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Health Care Compliance Association
15th Annual Compliance Institute
**HOME HEALTH AND HOSPICE
COMPLIANCE AND MARKETING
PRACTICES UNDER
FLORIDA & FEDERAL LAW**

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Marketing Practices



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LEGAL ASPECTS OF MARKETING: ADVANTAGES AND CONSEQUENCES © Raffa 2011 2 °

Objectives

1. Describe marketing issues In health care.
2. Identify marketing practices that are compliance risk areas and/or cost report issues.
Recommend solutions.
Role of OIG Advisory Opinions.
3. Who is policing illegal marketing practices?
What are the sanctions?
4. Describe good marketing practices.
Compliance Strategies.
How to get help.

Defining the Terms

1. What is “marketing”?
2. Who does marketing?
3. Who is the target?
4. Where and when does marketing occur?
5. When is it marketing, and when is it “educational” activities?
Test: “related to patient activity.”
42 C.F.R. § 413.9
6. Why is marketing a legal issue?
 - ◆ Kickback to referral sources
 - ◆ Inducements to patients
 - ◆ Steering of patients to certain providers

What are the Goals of Marketing?

1. To create a favorable impression of the Company's services and practitioners in the community and market.
2. To enhance the possibility of new business referrals and relationships.
3. To recruit workers and managers.
4. To educate the decision makers, *i.e.*, referral sources, patients and families.

What are the Hazards of Marketing?

1. Misinformation is provided.
2. Untrue/unsustainable "promises" are made.
3. Inconsistent messages are given.
4. Unethical or illegal inducements are offered.
5. Competitors or others are slandered.
6. Legal consequences.

Objective 2

1. Identify marketing practices that are compliance risk areas, and/or cost report issues.
2. Recommend solutions.
3. Role of OIG Advisory Opinions.

Hospice OIG Risk Areas

<http://oig.hhs.gov/authorities/docs/hospice.pdf>

Department of Health & Human Services

Office of the Inspector General

Compliance Program Guidance for Hospice –
10/5/99

29 Risk Areas listed in handout – details are in the footnotes of the Compliance Program Guidance.

Risk areas that impact marketing are:

#1, 3, 10, 19, 20 and 22.

Hospice Risk Areas That Impact Marketing

Risk #1: Uninformed consent to elect the Medicare Hospice Benefit.

Issue: Are marketers explaining elements of an informed consent?

- waiver of curative care
- patient capacity, health care proxy, surrogate
- right to revoke or change hospice

Solution: Marketer with clinical background or train on election – 42 C.F.R. § 418.24.

Hospice Risk Areas That Impact Marketing

Risk #3: Admitting patients to hospice care who are not terminally ill (TI).

Issue: - Are marketers referring patients who are not TI?

- Basis of two Corporate Integrity Agreements for Odyssey and Southern Care Hospice.
- TI definition permits outliers.
- Document clinical snapshot of patient at time of certification.

Hospice Risk Areas That Impact Marketing

Risk #3: Admitting patients to hospice care who are not terminally ill (TI).

Solutions:

1. § 418.54
 - a. Initial assessment by hospice RN within 48 hours of election.
 - b. Comprehensive assessment by IDG and attending physician within 5 days of election.
2. Marketer should be trained on requirements of § 418.22 - Certification, and § 418.25 - Admission.
3. Audit medical records for compliance.
4. § 418.22 requires narrative signed by physician or Medicare Director describing clinical findings that support TI. Face to Face requirement.

Hospice Risk Areas That Impact Marketing

Risk #10: Incentives to Referral Sources.

Hospice incentives to actual or potential referral sources (e.g., physicians, nursing homes, hospitals, patients, etc.) that may violate the anti-kickback statute or other similar Federal or State statute or regulation, including improper arrangements with nursing homes.

Federal and State Anti-Kickback Laws

Risk #10: Incentives to Referral Sources.

Prohibits, among other things, remuneration in return for ordering, or for arranging for or recommending the purchase or order of, any item for which payment may be made in whole or in part under a federal healthcare financing program.

42 U.S.C. 1320a-7B(b)

Federal and State Anti-Kickback Laws

Risk #10: Incentives to Referral Sources.

