

To: Medicaid Providers
Subject: Federal Anti-Kickback Statute

On December 13, 2007, the Department issued Medicaid Information Release MA07-24 warning health care providers of certain practices that may violate the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b). Since that time, the Department has received many questions concerning the Department's interpretation and application of the Anti-Kickback Statute. This letter is intended to address such questions and clarify the Department's prior communication.

I. The Anti-Kickback Statute.

The Anti-Kickback Statute provides in relevant part:

Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly..., in cash or in kind, to any person to induce such person to refer an individual [for] any item or service for which payment may be made ... under a Federal health care program, ... shall be guilty of a felony.

42 U.S.C. § 1320a-7b(b). In other words, the statute prohibits giving anything of value in order to induce referrals for business covered by Medicaid and other federally funded health care programs. The Anti-Kickback Statute potentially applies to any transaction between referral sources, including transactions between providers and program beneficiaries.

II. Limitations and Exceptions to the Anti-Kickback Statute.

Although the Anti-Kickback Statute is an important protection against program fraud and abuse, it was not intended to prohibit otherwise beneficial transactions that further appropriate health care without creating a risk of program fraud or abuse. Accordingly, the Anti-Kickback Statute contains certain limits and exceptions to facilitate such arrangements.

A. Private Pay Patients.

The Anti-Kickback Statute only applies to referrals for items or services payable by government health care programs such as Medicaid and Medicare. The statute does not apply to arrangements involving private pay patients.

B. Intent to Induce Referrals.

The Anti-Kickback Statute only prohibits actions that are intended to induce referrals for items or services covered by government health care programs. The statute does not apply if a health care provider acts without any intent to induce improper referrals. Furthermore, to violate the statute, the provider must actually know about the law, and act "with the specific intent to violate the law." *Hanlester Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995). Accordingly, the Anti-Kickback Statute generally does not prohibit actions that are taken in good faith for the benefit of patients or program beneficiaries without any improper intent to generate referrals or violate the law. For example, a health care provider may generally offer free assistance to a program beneficiary in a good faith effort to help the beneficiary so long as the provider is not doing so as a way to get more business, including more business from the beneficiary.

Providers should be cautioned, however, that the Anti-Kickback Statute is violated if one purpose of an arrangement is to generate improper referrals. *United States v. Katz*, 871 F.2d 105 (9th Cir. 1989);

Unites States v. Greber, 760 F.2d 68 (3d Cir.), *cert. denied* 474 U.S. 988 (1985). The Department may examine any transaction that could generate improper referrals, especially those in which a provider offers free or discounted items or services to program beneficiaries, or those that would otherwise promote over-utilization or create a risk of fraudulent claims. *See* OIG Special Advisory Bulletin, Offering Gifts and Other Inducements to Beneficiaries (8/02).

C. Statutory and Regulatory Exceptions.

The Anti-Kickback Statute contains several statutory and regulatory exceptions. If a transaction complies with all of the elements of a regulatory exception, the Anti-Kickback Statute is not violated. Exceptions exist for many common arrangements that might otherwise violate the statute, including but not limited to:

- Employment relationships.
- Personal services and management contracts.
- Leases of space and equipment.
- Sales of practices.
- Investments in group practices and other entities.
- Practitioner recruitment arrangements.
- Certain discounts.
- Certain waivers of coinsurance and deductibles.

See 42 C.F.R. § 1001.952. Compliance with these safe harbors is purely voluntary. The failure to fit within an exception does not necessarily mean that the Anti-Kickback Statute has been violated, *e.g.*, if the health care provider had no improper intent to induce referrals. However, a provider is protected if they structure a transaction to satisfy one of these regulatory exceptions.

D. OIG Guidance.

The OIG has published fraud alerts and bulletins that allow certain types of transactions, including the following:

1. Inexpensive Gifts.

The OIG has interpreted relevant statutes to allow providers to give beneficiaries inexpensive gifts (other than cash or cash equivalents) that have a retail value of no more than \$10 per item or \$50 in the aggregate annually per patient. *See* Special Advisory Bulletin, Offering Gifts and Other Inducements to Beneficiaries (8/02).

