



Davis Graham & Stubbs LLP

MEMORANDUM

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ATTORNEY-CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT**

TO: Francis M. LeGasse Jr.

CC: Erin McAlpin Eiselein

FROM: Elizabeth Merritt *em*

DATE: November 28, 2012

SUBJECT: **Legal Risks Associated with Inappropriate Referrals for Post-Acute Care**

I. QUESTIONS PRESENTED

This memorandum addresses two questions relating to potential legal risks and penalties associated with inappropriate referrals by health care facilities to post-acute care providers: (1) What are the most common legal risks associated with referrals from facilities such as hospitals, inpatient rehabilitation facilities, and skilled nursing facilities to post-acute care providers such as home health agencies; and (2) What types of sanctions can be imposed for participating in inappropriate referral relationships.

II. SHORT ANSWERS

1. The most common legal risks for such relationships involve kickbacks to referral sources in violation of the anti-kickback statute, or steering patients to certain providers in violation of Medicare conditions of participation that require hospitals to inform patients of their freedom to choose their post-acute care provider(s).

2. Sanctions at the federal and/or state level may include criminal sanctions such as monetary penalties or prison time, civil sanctions such as monetary penalties and damages against individuals who submit fraudulent or false claims, and administrative sanctions such as exclusions from Medicare and Medicaid or termination of a facility or provider's Medicare and Medicaid participation.

III. DISCUSSION

A. What are the most common legal risks associated with referrals from facilities such as hospitals, rehabilitation centers, and long term care facilities to post-acute care providers such as home health agencies?

The most common legal risks for such referral relationships involve kickbacks to referral sources in violation of the anti-kickback statute, or steering patients to certain providers in violation of Medicare conditions of participation that require hospitals to inform patients of their freedom to choose their post-acute care providers. Although kickbacks and patient steering may occur in variety of ways, some of the more common scenarios are discussed below.

The anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a federal health care program, such as Medicare or Medicaid.¹ For purposes of the anti-kickback statute, "remuneration" includes the transfer of anything of value, including cash, gifts, entertainment, etc. The statute has been interpreted to cover any situation where one purpose (even if not the primary purpose) of the remuneration was to obtain payment for the referral of services or to induce further referrals. Parties on both sides of an impermissible "kickback" are criminally liable. The Department of Health and Human Services has issued safe harbor regulations that define arrangements that are not subject to the anti-kickback statute because the arrangements would be unlikely to result in fraud or abuse of federal health care programs. Arrangements that meet all of the specific conditions set forth in a safe harbor assure entities involved that they will not be prosecuted or sanctioned for the arrangement. Although safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the safe harbor, the fact that an arrangement does not meet all of the conditions does not necessarily mean that it violates the anti-kickback statute. Accordingly, whether or not an arrangement violates the anti-kickback statute is dependent on the particular facts and circumstances.

A home health agency or hospice provider might offer or provide incentives to referral sources such as physicians, skilled nursing facilities, rehabilitation facilities, or hospitals (including specific individuals at the facility such as a discharge planner) that are prohibited by the anti-kickback statute. For example, a home health agency owner might offer or give a rehabilitation facility discharge planner a \$25 gift card, a spa day, a restaurant dinner, or event tickets as a "thank you." Although these items seemingly have nominal value relative to the value of the rehabilitation facility's referrals to the home health agency, they would be considered "remuneration" under the anti-kickback statute and could result in criminal, civil, and administrative penalties being imposed on the individuals and/or the home health agency and rehabilitation facility. To provide another example, a home health agency might "help" a hospital with discharge planning activities, which often are similar to the duties of a home health agency's intake coordinator. However, free discharge planning activities and services (such as

¹ 42 U.S.C. § 1320a-7b(b)

helping hospital staff screen and review patient files to determine the level of care the patient will require upon discharge) provided by a home health agency to a hospital would be considered kickbacks. In order to reduce the risk of anti-kickback liability, the hospital would need to pay the home health agency fair market value for the discharge planning assistance. As a final example, an assisted living facility administrator might request a financial reward from a home health agency in exchange for an exclusive or semi-exclusive arrangement to provide home health services to the facility's residents. Such payments for referrals are illegal under the anti-kickback statute and could subject both the providers and individuals to criminal and civil liability.