Solutions:

- Comply with federal safe harbor for 25 different business relationships. For example, safe harbors for space rental, personal service and management contracts, equipment rental, referral services, discounts, employees, group purchasing organizations, investment interests, warranties, waiver of beneficiary co-insurance and deductibles, electronic and health records items and services, etc.

42 C.F.R. § 1001.952

Hospice Risk Areas That Impact Marketing

Risk #10: Incentives to Referral Sources

- ◆ Providing payments to entities or individuals to refer.
- ◆ Providing services for free or reduced rate to the patient, or potential patient/family.
- ◆ Providing free staff, rental payments for space, meals and entertainment, training, “back-up”, to referral sources.

Hospice Risk Areas That Impact Marketing

Risk #10: Incentives to Referral Sources

1998 OIG Special Fraud Alert – “*Fraud and Abuses In Nursing Home Arrangements With Hospice*”

<http://oig.hhs.gov/fraud/docs/alertandbulletins/hospice.pdf>

Examples of kickbacks between Hospice and Nursing Home for referrals in contract or practice:

1. Hospice offers free goods or below FMV to Nursing Home
2. Hospice offers free services, *i.e.*, hospice aide for non-hospice residents.

Hospice Risk Areas That Impact Marketing

Risk #10: Incentives to Referral Sources 1998 OIG Fraud Alert cont'd:

3. Hospice pays Nursing Home additional amount for services that are part of room & board (R&B). R&B includes:
 - ◆ Performing personal care services
 - ◆ Assisting with ADL
 - ◆ Administering medications
 - ◆ Socializing activities
 - ◆ Maintaining cleanliness of room
 - ◆ Supervising and assisting in the use of DME and prescribed therapies

Hospice Risk Areas That Impact Marketing

Risk #10: Incentives to Referral Sources 1998 OIG Fraud Alert cont'd:

4. Hospice payment to Nursing Home for R&B exceeds any state limit – *i.e.*, what Nursing Home would have received directly from Medicaid had patient not elected hospice.

Incentives to Referral Sources

Fundraisers

OIG Advisory Opinions:

Donations to a non-profit provider at a fundraiser which is open to the general public, as well as vendors and referral sources, is permissible. For example, if hospice bought an ad and attended fundraising gala of non-profit Nursing Home.

Informal Guidance from OIG

Can a provider refer to itself?

The coordination of care delivery within a single health system is not a “*referral arrangement*” subject to adverse review under the Anti-Kickback Statute.

But not steering by hospital discharge planner to hospice or HHA owned by hospital.

Hospice Risk Areas That Impact Marketing

Risk #19

High-pressure marketing of hospice care to ineligible beneficiaries.

Risk #20

Improper patient solicitation activities, such as *“patient charting.”*

Discharge Planning vs. Intake Coordination

1. SNF & Hospital COPs and State Law.
2. SNF Rate and DRG reimburse for discharge planning (D/P).
3. What is discharge planning?
4. What is intake coordination?
5. How can marketing activities become D/P?
6. Free D/P activities are kickbacks.
7. Safe harbor if state law permits delegation.
8. Also Cost Report issue.

Hospice Risk Areas That Impact Marketing

Risk #22

Sales commissions based upon length of stay in hospice.

Compliance Strategy: Productivity bonus to bona fide employee based on written criteria for bonus and policy that admissions are based on eligibility of patient and no nexus to LOS.

Compensation for Marketers

1. OIG safe harbor for W-2 equivalent Employees.
2. Marketing as part of employee goals and basis for annual evaluations.
3. Policy describes bonus criteria – include compliance with admission criteria.
4. OIG Advisory Opinion – No. 98-9. Nurses paid add-on to hourly wage based on the number of health plan members admitted to hospital. OIG held bona fide employee safe harbor applied, and therefore no kickback.

Home Health OIG Risk Areas

<http://oig.hhs.gov/authorities/docs/cpghome.pdf>

Department of Health & Human Services
Office of the Inspector General
Compliance Program Guidance for
Home Health Agencies – 8/7/98

31 Risk Areas listed in handout – details are in the footnotes of the Compliance Program Guidance
Risk Areas that impact marketing are:
#6, 14, 20, 24, and 25.

