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Fundraising Initiatives and Vendor Solicitation: Avoiding Kickback Implications

By:
Lynn Gordon

Introduction

Tax-exempt organizations such as hospitals, indigent care clinics and nursing homes often solicit charitable donations for use in support of their respective operations. Whether such solicitation is done through an affiliated exempt foundation or directly by the healthcare organization, fundraising efforts should be mindful of the legal implications under federal and state anti-kickback laws when it comes to vendor solicitations. Given the fraud and abuse implications of soliciting anything of value from vendors who furnish health care providers with equipment, supplies and pharmaceuticals where ultimately health insurers pay for such items, exempt organizations should adhere to certain compliance guidance as they seek charitable donations.

Anti-Kickback Law Implications

The Federal Anti-Kickback Statute prohibits parties from soliciting or receiving kickbacks, bribes or rebates in exchange for referring goods or services to another party where payment for such goods or services ultimately comes from federal health care programs.¹ Such prohibition would not preclude “a discount or other reduction in price . . . [if] properly disclosed and appropriately reflected in costs claimed or charges made . . . under a Federal health care program” (an “Acceptable Discount”).² To find a violation of the Anti-Kickback Statute, the parties must knowingly and willfully solicit or receive remuneration to induce referrals of program-related business.³ There are also certain limited exceptions to practices otherwise suspect under the Anti-Kickback Statute commonly known as safe harbors.⁴ Since courts have varied widely in their interpretation of what would constitute intent (i.e., what indicates that the parties knowingly and willfully solicited or received remuneration to induce referrals of program-related business), parties should adhere to these safe harbors where applicable and follow other guidance as closely as possible when no safe harbor would protect an arrangement or activity that implicates the Anti-Kickback Statute.

There are similar anti-kickback laws at the state level that may be implicated by inappropriate vendor solicitation. For example, the Illinois Insurance Claims Fraud Prevention Act prohibits kickbacks where payment for services comes from any insurance program.⁵ In addition, the Illinois Medicaid anti-kickback provisions allow for criminal penalties of varying severity as well as civil penalties for illegal vendor fraud and kickbacks.⁶

In the context of provider-vendor relationships, the Anti-Kickback Statute has been the basis of prosecution for illegal kickbacks in connection with the provider’s purchase of certain healthcare goods and services from vendors.⁷ In U.S. v. Shaw, the defendant Glenn K. Shaw served as the president of a medical products company that sold dialysis related products and was also a subsidiary of a company

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¹ 42 U.S.C. § 1320a-7b.
² 42 U.S.C. § 1320a-7b(3).
³ Hanlester Network v. Shalala, 51 F.3d 1390 (9th Cir. 1995).
⁴ 42 C.F.R. 1001.952. Although each safe harbor is narrowly defined, the general areas are as follows: (a) limited investment interests, (b) space rental, (c) equipment rental, (d) personal services and management contracts, (e) sale of a practice, (f) referral services, (g) warranties, (h) discounts, (i) employees, (j) group purchasing organizations, (k) waiver of beneficiary coinsurance and deductible amounts, (l) increased coverage, reduced cost-sharing amounts or reduced premium amounts offered by health plans, (m) price reductions offered to health plans, (n) practitioner recruitment, (o) obstetrical malpractice subsidies, (p) investments in group practices, (q) cooperative hospital service organizations, (r) ambulatory surgical centers, and (s) referral agreements for specialty services.
⁵ 740 ILCS 92 et seq.
⁶ 305 ILCS 5/8A-3 et seq.
(LifeChem) that provided specialized laboratory blood tests for patients with end-stage renal disease. The government alleged that the defendant provided inducements for referring orders for LifeChem’s services, which took the form of rebates and special pricing, educational and research grants, entertainment and hunting trips, and write-offs of bad debt for blood laboratory tests of indigent and HMO patients.