The Department of Health and Human Services' Office of Inspector General ("OIG") has recognized potentially illegal arrangements between some home health agencies and referral sources in various publications. In its Compliance Program Guidance for Home Health Agencies, the OIG established general compliance guidelines that home health agencies should adopt and follow to avoid anti-kickback violations, including the prohibition of gifts, free services, or other incentives to potential referral sources for the purpose of inducing referrals.² In a special fraud alert concerning home health, the OIG provided as an example of illegal kickbacks by home health agencies, "providing hospitals with discharge planners, home care coordinators, or home care liaisons in order to reduce referrals."³ In other words, the OIG has identified certain illegal practices that commonly occur among some home health agencies and facilities and warned them of the potential consequences, which are discussed more fully in section B below.

Patient steering is another legal risk area associated with referrals from facilities to post-acute care providers. A patient's freedom to choose his or her health care provider comes from multiple sources, including court decisions, federal Medicare and Medicaid statutes, the Balanced Budget Act of 1997, and hospital conditions of participation in the Medicare program. For purposes of this discussion, the most important patient choice requirements under the Balanced Budget Act of 1997⁴ and the Medicare conditions of participation for hospitals⁵ are the requirements that hospitals present a prospective home health patient with a list of Medicare-certified home health agencies that provide services in the geographic area in which the patient resides and request to be on the hospital's list. **The hospital must document in the patient's medical record its provision of the home health agency list. The hospital must also disclose any financial interest it has in a home health agency on the list, inform patients of their freedom to choose a participating Medicare home health agency, and respect any agency preference expressed by a patient.** Despite these requirements, non-affiliated providers reportedly complain that hospitals do not comply with these requirements or that hospital non-compliance is not

² Office of Inspector Gen., U.S. Dep't of Health & Human Servs., Compliance Program Guidance for Home Health Agencies, 63 Fed. Reg. 42410 (Aug. 7, 1998).

³ OIG Special Fraud Alert: Home Health Fraud, Fraud and Abuse in the Provision of Medical Supplies to Nursing Facilities, 60 Fed. Reg. at 40848 (Aug. 10, 1995).

⁴ Social Security Act, § 1802(a).

⁵ 42 C.F.R. §482.43(c)(6) - (c)8.

routinely enforced. Perhaps the most effective way to remedy violations of patients' freedom to choose their home health providers is to bring patient steering activities to the attention of the hospital's compliance officer, who, given the potential consequences that patient steering could have on the hospital's Medicare participation, should make a reasonable investigation or inquiry into the complaint. Complaints can also be made to the state survey agency and/or the Joint Commission, which is responsible for hospital-accreditation, although such complaints will probably be more effective if supported by specific, documented instances of patient steering.

B. What types of sanctions can be imposed for participating in inappropriate referrals?

i. Criminal Sanctions

Violating the anti-kickback statute can result in criminal sanctions being taken against both the individuals and providers involved. **More specifically, violating the anti-kickback statute is a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both.** Conviction will also lead to automatic exclusion from federal health care programs, including Medicare and Medicaid.

ii. Civil Monetary Penalties

The government may also assess civil money penalties, which could result in treble damages plus \$50,000 for each violation of the anti-kickback statute.⁶ Additionally, because a claim submitted for items or services provided as a result of violation of the anti-kickback statute can trigger False Claims Act⁷ liability, providers may be subject to penalties ranging from \$5,500 to \$11,000 per claim submitted, plus treble the amount of the government's damages. To simplify things for purposes of illustration, if the government were to establish liability under the False Claims Act due to an underlying kickback, a single \$100 claim could theoretically result in civil penalties of \$61,600 (\$50,300 for violation of the anti-kickback statute plus \$11,300 for violation of the False Claims Act). With that said, monetary penalties widely vary depending on the facts and circumstances. Some relevant examples of published OIG settlements for allegations of anti-kickback statute violations include:

- After it self-disclosed conduct to the OIG, Allied Health Care Corporation (Allied) agreed to pay \$132,500 for allegedly violating the Civil Monetary Penalties Law ("CMPL") provisions applicable to kickbacks and physician self-referrals. The OIG alleged that two physicians that were shareholders in Allied made referrals to two home health agencies which were wholly owned subsidiaries of Allied.