Home Health Risk Areas That Impact Marketing

Risk #6: Incentives to Referral Sources.

Home Health Agency incentives to actual or potential referral sources (e.g., physicians, hospitals, patients, etc.) that may violate the anti-kickback statute or other similar Federal or State statute or regulation.

Federal and State Anti-Kickback Law

Risk #6: Incentives to Referral Sources

Prohibits, among other things, remuneration in return for ordering, or for arranging for or recommending the purchase or order of, any item for which payment may be made in whole or in part under a federal healthcare financing program.

42 U.S.C. 1320a-7B(b);

Federal and State Anti-Kickback Law

Risk #6: Incentives to Referral Sources.

Solutions:

- ◆ Comply with federal safe harbor for 25 different business relationships in real life. For example, safe harbors for space rental, personal service and management contracts, equipment rental, referral services, discounts, employees, group purchasing organizations, investment interests, warranties, waiver of beneficiary co-insurance and deductibles, electronic and health records items and services, etc.

42 C.F.R. § 1001.952.

Home Health Risk Areas - Impact Marketing

Risk #6: Incentives to Referral Sources.

Referral Issues:

- ◆ Providing staff, rental payments, meals and entertainment, training, or back-up staff to referral sources.
- ◆ Providing payments to entities or individuals to refer patients.
- ◆ Providing services for free or reduced rate to the patient, or potential patient/family.
- ◆ Providers agreeing to provide referrals to each other, i.e.. Licensed agencies, and certified home health agencies.

Home Health Risk Areas - Impact Marketing

Risk #6: Incentives to Referral Sources.

- ◆ Aides referring patients in exchange for hiring/bonus.
- ◆ Aides changing agencies and bringing patients with them from one agency to another.

See OIG Special Fraud Alert Home Health Fraud at:

<http://oig.hhs.gov/fraud/docs/alertsandbulletins/081095.html>

Home Health Risk Areas - Impact Marketing

Risk #14: Billing for unallowable costs of home health intake coordination.

Strategy:

- ◆ SNF & Hospital COPs and State Law.
- ◆ SNF Rate and DRG reimburse for discharge planning (D/P).
- ◆ Discharge Planning vs. Intake Coordination
- ◆ How can marketing activities become D/P?
- ◆ Free D/P activities are kickbacks.
- ◆ Safe harbor if state law permits delegation.
- ◆ Also cost report issue.

Home Health Risk Areas - Impact Marketing

Risk #20: Improper patient solicitation activities and high pressure marketing of uncovered or unnecessary services.

Strategy:

- ◆ No prohibited conduct (*i.e.*, free gifts or services).

“Marketing should be clear, correct, non-deceptive and fully informative.”

Home Health Risk Areas - Impact Marketing

Risk #24: Compensation programs that offer incentives for number of visits performed and revenue generated.

Strategy:

- ◆ Bonuses should be based on objective criteria set forth in a policy.

Home Health Risk Areas - Impact Marketing

Risk #25: Improper influence over referrals by hospitals that own home health agencies.

Strategy:

- ◆ Federal law requires that hospitals provide patients with a list of post-hospital service providers to ensure patient choice.

Cost Report Issues for Hospice & HHA

Cost Report Issues – Attestation & DRA

- ◆ Discharge Planning vs. Patient Coordination.
- ◆ Public Relations vs. Marketing.

Public Relations vs. Marketing **Allowable vs. Non-Allowable Advertising Costs**

Test is whether costs are related to patient care?

1. Advertising costs aimed at educating the community about hospice, or presenting a good public image about your hospice (Public Relations) are an allowable cost.
2. Advertising costs aimed at increasing referrals/ patient utilization are not an allowable cost. An example is Fundraising.
3. Provider Reimbursement Review Manual § 2136.

Anti-Inducement Laws

Section 1128A(a)(5) imposes civil monetary penalties against any person who offers or transfers remuneration to any individual eligible for Medicare or State health care program, that such person knows or should know is likely to influence such individual to order or to receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, under Medicare or a State health care program. 42 C.F.R. § 1003.102(b)(13).

