

- OIG rejected giving away free software licenses when the cost to provide them was significant (Arrangement D). The software wasn't interoperable; losing access meant losing all stored data. OIG said this created data lock-in, which becomes referral lock-in, giving the pharmacy an unfair competitive advantage that competitors with better services couldn't match.

- The key distinction: nominal cost items that competitors can easily replicate pose minimal risk. Significant cost items with independent value that create switching costs cross the line into problematic remuneration, even if they improve patient safety.

CABRA CONSULTING

Diligence Checklist

What you need to be ready to show in diligence

- ✓ Prove any free or reduced-price items provided to referral sources have only nominal cost to you, and that your competitors could easily provide something comparable at similar cost.
- ✓ If you're selling technology or services to referral sources at below-market rates, document that your price still reflects fair market value, is at or above your cost, and is offered uniformly regardless of referral volume or value.
- ✓ Show that any technology provided is interoperable or that recipients can export their data without losing access to critical records. Data lock-in will be read as referral lock-in.
- ✓ Document that items or services provided are commercially necessary, clearly scoped in a written agreement, and don't exceed the recipient's actual need.
- ✓ Have independent valuation support for any items or services with significant cost or independent value provided to parties who can influence referrals.

If you're providing significant-cost items for free to referral sources and your competitors can't match it, this is the profile OIG said creates unfair competition risk and potential kickback exposure.

CABRA CONSULTING

Structure not diligence-ready?

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

CABRA CONSULTING