HOSPITAL-PHYSICIAN JOINT MARKETING COMPLIANCE GUIDELINES

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Introduction

Hospitals often engage in certain marketing of the physicians who are members of their medical staffs. While such activity may be appropriate, even at no cost to physicians, the scope and type of marketing must be monitored to ensure compliance with fraud and abuse and physician self-referral laws. This article focuses on two key areas of enforcement as it relates to this area: the Stark Law and the Federal Anti-Kickback Statute.

Federal Self-Referral Statute ("Stark") Implications

The Stark Law prohibits physicians from referring Medicare patients for the provision of designated health services ("DHS") to entities with which the physician (or an immediate family member) has a financial relationship, unless an exception applies. DHS includes inpatient and outpatient hospital services, thereby implicating arrangements between hospitals and members of their medical staffs. Stark also prohibits entities from billing governmental payors for such prohibited referrals. It is a strict liability statute, which means that if a particular arrangement implicates the statute but does not meet an exception, the arrangement is illegal.

Sanctions for a prohibited referral under Stark include denial of payments, or a refund if payment has been made, for any related services that are delivered under the Medicare program. While the Government’s primary remedy for Stark violations is non-payment of claims without penalties, the Centers for Medicaid and Medicare Services ("CMS") has advised that wrongful conduct may be punished through recoupment and penalties under false claims laws as well.

Stark is implicated by hospital marketing of physicians who are not hospital employees because marketing has value to independent physicians and medical groups. Moreover, it is likely that the recipient of such value — the physician or group — is also a source of Medicare-reimbursed DHS referrals for the hospital. Accordingly, in order to be protected, the arrangement must meet a Stark exception. The three Stark exceptions that apply to marketing are the Incidental Benefits Exception, the Nonmonetary Compensation Exception, and the Payments by a Physician Exception.

The Incidental Benefits Exception allows a hospital to provide compensation in the form of items or services (not including cash or cash equivalents) to a member of its medical staff when the item or service is used on the hospital’s campus. According to CMS commentary, a simple listing or identification of the medical staff on a hospital’s web site is an incidental benefit that is reasonably anticipated and falls within the exception. Such listing or inclusion should be provided for all members of the medical staff, with similar practice area and contact information provided for each. However, where the marketing activity or advertisement goes beyond such limited incidental benefit, these arrangements would have to either fit into the Nonmonetary Compensation Exception or the hospital would have to charge fair market value for the advertising in accordance with the Payments by a Physician Exception.

The Nonmonetary Compensation Exception allows a hospital to provide nonmonetary compensation and benefits to physicians, including advertising, up to an annual aggregated amount of $338.00 (as of 2008), if all of the following conditions are satisfied:

(i) the compensation may not be solicited by the physician or the physician’s practice (including employees and staff members); and

(ii) The compensation arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act) or any Federal or State law or regulation governing billing or claims submission.

It is important to note that CMS would preclude a hospital from marketing or advertising a physician and not charging for such services under the Nonmonetary Compensation Exception if the physician (or a practice staff member) directly solicits such support from the hospital. Accordingly, in the event a hospital would like to offer marketing services such as shared advertising with members of the Medical Staff, and not charge for same to the extent the value does not exceed $338 (or such higher amount as may be applicable in the future), it would need to offer this service rather than respond to requests for such services. Moreover, for compliance purposes, such benefit should be offered at the same level to all medical staff members.

Finally, to the extent a marketing activity would not meet the limited Incidental Benefits Exception or the Nonmonetary Exception, a hospital may provide such services so long as the services are furnished at a price that is consistent with fair market value, pursuant to the Stark exception for Payments by a Physician. This is one of the few Stark Law compensation exceptions that does not require a written agreement. However, it would be prudent for the hospital to have a policy that will ensure fair market value is paid by the
physician in exchange for any joint advertising or other marketing activity provided by the hospital on behalf of the physician. The Marketing Guidelines attached hereto as Exhibit A may serve as the basis of such policy.

Whether the hospital is relying on the Nonmonetary Compensation Exception or the Payments by a Physician Exception, it should keep a log of any marketing activity or advertising that it provides for non-employed physicians, the value of each such activity or service as calculated in accordance with the Marketing Guidelines, and evidence of payment for same (e.g., a check number and date of receipt) for audit purposes. This documentation, however, would probably be unnecessary for limited marketing or advertising the hospital provides so long as such marketing or advertising otherwise meets the Incidental Benefits Exception discussed above.

**Anti-Kickback Statute Implications**

The Federal Anti-Kickback Statute ("AKS") makes it a crime to provide anything of value to a referral source (either directly or indirectly) with the intent of inducing a referral or inducing the purchase of items or services paid for by a government health plan payor, such as Medicare, Medicaid, or TriCare. Penalties for violation of the AKS may include fines, exclusion from governmental payor programs and imprisonment.

For the purposes of the AKS, "remuneration" includes the transfer of anything of value, directly or indirectly, covertly or overtly, in cash or in kind. Since advertising would be of value to physicians trying to grow and develop (or retain) their practices, providing free or discounted advertising services to referral-source physicians would implicate the AKS. Therefore, the hospital should not be providing free advertising or marketing support to physicians, except as such support may meet the more nominal value exceptions further discussed in the Stark Law analysis above.

As recommended for Stark Law compliance, in the event that a hospital engages in support that goes beyond that addressed in the Stark Incidental Benefits and Nonmonetary Compensation Exceptions, it should establish the fair market value and charge for such services, keeping a record thereof. Also, the hospital should not differentiate among whom it may provide marketing support for based on any volume or value of referrals differential.

Moreover, the Office of Inspector General ("OIG"), which enforces the AKS, has expressed concerns that advertising activity "like any marketing" implicates the AKS because it is intended to recommend the use of a particular product, service or provider. Therefore, as a hospital includes physicians in its marketing activity (websites, print ads etc.), or otherwise advertises on a physician's behalf, it should exercise due care in how it presents information. In assessing marketing activities, the OIG will consider a number of factors, including:

- The identity of the party engaged in the marketing activity and the party's relationship with its target audience;
- The nature of the marketing activity;
- The item or service being marketed;
- The target population; and
- Any safeguards to prevent fraud and abuse.

The OIG has concluded that customary, accurate and non-deceptive print advertising in general circulation media (such as periodicals or broadcast media) does not raise anti-kickback concerns. In determining a particular advertising approach reasonably acceptable under the AKS, the OIG noted that "[m]ost importantly, the advertising would be essentially passive in nature, in that any contact with the Advertiser must be initiated by the customer." The OIG also noted the importance of a provider compensating a managed care organization ("MCO") for the value of the advertising when a provider advertised on the MCO's website.

Similarly, in its advisory opinion assessment of another proposal that included marketing, the OIG noted the importance of a certification "that all advertising and promotional activity under the proposed arrangement would comply with all applicable Federal and state laws and regulations, including, but not limited to, compliance with consumer laws prohibiting false advertising, unfair and/or deceptive advertising, and consumer fraud."

Finally, safe harbors under the AKS protect certain arrangements that may otherwise implicate the statute. Unfortunately there is not a safe harbor specific to marketing support. Whereas under the Stark Law any marketing support must meet an applicable Stark exception, there is no parallel requirement that such support meet an AKS safe harbor to avoid illegality because the AKS is not a strict liability statute. Rather, AKS safe harbors serve to protect certain arrangements and to provide guidance for others where a specific safe harbor does not exist. In commentary to safe harbor regulations, regulators have indicated that "[i]n many instances, prosecutorial discretion would be exercised not to pursue cases where the participants appear to have acted in a genuine good-faith attempt to comply with the terms of a safe harbor..." Accordingly, following the guidance summarized above will facilitate AKS compliance.

**State Law Implications**

Hospitals should also comply with any relevant state laws that may be implicated by marketing support. While frequently Stark Law and AKS provisions are paralleled in state law, it is necessary to consult applicable state laws to determine if state requirements are more stringent than those imposed under federal law. For example, the Illinois Insurance Claims Fraud Prevention Act is a civil law that largely parallels the AKS in its prohibitions, except that it applies to all insurance

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payments, making it a more broadly applicable law. Accordingly, where a hospital might consider instituting a marketing program for physicians who do not participate in governmental programs, such a program would still be governed by anti-kickback rules, calling for an approach similar to the one outlined above under federal law.

Conclusion and Recommendations

A hospital may engage in shared marketing, or in marketing or advertising on behalf of the members of its medical staff, so long as such activity meets the various parameters discussed herein. More limited activities such as including medical staff members on physician lists, and providing limited background and contact information on the hospital website, would be permissible absent payment from physicians. However, such limited marketing should be equally applied to all members of the medical staff without consideration of volume or value of referrals and the description for each member should be similar. For example, a primary care physician should enjoy the same type of listing as a cardiologist or neurosurgeon. In addition, general rosters should not recommend or promote individual physicians but rather simply present information so that the patient may review and decide whether to contact any particular physician.

Again, to the extent a particular marketing activity is not covered under the Stark Law Incidental Benefits Exception or the Nonmonetary Compensation Exception, the hospital should charge physicians fair market value for its services. While a written agreement is not required, physicians should understand up front that they will be charged a certain amount. Furthermore, the hospital should maintain documentation on such activity, amounts charged and payments received.

Exhibit A
Sample Marketing Guidelines

Shared Ads or Ad Placement by the Hospital

Most advertisements consist of three elements: text, logo and graphics. As such, the amount of space attributable to each party-specific element should be in direct proportion to the percent of the cost borne by that party.

For example, if each party pays fifty percent (50%) of the cost of the ad, the space in the ad attributable to text, logo and graphics for each party should be the same for each party. Similarly, if the Hospital pays seventy-five percent (75%) of the cost, the Hospital should receive this same proportion of total ad space for its text, logo and graphics.

To the extent the Hospital lines up advertising that does not market or promote the Hospital but rather focuses on one or more independent physicians or groups, it should allocate all costs to the physician(s)/group(s) and include a handling surcharge (i.e., a reasonable charge that will address the time and effort spent by Hospital staff in arranging for the ad).

If a graphic is used that is neither Hospital nor physician-specific, (i.e., a picture depicting both a hospital facility and a physician), then the space attributable to such a graphic should be added to each party’s proportionate space on a fifty/fifty basis.

This same allocation approach should be applied to radio and television ads as well.

In general, the Hospital should follow a logical approach to implementing joint advertising. This approach should seek to assure a fair and equitable allocation of advertising expense and advertising space. Again, in the event the Hospital is simply a “placement” go-between, it should not only allocate all advertising costs to the physician(s) but also include a reasonable fee for its pro rata efforts on behalf of the physician(s).

Documentation

The Hospital should keep a log of any marketing activity or advertising that it provides for independent physicians or groups, the value of each such activity or service as calculated in accordance with these Marketing Guidelines, and evidence of payment for same (e.g., a check number). Such log shall not apply to listing physicians (and relevant contact information) in general marketing, such as the website for the Hospital, so long as these listings address all members of the Medical Staff.

In determining fair market value of a particular marketing activity, and otherwise engaging in shared or direct marketing of physicians, the hospital should defer to the Marketing Guidelines attached hereto as Exhibit A which factor in regulatory guidance in this matter. In following these guidelines where the Incidental Benefits Exception or the Nonmonetary Compensation Exception would not apply to a particular marketing activity and a hospital will provide shared marketing or marketing on behalf of a physician, this will ensure Stark Law compliance under the Stark exception for Payments by a Physician and facilitate compliance with the AKS per OIG guidance in such matters.
Ingredients:

- 4 oz. Butter
- Flour to make a Roux (about 6 tablespoons)
- 3 - 3 1/2 cups Milk
- 1 Beaten Egg
- 6 tablespoons Grated Parmesan Cheese
- 1 oz. Whipped Cream (optional)
- Salt and Pepper to Taste
- Slices of Roast Turkey
- 8-12 Slices of Toast (may be trimmed)
- Extra Parmesan for Topping
- 8-12 Strips of Fried Bacon

Melt butter and add enough flour to make a reasonably thick roux (enough to absorb all of the butter). Add milk and Parmesan cheese. Add egg to thicken sauce, but do not allow sauce to boil. Remove from heat. Fold in whipped cream. Add salt and pepper to taste.

For each Hot Brown, place two slices of toast on a metal (or flameproof) dish. Cover the toast with a liberal amount of turkey. Pour a generous amount of sauce over the turkey and toast. Sprinkle with additional Parmesan cheese. Place entire dish under a broiler until the sauce is speckled brown and bubbly. Remove from broiler, cross two pieces of bacon on top, and serve immediately. (I also add a couple of slices of tomato to the top of the sandwich before placing it under the broiler.)

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