Anti-Inducement Laws

1. **Remuneration** under section § 1128A(i)(6) includes transfers of items or services for free or for other than fair market value.
2. Congress did not intend to preclude provision of items and services of nominal value, including, *i.e.*, refreshments, medical literature, complimentary local transportation services, or participation in free health fairs.

H.R. Conf. Rep. No. 104-736, at 255 (1996).



Anti-Inducement Laws

3. OIG states nominal value no more than \$10 per item, or \$50 in the aggregate on an annual basis per beneficiary. Frequent rendering of items or services to any individual may preclude such items and services from being classified as nominal in value.

65 Fed. Reg. 24400, 24411 (4/26/00).

4. **Special Advisory Bulletin** on Gifts and Other Inducements to Medicare or Medicaid Patients issued 8/30/02.

<http://oig.hhs.gov/fraud/docs/alertsandbulletins/SABGiftsandinducements.pdf>



Anti-Inducement Laws

5. The Affordable Act amends §1128A(a)(i)(6), definition of remuneration under CMP, to exclude "*certain charitable and other innocuous programs.*"

- a. Remuneration which promotes access to care and poses a low risk of harm to patients and Federal health care programs;



Anti-Inducement Laws

- b. The offer or transfer of items or services for free or less than FMV if:
- i. Coupons, rebates, or other rewards from retailer;
 - ii. Items offered on equal terms to general public regardless of health insurance status; and
 - iii. Offer or transfer is not tied to provision of care reimbursed by Medicare or Medicaid.



Anti-Inducement Laws

- c. Offer or transfer of items or services for free or less than FMV by a person to an individual in financial need if not part of an ad or solicitation; not tied to care paid for by Medicare or Medicaid; and there is a reasonable connection between the item or service and the medical care being provided.
- d. Effective March 23, 2010.
- e. Effective January 1, 2011, waiver of certain co-pays under Part D for first prescription under certain circumstances.
6. Stark Law guidance for gifts to physicians.



OIG Advisory Opinions

42 C.F.R. § 1008.1 et seq. describes process to obtain a legal opinion from OIG on whether a potential business arrangement or activity is a kickback, 42 U.S.C. § 1320a-7b, and whether sanctions will be imposed such as Civil Money Penalties or Exclusions

- ◆ fee,
- ◆ opinion is only applicable to parties and facts presented,
- ◆ no opinion as to False Claims Act, improper billing, claims submission, cost reporting or related conduct.

Compliance Strategy

OIG Advisory Opinion – No. 00-3 Hospice Foundation of Martin & St. Lucie, Inc.

Held volunteer program providing friendship, visitation, transportation, assistance with writing and reading correspondence, errands, food preparation, and respite breaks for family/caregivers could be a kickback if intent to induce referrals. However, no sanction because program run by non-profit foundation to provide various end-of-life services.

Compliance Strategy

OIG Advisory Opinion – No. 00-7

Hospital vehicles to provide free transportation between patient's home and hospital; no sanction as kickback because:

- ◆ There was limited public transportation in the area;
- ◆ The services were unadvertised and available only to patients who were currently being treated at the hospital;
- ◆ The services were available only upon an individualized determination of need;
- ◆ The services were available to all qualified patients who required a course of multiple treatments;
- ◆ The costs of the services would not be shifted to a federal health care program
- ◆ The service area was limited to the hospital's primary service area;
- ◆ The arrangement furthered the hospital's not-for-profit mission in providing hospital access to elderly and low-income patients; and
- ◆ Advisory Opinion 09-01 – detailed criteria on Free transportation.

Compliance Strategy

OIG Advisory Opinion – No. 01-19

Hospital donation of space to an end-of-life program was not a kickback because run by volunteers and served a bona fide community purpose.

OIG Advisory Opinion – No. 03-4

Free pagers to home health patients could be a kickback, but not sanctioned because CMS encourages telehealth technologies in the delivery of home health care.

Compliance Strategy

OIG Advisory Opinion – No. 06-10

Orthopedic Surgeon referred patient to home health agency for free pre-operative safety assessment of patient home. Prohibited kickback because value of assessment between \$85 to \$100, and inducement to patient to pick that home health agency.