2. Waiving Copays, Deductibles, or Other Amounts Owed by the Financially Needy.

Copays and deductibles help discourage unnecessary services as well as reducing the cost of government programs. A provider's routine waiver of copays and deductibles may create an incentive to over-utilize program resources and violate the Anti-Kickback Statute. *See* OIG Special Fraud Alert (12/94). Nevertheless, the OIG recently reaffirmed that waiving Medicaid copays or deductibles would not violate the Anti-Kickback Statute if:

- the waiver is not offered as part of any advertisement or solicitation;
- the provider does not routinely waive coinsurance or deductibles; and

- the provider waives the coinsurance and deductibles after determining in good faith that the individual is in financial need or reasonable collection efforts have failed.

See Addendum to “Hospital Discounts to Patients Who Cannot Afford to Pay their Hospital Bills (02/02/2004)” (6/18/07). The beneficiary’s “financial need” will depend on the individual’s circumstances; providers should consider factors such as the local cost of living, the patient’s income, assets and expenses, and the scope and extent of the patient’s medical bills. Providers should establish an indigency policy, make an individualized determination of financial need consistent with that policy, and document the financial need.

3. Benefits by Independent Entity.

According to the OIG, an independent entity, such as a patient advocacy group, may provide free or other valuable services or remuneration to financially needy beneficiaries, even if the benefits are funded by providers, so long as the independent entity makes an independent determination of need and the beneficiary’s receipt of the remuneration does not depend, directly or indirectly, on the beneficiary’s use of any particular provider. *See* OIG Special Advisory Bulletin re Gifts to Beneficiaries (8/02).

Additional guidance concerning these and other situations is published on the OIG’s fraud prevention website, www.oig.hhs.gov/fraud.

D. Advisory Opinions

The Office of Inspector General (“OIG”) has established a process whereby health care providers may request an Advisory Opinion concerning whether a proposed transaction violates the Anti-Kickback Statute, thereby allowing providers to avoid penalties. *See* 42 C.F.R. part 1008. Past Advisory Opinions are posted on the OIG’s fraud prevention website, www.oig.hhs.gov/fraud. The Advisory Opinions are only binding on the parties to the opinions; however, the published Advisory Opinions may provide guidance to health care providers who are considering similar transactions.

Although Idaho does not have an advisory opinion process, the Department is willing to respond to questions from providers about proposed transactions. Providers with questions should call Rebecca Fadness, Licensing and Certification Program Supervisor, at (208) 364-1906. In addition, we attach several examples of the probable application of the Anti-Kickback Statute.

Examples of Anti-Kickback Statute Application

The Anti-Kickback Statute is a federal statute. Federal agencies are charged with enforcement of the law. The Department's application and conclusions concerning the law are not binding on federal agencies, and will not protect a health care provider from federal prosecution. However, in an effort to provide guidance for Idaho health care providers concerning how the Department would likely respond to illustrative situations, the Department provides the following examples:

1. A health care provider gives a Medicaid beneficiary small rewards (e.g., candy or other items) as part of a clinically appropriate behavior modification program.

Response: The action would not violate the Anti-Kickback Statute if the purpose of the reward was to facilitate or further appropriate treatment, and not to induce referrals for items or services covered by Medicaid. In addition, the reward would likely be protected if each award cost less than \$10, and the aggregate value of the rewards was less than \$50 per year.

2. A health care provider gives an indigent program beneficiary food, clothing, and furniture because the beneficiary had no other resources to obtain such.

Response: The action would not violate the Anti-Kickback Statute if the purpose of the gift was not to induce referrals for items or services covered by Medicaid. To protect itself, the provider should document the financial need of the beneficiary. Also, the provider might consider donating the items through a patient advocacy group. However, if the health care provider had a policy of offering such free or discounted items to beneficiaries regardless of individual need, and advertised such policy as a way to generate business, then the action would violate the Anti-Kickback Statute.