Certain guidance from the Office of Inspector General concerning grants and gifts from pharmaceutical companies to health care providers is also helpful in understanding how vendor solicitation practices may become problematic. The OIG’s position in a 1994 Fraud Alert with respect to certain grants, prizes, gifts and other benefits provided by pharmaceutical companies to providers in the position to generate business for such companies (i.e., prescribe their pharmaceuticals) is that such perks may often simply be a kickback in exchange for the business. Such quid pro quo exchanges are illegal under state and federal anti-kickback laws.

Compliance with Vendor Solicitation Rules

Generally, any payments to a provider by its vendor will be considered as discounts, refunds, or rebates in determining allowable costs under Medicare, even though these payments may be treated as “contributions,” “donations” or “unrestricted grants” by the provider and the vendor. In order, then, for such payments to be protected under the Anti-Kickback Statute, they should constitute Accepted Discounts or discounts provided in accordance with the Discount Safe Harbor, which delineates how discounts must be handled so as to avoid fraud and abuse.\(^8\)

We assume, however, that most exempt organizations would like to avoid having to treat any vendor’s charitable donations as discounts. Since the government recognizes that charitable contributions may be appropriate and distinct from a business relationship, guidance from the OIG sets forth certain minimal requirements so as to avoid having to characterize donations as discounts which then must be covered under the safe harbor (e.g., having to credit amounts to the hospital’s payments for particular goods or services and ensuring that the additional discount is passed on to the Federal government).

In an OIG Advisory Opinion issued March 20, 2001, the OIG addressed a request from a tax-exempt healthcare organization for an advisory opinion regarding the solicitation and acceptance by the organization of proceeds from a charitable fund-raising event — a golf tournament to be held on its behalf in July 2001 — in which some of the organization’s vendors and suppliers participate as sponsors and registrants. The OIG determined that the solicitation and acceptance of proceeds “would potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent were to induce or reward referrals of Federal health care program business.” However, based on certain facts presented, the OIG concluded that the arrangement would not be subject to administrative sanctions under the Anti-Kickback Statute. The following general analysis is helpful in understanding the OIG’s position in this matter.

We accept that the majority of donors who make contributions to tax-exempt organizations, including donors with ongoing business relationships with the donees, are motivated by \textit{bona fide} charitable purposes and a desire to help their communities. Substantial numbers of health care providers are not-for-profit organizations, many of which are community-based services providers, and depend on tax-deductible charitable donations to fund all or part of their operations. We recognize that soliciting donations is vital to these providers’ viability and that the potential donor pool will include many persons and entities in the local community with which the soliciting entity has past, present, or potential business relationships. Invariably, some of the persons or entities solicited will be in a position to receive referrals or business from the soliciting provider. This business relationship does not make a tax-deductible donation automatically suspect under the anti-kickback statute.\(^9\)

The OIG approved participation of vendors in the golf tournament based on the following determinations:

- that the golf tournament was a \textit{bona fide charitable event} — it intended to provide benefit to the community with an emphasis on underserved and uninsured populations. Its charitable

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\(^8\) Vendor Discount Safe Harbor, 42 C.F.R. § 1001.952(b).

mission was clearly furthered by the purposes to which the tax-exempt organization expected to allocate the donated sums (social services programs, scholarships, and holiday gift-giving to low-income families);

- that the participation of vendors was incidental to a broad community solicitation — the Golf Committee’s members and tournament sponsors and participants were drawn from a broad pool of civic leaders and business sources, many of whom have little or no nexus to the health care industry, and the tournament’s promotional materials were widely disseminated and emphasized community services provided by the tax-exempt organization and the tournament’s charitable goals; and

- that the tax-exempt organization had certified that it did not take tournament participation or sponsorship into account when awarding contracts or purchasing items or services (the OIG relied on this certification without further documentation).