Compliance Strategy

OIG Advisory Opinion 02-14

OIG found that a for-profit infusion therapy company's program to provide free safety equipment to hemophiliac patients and free pagers to their families violated the anti-kickback statutes prohibiting improper inducements to beneficiaries; no sanctions were imposed. OIG has interpreted the statutes to include an exception for gifts where the retail value of provided benefits is less than \$10 per item, and less than \$50 per patient annually. This program's benefits were way above these threshold limits.

Compliance Strategy

OIG Advisory Opinion – No. 08-07

Health Care System pays patients \$10 gift cards for complaints when there is a 30-minute or more delay in service such as excessive wait times, delayed meals, cancelled appointments, excess noise, house-keeping or dietary concerns, TV not working, lost personal items. Gift card used at certain restaurants and theaters, but not redeemable for cash or health care items or services. Tracking system to ensure no more than \$50 gifts per patient per year. OIG held:

- CMP prohibiting beneficiary inducements and anti-kickback statute implicated.
- No sanctions because nominal in value and gift not cash or cash equivalent for enforcement purposes under CMP.

Compliance Strategy

OIG Advisory Opinion - No. 08-07

“If an incentive is nominal in value, then the individual providing the incentive would not and should not know that the incentive is likely to induce a beneficiary to use a particular provider, practitioner or supplier. Accordingly, ...incentives that are only nominal in value are not prohibited by the statute.” 65 Fed. R. 24400, 24410 (April 26, 2000) (preamble to the final rule on the CMP). *For enforcement purposes, we have interpreted nominal value to be no more than \$10 per item, or \$50 in the aggregate on an annual basis. Such inexpensive gifts cannot be in the form of cash or cash equivalents.* Special Advisory Bulletin: Offering Gifts and Other Inducements to Beneficiaries, August 2002.

Compliance Strategy

OIG Advisory Opinion – No. 09-07

ESRD provider gave free oral nutritional supplements to malnourished patients receiving dialysis. Held although could be kickback, low risk and no sanctions.

Reasons: physician ordered medically necessary if blood tests did not meet target; cap on number of doses, delivered individually to patient, not bulk, and stopped when blood test target reached; not advertised; and provider did not claim cost on cost report on bill. These factors override concern that *“giveaways corrupt clinical decision-making process;”* are harmful to competitors who can’t afford giveaways to attract business; and negative effect on quality of care.

Citing OIG Special Advisory on Offering Gifts and Inducements to Beneficiaries 8/02.

Compliance Strategy

OIG Advisory Opinion – No. 09-11

Provision of free blood pressure screenings to walk-in visitors at hospital held not inducement to beneficiary. Issue whether the free screenings promotes non-preventative care reimbursed by Medicare or Medicaid. Free screenings were not contingent on visitor using hospital services; if the results were abnormal, visitor was advised to see his own health care professional and not directed to hospital professionals; no special discounts or follow-up services; and hospital did not bill for screening.

OIG concluded free screenings met exception for incentives given to individuals to promote delivery of preventative care because screening not tied to provision of service by the hospital.

Compliance Strategy

OIG Advisory Opinion No. 10-08

Provision of free dietician/licensed & social work services to patients in a radiation oncology center. These services would not be advertised as free, and the center would collect all applicable copays.

OIG concluded that these free services would generally be considered a kickback. However, because these services would be included in the Medicare reimbursement for the radiation oncology services, and the centers would not waive any cost-sharing, there was no violation.

Objective 3

1. Who is policing illegal marketing practices?
2. What are the sanctions?

Government Agencies

- ◆ DOJ – U.S. Attorney’s Office Civil & Criminal
- ◆ Office of the Inspector General (OIG)
- ◆ Federal Bureau of Investigation (FBI)
- ◆ State Attorney General’s Office
 - ◆ State Medicaid Fraud Control Units
- ◆ Office of the Medicaid Inspector General (OMIG)
- ◆ Medicaid Integrity Program
- ◆ Medicare Contractors
 - ◆ Quality Improvement Organization
 - ◆ Program Integrity Units & Fiscal Audit
 - ◆ Medicare Administrative Contractor
 - ◆ Recovery Audit Contractors (RAC)
 - ◆ Zone Program Integrity Contractors
 - ◆ Medicare Secondary Payer Recovery Contractor
- ◆ State Survey and Certification Agencies

Government Agencies & Private Citizens

- ◆ DRA – Federal Medicaid Integrity Program
- ◆ Relators or Whistleblowers
 - ◆ Employees
 - ◆ Patients and Family
 - ◆ Referral Source
 - ◆ Vendors
 - ◆ Competition

What Sanctions Are Providers Exposed To?