⁶ 42 U.S.C § 1320a-7a(a)(7).

⁷ 31 U.S.C. § 3729.

- **MedCare Home Health and its owner Wilfred Braceras agreed to pay \$178,000 for allegedly violating the CMPL provisions applicable to kickbacks.** The OIG alleged that Medicare and Braceras paid kickbacks to a "coordinator" to induce the referral of home health care patients. The recipient of the kickbacks was not an employee, had no contract, and was paid based on the volume and value of the referrals. Braceras's home health care chain, B& B Holdings Enterprises, Inc. d/b/a South Eastern Health Management Association, Inc., also entered into an addendum to the existing corporate integrity agreement
- After it self-disclosed conduct to the OIG, TLC Health Care Services, Inc. (TLC) agreed to pay \$86,327 for allegedly violating the CMPL provisions applicable to kickbacks. The OIG alleged that TLC's subsidiary, AccuMed Home Health of North Texas, LLP, entered into two arrangements that provided free nursing services to beneficiaries and physicians with the intent to induce Federal health care program referrals from them.
- Caring Physicians, P.C. and two Pennsylvania physicians agreed to pay \$50,000 to resolve their liability under the Anti-Kickback provision of the CMPL and the Stark Law. The OIG alleged that the respondents received illegal remuneration from Home Health Corporation of America, Inc. (HHCA) in the form of monthly lease payments for rental space that was not utilized by HHCA in exchange for Medicare patient referrals.
- Home Health Corporation of America (HHCA) agreed to pay \$300,000 and enter into a 5-year corporate integrity agreement to resolve its liability under the CMPL provisions applicable to kickbacks. The OIG alleged that from February 1997 through May 1998, HHCA made payments in the form of loans, consulting fees, and monthly space rental payments to six physicians located in Pennsylvania and Florida to induce their referral of Medicare beneficiaries requiring home health services and/or durable medical equipment that was provided by HHCA and paid for by the Medicare program.

iii. **Administrative Sanctions**

Finally, violating the anti-kickback statute may result in the OIG initiating administrative proceedings to exclude involved parties from federal health care programs, including Medicare and Medicaid. As mentioned above, parties convicted of violating the anti-kickback statute are mandatorily excluded from participation in federal health care programs.⁸ Even without a conviction, individuals who violate the anti-kickback statute may still face exclusion from federal health care programs at the discretion of the Secretary of Health and Human Services.⁹

⁸ 42 U.S.C. § 1320a-7(a).

⁹ 42 U.S.C. § 1320a-7(b).

Administrative sanctions such as exclusion or termination from Medicare and Medicaid participation would put many providers out of business, particularly facilities.

Administrative sanctions could also be imposed against a hospital for patient steering in violation of the Medicare conditions of participation. More specifically, a hospital's participation in Medicare could be terminated, its state license could be revoked, or it could lose its accreditation status. While such administrative sanctions would probably be imposed only for egregious patterns of patient steering, given the severity of these potential administrative sanctions, hospitals should educate their discharge planners and staff on patient freedom of choice and discharge requirements, and continually monitor their discharge activities to ensure compliance.

IV. CONCLUSION

Although determination of whether an arrangement violates the anti-kickback statute is dependent on its particular facts and circumstances, the severity of the potential criminal, civil, and administrative sanctions makes it imperative that health care providers educate their staff and implement procedures ensure compliance. Additionally, hospitals need to be certain that their discharge planners and related staff fully understand the requirements and their roles with respect to discharge planning, and should continually monitor compliance with laws that protect patients' freedom to choose their providers.

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