Guidance to date indicates that, in general, the OIG has accepted the following types of contributions as bona fide charitable donations:

- Donations or grants made by a vendor in response to building or other fund raising campaigns in which community-wide contributions are solicited;

- Donations or grants unrelated to purchased goods or services and made in addition to discounts, refunds, or rebates which have been customarily allowed under arrangements between the provider and the vendor;

- Donations or grants made where the volume or value of purchases from such vendor is so nominal that no relationship to the contribution can be inferred; or

- Donations or grants made by a vendor who is not engaged in business with the provider or a facility related to the provider.

To the extent organizations engage in solicitation for charitable donations along the lines delineated under the Golf Tournament Advisory Opinion, or to the extent one of these four general categories would apply to a donation and there is no express or implicit tie between such donation and health care business activities between the parties, such activity should be protected from sanctions under anti-kickback laws.

Again, with each of these areas, due care must be taken that any vendor funding of and/or participation in charitable events or activity is not inappropriately offered by the vendor or solicited by the organization. No request for, or acceptance of, a vendor contribution should be tied in any manner, expressed or implied, with the conduct of business from the vendor (i.e., receiving funds from the vendor does not equate to an incentive or implied obligation to purchase goods or services from that vendor. Except for Accepted Discounts and rebates, discounts and refunds that are appropriate and will be applied in accordance with the Discount Safe Harbor, no payments in cash or kind are to be received from a vendor that are a reward for or contingent on the purchase of supplies, equipment or services from that vendor.

**Vendor Solicitation Case Study**

The following scenario concerns a particular fundraising initiative of a tax-exempt hospital (“XYZ Hospital”) and provides vendor solicitation guidance.

One area of vendor solicitation that XYZ Hospital is very interested in is support of its new Center for Innovative Practices (the “Center”), a training center which facilitates physician education, training and practice of new medical technologies planned for XYZ Hospital, including new surgical techniques in the area of orthopedics. XYZ Hospital would like to solicit donation of equipment from specific vendors so that physicians may train on such equipment free of charge.

Whereas we believe that such physician education is a bona fide charitable activity, in order to meet the limited OIG guidance available to date on educational initiatives, we would recommend donor solicitation for the Center be part of an overall program to fund and develop the Center. Seeking specialized equipment from a limited number of vendors who may then benefit as physicians use their equipment may have kickback implications.

Coming up with lists of certain innovative equipment desired and seeking donations of cash or equipment from a number of vendors — as a deductible charitable donation — would help to establish the
appropriate disconnect between vendor donations to XYZ Hospital and purchases by XYZ Hospital of any particular donor’s goods and services. Moreover, to further dilute the charitable support of the Center (away from funding primarily through entities involved in health care goods and services) the Center should solicit donations from the community generally, in support of the Center’s educational mission. Finally, XYZ Hospital should adopt a policy that no request for, or acceptance of, a vendor contribution should be tied in any manner to business with such vendor.

Where only one vendor is a potential donor (e.g., only one offers the technology sought by the Center), solicitation may still be appropriate even if such vendor has an existing relationship with XYZ Hospital provided that the solicitation is part of a broader appeal. In sending out a uniform request for monetary contributions and donations of equipment delineated in the solicitation, XYZ Hospital could include that vendor’s particular equipment. In the event the vendor is inclined to support the Center’s charitable mission, it could then contribute any requested support. If sufficient monetary donations come in, including from such vendor, the Center could then simply purchase the desired equipment outright, using the charitable donations earmarked for use by the Center.

Conclusion

Vendor solicitation is an area of concern under anti-kickback laws. However, guidance to date is still fairly limited and is derived primarily through OIG Advisory Opinions. The basic guidelines presented above may serve as the basis of a compliance policy governing donor solicitation activity where potential donors are also vendors to the organization. Again, as organizations seek charitable donations from vendors, they should avoid direct or indirect inference that such donations are tied in any way to the organization doing business with a particular vendor and such solicitation should be part of an organization’s overall fundraising initiatives. Whereas the OIG does not intend to stymie bona fide charitable fundraising, it also will not allow charitable donation solicitation to serve as a guise for kickbacks in exchange for the purchase of a particular vendor’s goods or services.