State and/or Federal Sanctions

- ◆ Criminal – money penalties and/or jail.
- ◆ Civil – money penalties and damages against person who knowingly submits fraudulent or false claim or statement in support of a claim.
- ◆ Administrative – exclusions, suspensions, recoupments, termination of provider agreement.

The Civil False Claims Act 31 U.S.C. § 3729

- ◆ Fraud Enforcement and Recovery Act of 2009 (FERA) – effective May 20, 2009 – amends the FCA.
- ◆ False or fraudulent claim for government payment exists regardless of whether the claim was presented to the government for payment.
- ◆ Actual knowledge, deliberate ignorance, or reckless disregard used to be intent requirement. Amended to eliminate the intent requirement: *“require no proof of specific intent to defraud.”*
- ◆ Sufficient that the false record or statement may be *“material to a false or fraudulent claim.”*
- ◆ Penalty from \$5,500 to \$11,000 per claim, plus treble damages.
- ◆ Other penalties include criminal prosecution, exclusions, costs and attorneys fees.
- ◆ Qui tam provisions – whistleblower.

Return of Overpayments

- ◆ Failure to return money a provider is not entitled to is considered a violation of the FCA and subjects the provider to a penalty of \$5,500-\$11,000 per claim.
- ◆ Knowingly concealing or failing to disclose occurrence of event affecting right to payment – 42 U.S.C.1320a-7b(a)(3). Criminal Sanction.

Return of Overpayments

- ◆ ACA § 6402 defines overpayment as *“any funds that a person receives or retains under Medicare or Medicaid to which the person after applicable reconciliation is not entitled . . .”*
- ◆ Person includes provider of services, Medicaid managed care organization, Medicare Advantage Plan and Prescription Drug Plan.
- ◆ Report and return the overpayment to Medicare or Medicaid within 60 days after O/P is identified or date any corresponding cost report is due.

Deficit Reduction Act of 2005 and State False Claims Act

- ◆ Medicaid Fraud & Abuse Provisions.
- ◆ Financial Incentives for States to Adopt False Claims Act similar to Federal Law.
- ◆ If an “entity” receives \$5 million or more in Medicaid Funds, DRA requires education, but not training, of employees on the Federal False Claims Act, *i.e.*, more whistleblowers.
 - ◆ Written Policies
 - ◆ Employee Handbook
 - ◆ Certification that education was done
- ◆ Creates Federal Medicaid Integrity Program.

Medicare-Medicaid Anti-Kickback Statute – 42 U.S.C. § 1320a-7b(b)

1. whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind —
 - (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or
 - (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

Medicare-Medicaid Anti-Kickback Statute – 42 U.S.C. § 1320a-7b(b)

2. whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person --

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

Medicare-Medicaid Anti-Kickback Statute – 42 U.S.C. § 1320a-7b(b)

- ◆ Remuneration – in cash or in kind.
- ◆ Direct or indirect.
- ◆ Referring, arranging or recommending services or items paid by a federal care financing program.
- ◆ Giver and receiver of kickback, bribe or rebate are liable.
- ◆ Criminal conviction fines \$25,000 and/or 5 years jail.
- ◆ Compliance Strategy: Comply with safe harbors in real life. 42 C.F.R. § 1001.952.

Examples of Marketing Practices Under Anti-Kickback Law

1. Free items or services contingent on purchases, or on access to referral base.
2. Payments disguised as grants.
3. Travel, entertainment, gifts.
4. Free consultants.
5. Free Continuing Education – when the CE is the responsibility of the referral source.
6. