

How Can You Telemarket? The OIG Adds a New Twist to DME Suppliers' Telemarketing Prohibition

by Jana Kolarik Anderson and George B. Breen

February 2010

On January 13, 2010, the Office of Inspector General ("OIG") revised and reissued its 2003 Special Fraud Alert regarding prohibited telemarketing conduct by durable medical equipment ("DME") suppliers. There is a new twist.

Both the previous and new OIG Special Fraud Alert explains that DME suppliers are statutorily prohibited from making unsolicited telephone calls to Medicare beneficiaries regarding the furnishing of a Medicare covered item, except in certain limited circumstances.¹ The OIG explained that the statute also prohibits payment to a supplier who "knowingly" submits a claim generated pursuant to a prohibited telephone solicitation and that such claims are false. Consequently, violators are potentially subject to criminal, civil and administrative penalties, including exclusion from the Federal health care programs.

In both alerts, the OIG also explained that DME suppliers cannot do indirectly what they cannot do directly. In other words, a DME supplier can not use independent marketing firms to make unsolicited telephone calls to Medicare beneficiaries to market DME, unless those calls meet the following statutory exceptions:

- i. The beneficiary has given written permission to the supplier to make contact by telephone;
- ii. The contact is regarding a covered item that the supplier has already furnished the beneficiary; or
- iii. The supplier has furnished at least one covered item to the beneficiary during the preceding 15 months.²

However, in its 2010 revised version, the OIG added a new twist, explaining that the OIG also has been made aware of instances where DME suppliers contact Medicare beneficiaries by telephone based "solely on treating physicians' preliminary written or verbal orders prescribing DME for the beneficiaries."³ The OIG stated: "A physician's preliminary written or verbal order is not a substitute for the requisite written consent of

a Medicare beneficiary.”⁴ Again, the OIG emphasized that DME suppliers may only telemarket to Medicare beneficiaries if the calls meet one of the three statutory exceptions listed above, even in the case of a preliminary physician order.

The new language in the revised and reissued OIG Special Fraud Alert raises compliance concerns for DME suppliers with regard to a common practice of physicians, who often ask patients if they have a preference for a DME supplier, and if no preference is stated, the physician will fax an order to a DME company. The DME company then contacts the patient by phone to arrange delivery of the ordered DME item. This practice does not fit within one of the three telemarketing exceptions noted above, and as such, is improper according to the OIG guidance. The onus of compliance is on the DME supplier, not the physician, because it is the DME supplier that bills Medicare. As a result, suppliers need to revisit this common practice to ensure that, for any new customers, the suppliers reach out in writing (not by telephone) to arrange delivery or work with physicians’ offices to supply the necessary consent forms to new customers to streamline the delivery process.

* * *

This Client Alert was authored by Jana Kolarik Anderson and George B. Breen. For additional information about the issues discussed in this Client Alert, please contact one of the authors or contributors or the EpsteinBeckerGreen attorney who regularly handles your legal matters.

The EpsteinBeckerGreen Client Alert is published by EBG's Health Care and Life Sciences practice to inform health care organizations of all types about significant new legal developments.

**Lynn Shapiro Snyder, Esq.
EDITOR**

If you would like to be added to our mailing list or need to update your contact information, please contact, Kristi Swanson, at Kswanson@ebqlaw.com or 202-861-4186.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

© 2010 Epstein Becker & Green, P.C.

Endnotes:

¹ OIG, Special Fraud Alert, *Telemarketing by Durable Medical Equipment Suppliers* (Mar. 2003), available at <http://www.oig.hhs.gov/fraud/fraudalerts.asp>; OIG, Updated Special Fraud Alert, *Telemarketing by Durable Medical Equipment Suppliers* (Jan. 2010), available at <http://www.oig.hhs.gov/fraud/fraudalerts.asp>. As a separate, but related, note, on January 22, 2010, the Federal Communications Commission (“FCC”) issued a notice of proposed rulemaking (“NPRM”), seeking comments regarding whether it should conform its Telephone Consumer Protection Act rules to the Federal Trade Commission’s (“FTC”) Telemarketing Sales Rule. One of the major changes in the regulations would affect the sending of prerecorded messages, which are known as “robocalls.”

The FTC rule prohibits interstate prerecorded marketing calls to any consumer, including the seller’s existing customers, absent the consumer’s prior express written permission. At this time, the current FCC rule, which is the focus of the NPRM, permits those same prerecorded marketing calls to be made interstate or intrastate to any existing customer unless such customer requests those calls not be made. Further, the FCC rule applies to any seller or telemarketer (except for charities). The NPRM includes a proposal to exempt calls that are subject to the Health Insurance Portability and Accountability Act (“HIPAA”) from the general prohibition against prerecorded telemarketing calls to residential telephone lines (e.g., prescription refill reminders). Health care companies that use robocalls with a marketing component should consider submitting comments to the FCC.

² Social Security Act § 1834(a)(17)(B), 42 USC § 1395m(a)(17)(B).

³ OIG, Updated Special Fraud Alert, *Telemarketing by Durable Medical Equipment Suppliers* (Jan. 2010), available at <http://www.oig.hhs.gov/fraud/fraudalerts.asp>.

⁴ *Id.*