3. A health care provider initiates a program whereby the provider offers free or subsidized housing or services to program beneficiaries who utilize the provider's services as a way to generate business for the provider.

Response: The program would likely violate the Anti-Kickback Statute. The fact that the provider advertised or offered the program to all persons who chose to utilize the provider's services without regard to individual need evidences improper intent suggesting a violation of the Anti-Kickback statute.

4. A health care provider loaned an indigent program beneficiary certain items of necessary equipment or clothing because the program beneficiary had no other means for securing the items.

Response: The action would likely not violate the Anti-Kickback Statute if the provider loaned the items based on the beneficiary's demonstrated need, and not as a way to induce the beneficiary to utilize the provider's services. Furthermore, the loan itself should not violate the statute if it were made on reasonable terms and the provider required repayment.

5. A health care provider defers payment for its services because the patient has not yet received assets to pay for the services; however, the provider continues to carry the account and requires payment when the patient receives assets.

Response: The actions would likely not violate the Anti-Kickback Statute if the provider deferred the payment based on individualized, documented financial need; sought payment when resources were available; and did not intend to defer payment merely as a way to induce the beneficiary to

obtain services. The provider should not advertise or otherwise use the program as a means to generate referrals.

6. A health care provider adopts a policy of waiving Medicaid copays and deductibles as a way to generate business. The provider advertises the policy and applies the policy without regard to financial need.

Response: The action would likely violate that Anti-Kickback Statute. The fact that the program was advertised, and was not based on a showing of individualized need suggests that one purpose of the program was to generate referrals.

7. A health care provider purchases small gifts for program beneficiaries on Christmas and birthdays.

Response: The action would not violate the Anti-Kickback Statute if their value was less than \$10 per item, or a total of \$50 annually, or they were not given as a way to induce referrals. Larger gifts that are conditioned on or tied to utilization of program resources would likely violate the Anti-Kickback Statute.

8. A health care provider guarantees a program beneficiary's lease because the landlord requires a co-signor, and there are no other co-signers available.

Response: The action would likely not violate the Anti-Kickback Statute if the provider did not guarantee the lease as a means to generate more business for itself; does not make a practice of guaranteeing leases; and guaranteed the lease in this particular case based on an individualized determination of need.

9. A health care provider pays a portion of an indigent program beneficiary's lease or utilities. The provider does so after considering and documenting the beneficiary's financial need consistent with the provider's indigency policy, and not as a program or means to induce referrals.

Response: The action would not violate the Anti-Kickback Statute if the provider made the payment based on the beneficiary's demonstrated need, and not as a way to induce the beneficiary to utilize the provider's services. However, such transactions will be scrutinized closely, and the provider must be able to document its individualized determination of financial need. Absent such a showing, the provider may be liable for a violation of the Anti-Kickback Statutes, especially if the practice is part of a advertised program offered to beneficiaries.

10. A health care provider pays a program beneficiary to perform certain jobs, either as an employee or an independent contractor.

Response: The action would not violate the Anti-Kickback Statute if the provider paid fair market value to the beneficiary for necessary services the beneficiary actually performed. The Anti-Kickback Statute contains an exception for payments made to employees and independent contractors if certain conditions are met. *See* 42 C.F.R. § 1001.952(d) and (i). The provider should ensure that its agreement with the beneficiary satisfies these requirements.

ADDITIONAL INFORMATION

Question: If a residential habilitation affiliate agency offers to provide CPR and First Aid training to certified family home providers who affiliate with their agency, would this meet the criteria of a kickback?

Answer: There does not appear to be a problem here because CPR is something the agency is required to do under IDAPA 16.04.17.203.06, not something the agency is offering as a bribe for affiliation. Even if the agency is saying, "Come affiliate with us and we'll provide CPR," the rules require it anyway. Training is something an affiliate would naturally look to the agency for. It is not a kickback to choose affiliation with the agency that offers the most support. I think it becomes a kickback when the affiliate gets something that is not normal to affiliation, like money, movie coupons, etc.