The Department of Health and Human Services, Office of Inspector General ("OIG") has issued Advisory Opinion No. 11-06 (the "Advisory Opinion") regarding a company’s proposal to charge a fee to post-acute providers to electronically receive and respond to referral requests from hospitals ("Proposed Arrangement"). Based on the facts and circumstances, the OIG concluded that the Proposed Arrangement could potentially generate prohibited remuneration under the federal Anti-Kickback Statute and the OIG could potentially impose administrative sanctions in connection with the Proposed Arrangement.

The company requesting the Advisory Opinion (the "Company") was a for-profit corporation that provided software, online tools, and related discharge planning support services to hospitals across the nation. The Company operated an online referral service (the "Service") that provided hospitals with access to a nationwide listing of post-acute care providers – such as, skilled nursing facilities, home health agencies, and assisting living providers. Hospitals would use the Service to identify and to select post-acute care providers best-suited to meet the needs of hospital patients, including Federal health care beneficiaries, and to send the selected providers referral requests. A hospital would initiate a referral by providing the Service the patient’s name and identifying information, which in turn would be provided to post-acute care providers. The Company stated that many hospitals provided referrals to post-acute care providers on a first-come, first-served basis.

Under the original structure, post-acute care providers were not charged a fee to use the Service. Under the Proposed Arrangement, the Company would begin to charge those post-acute care providers wanting to use the online capabilities of the Service a one-time implementation fee, as well as a monthly fee. Those post-acute care providers that chose not to pay for the online capabilities would continue to be listed by the Service but such providers would receive referral requests via facsimile only and would have to respond to referral requests by calling or faxing the hospital. According to the Company, non-paying providers would be significantly disadvantaged vis-à-vis paying providers – and may effectively be eliminated from any chance of receiving a patient – because they would not be able to communicate back to the hospital and accept referrals in a timely manner. The Company also certified that, once it recouped the development costs of the Service, it would be more expensive to fax referral requests to non-paying post-acute care providers than it would be transmit the requests online.

In its analysis, the OIG first noted that the Proposed Arrangement would not qualify for protection under the safe harbor for referral services because it failed several of the safe harbor’s requirements, including the requirement that the referral fees be assessed uniformly against all participants and be based only on the cost of operating the referral service. Next, the OIG concluded that, given all relevant facts, the Proposed Arrangement would pose more than a minimal risk under the Anti-Kickback Statute for the following reasons:

- Because referrals were made on a first-come, first-served basis, post-acute care providers paying for the Service and receiving referrals electronically would have a significant competitive advantage over non-paying providers. In fact, non-paying providers would effectively be eliminated from any chance of receiving the referral. This would result in paying post-acute care providers receiving more patients not based on the superior care provided but because they paid for the opportunity to receive referrals faster.
- The Company’s costs in faxing referrals to post-acute providers would exceed the costs incurred to send the referrals electronically. Thus, the OIG concluded that the purpose of the Service was to penalize the non-paying providers by giving the
payers a competitive advantage.

• The Company reported that some non-paying post-acute care providers could not afford to pay for online access to the Service. If these providers wanted to remain competitive or risk substantial loss of business, they would have had to find a way to pay the fees. As a result, these non-paying post-acute providers would face pressure to recoup the fees for online access by prolonging patient stays, upcoding, or providing unnecessary services.

Based on Advisory Opinion 11-06, post-acute care providers should carefully review any current arrangements with online “referral services” or any other vendors, including software companies, offering an online integrated system for coordinating patient discharge and post-discharge care to ensure that such arrangements are in compliance with the Anti-Kickback Statute.

For more information about referral service arrangements and the federal Anti-Kickback Statute, please contact Mary Malone, Jim Daniel or Harold Han at (804)967-9604, or by email mmalone@hdjn.com, jdanield@hdjn.com or hhan@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm’s website at www.hdjn.com.

The information contained in this advisory is for general educational purposes only. It is presented with the understanding that neither the author nor Hancock, Daniel, Johnson & Nagle, PC, is offering any legal or other professional services. Since the law in many areas is complex and can change rapidly, this information may not apply to a given factual situation and can become outdated. Individuals desiring legal advice should consult legal counsel for up-to-date and fact-specific advice. Under no circumstances will the author or Hancock, Daniel, Johnson & Nagle, PC be liable for any direct, indirect, or consequential damages resulting from the use of this material.