Jack Fernandez

OIG Reprises Anti-kickback Law

The new compliance guidance for nursing facilities targets provider, vendor, and supplier relationships to ensure arm's-length arrangements.

Last month's legal column examined the new Supplemental Compliance Program Guidance for Nursing Facilities from the U.S. Department of Health and Human Services Office of Inspector General (OIG) and the agency's intent to pursue poor quality of care as potential fraud (*December 2008*). This month brings an analysis of the remainder of the guidance, which covers arrangements between nursing facilities and other entities that might give rise to scrutiny under the federal anti-kickback law.

Under the new guidance, nursing facilities must re-examine their relationships with physicians; medical directors; pharmacies; and other vendors, contractors, and providers for violations of the Anti-kickback Act.

On the books since 1972, the law's stated purpose is to prevent fraud and abuse within federal health care programs by "curtailing the corrupting influence of money on health care decisions," according to OIG. In short, it seeks to stop the impropriety of offering or accepting remuneration (payment) if any one of its purposes is to induce patient referrals.

Although the anti-kickback law is by now a completely uncontroversial proposition embedded deeply in this country's business culture, the problem for the long term care industry is that even seemingly innocuous conduct can constitute a kickback.

Intent And Transparency Key

A wide range of conduct or business arrangements might give rise to kickbacks. Unfortunately, in many cases, the existence of a kickback is in the eye of the beholder.

For example, when is an in-service for local physicians an improper payment to induce referrals? When is a pharmacy chart review an improper remuneration to induce program business from a nursing facility? When is a medical directorship an indirect method by which to induce patient referrals? The answer, from a legal perspective, turns on the intent of the parties.

> **For example, when is an in-service for local physicians an improper payment to induce referrals?**

In most cases, successful kickback prosecutions all have one thing in common: The parties' intent was proven through circumstantial evidence, and that circumstantial evidence almost always included acts of concealment.

If there is one rule to be learned from the constellation of anti-kickback act prosecutions, it is that transparency and proper documentation of all aspects of a nursing facility's relationships with outsiders makes a criminal Anti-kickback Act prosecution very difficult, if not impossible.

That said, the new guidance outlines some areas that pose a particular risk.

To start, providers must scrutinize all arrangements where the facility provides anything of value to persons in a position to influence federally funded referrals.

Similarly, they should examine all arrangements where the facility receives anything of value from persons for whom the facility generates federally funded business. Such arrangements are most dangerous where they have the potential to skew clinical decision making, result in increased costs to the health care system or beneficiaries, raise the risk of inappropriate utilization, or create quality-of-care concerns.

An example of a situation raising this sort of risk would be where a facility engaged a medical director with a horrible record but with access to a large pool of patients.

Business Relationships

The guidance suggests that facilities evaluate all potentially problematic arrangements to determine if they fit into a safe harbor—a provision of the anti-kickback law that reduces or eliminates a party's liability on the condition that the party performed its actions in good faith. The following questions should be asked:

- What is the nature of the relationship between the parties, and what degree of influence do those parties have over the generation of federal program business for each other?

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■ How were the participants to that arrangement selected, and did the selection criteria relate to past referrals?

■ How is remuneration determined, and is it directly or indirectly related to the volume or value of referrals?

■ Is the remuneration fair-market value for the services rendered?

■ Are the services provided necessary to achieve a legitimate business purpose, and are they commercially reasonable?

■ Does the arrangement present the potential for affecting costs to federal programs?

■ Does the arrangement limit or alter a health care provider's professional judgment?

■ Is the arrangement transparently documented?

The answers to these questions will provide a good indicator of whether any particular arrangement presents a problem under the Anti-kickback Act.

Of course, a nursing facility concerned with a particular arrangement, whether existing or contemplated, may request a binding OIG advisory opinion. The procedures for seeking such an opinion are set forth at 42 Code of Federal Regulations Part 1008.

Free Goods And Services

The supplemental guidance does set forth a list of practices that "should receive close scrutiny from nursing facilities" and advises the industry to examine any free goods or services facilities are offering.

Some examples may include: a laboratory phlebotomist providing administrative services; free pharmaceutical consultant services, medication management, or supplies provided to a facility; laboratories reviewing infection control or providing chart review or other services; providing a facility with computers or software applications that have independent value; a hospice nurse providing nursing services for non-hospice patients; and a hospital providing the facility with a registered nurse.

The guidance advises that such arrangements might, if the requisite intent exists, give rise to criminal Anti-kickback Act liability.

Red Flags

Of course kickbacks are often disguised as otherwise legitimate payments. The receipt of goods or services at non-fair-market rates can be a red flag. Oftentimes nursing facility residents receive goods or services from outside suppliers and providers such as pharmacies, clinical laboratories, durable medical equipment suppliers, ambulance providers, parenteral and enteral nutrition suppliers, diagnostic testing facilities, rehabilitation companies, and various types of therapists.

■ Does the arrangement present the potential for affecting costs to federal payment programs?

The guidance asks facilities to take another look at their arrangements with such providers through the lens of the Anti-kickback Act. Such an inquiry should ask whether the good or service being provided is legitimate and needed, whether the goods or services were actually provided and properly documented, whether the compensation or cost is at fair-market value in an arm's-length transaction, and whether the arrangement is related in any way to the volume or value of program business.

The guidance also notes that nursing facilities should adopt and implement policies and procedures to minimize the risk of inappropriate pharmaceutical decisions tainted by kickbacks.

As for physician services, nursing facilities must closely monitor physician arrangements to ensure medical directors are not being paid for referrals.

The document suggests that in order to eliminate risk, nursing facilities should comply with the anti-kickback law's personal services and management contracts safe harbor provision whenever possible.

Likewise, facilities must be mindful when negotiating price reductions that the discounts are properly disclosed, accurately reported, and based on an arm's-length transaction.

Moreover, nursing facilities may not engage in "swapping" arrangements by accepting a low price from a supplier or provider on an item or service covered by the nursing facility's Medicare Part A per diem payment in exchange for the facility referring to the supplier or provider other federal program business, such as Medicare Part B business excluded from consolidated billing, that the supplier or provider can bill directly to a federal health care program. Such swapping arrangements are not protected under the discount safe harbor provision.

Hospice, Reserved Beds

Hospice care presents OIG with a particular area of concern when, in an effort to induce referrals, it offers free nursing services for non-hospice patients, additional room and board payments, or inflated payments for providing hospice services to hospice patients.

Some of the practices OIG views as suspect in the hospice area include free goods or below-market goods to induce referrals, room and board payments to the nursing facility in excess of what it would have received directly from Medicaid had the patient not been enrolled in hospice, payments for additional services Medicaid considers to be included in its room and board payment to hospice, a staff member provided to the facility at the hospice's expense, and the like.

Within the hospital context, OIG is concerned with reserved bed payments whereby hospitals pay nursing facilities

to keep certain beds available. Reserved bed arrangements might give rise to an inference of an anti-kickback violation where payments result in a nursing facility being paid for holding an already occupied bed, payments for more beds than the hospital actually needs, or payments in excess of the costs of actually holding a bed open.

OIG advises that reserved bed arrangements should only be entered into when there is a bona f de need to have the arrangement in place and should only serve the limited purpose of securing needed beds, not future referrals.

Similarly, nursing facilities are advised to familiarize themselves with the physician self-referral law, the law precluding supplementation of Medicaid payment rates (in that a facility must accept the applicable Medicare or Medicaid payment, including coinsurance or co-payments), Medicare Part D, and Health Information Portability and Privacy Act security and privacy rules.

Nursing facilities are advised to familiarize themselves with the physician self-referral law.

Under A Microscope

OIG's guidance tells us that, "In today's environment of increased scrutiny of corporate conduct and increasingly large expenditures for health care, it is imperative for nursing facilities to establish and maintain effective compliance programs." This means that the industry should expect increased scrutiny of all health care providers that accept government reimbursement. Such scrutiny will be undertaken with an eye toward recouping federal health care dollars. OIG has unequivocally announced its intention to treat poor quality of care as fraud and has announced how it will do so.

Also unequivocal is OIG's intention to examine all relationships between providers, vendors, and suppliers to ensure they are at an arm's length and not designed to induce referrals.

In this industry, the best line of defense is a robust and effective culture of compliance. ■

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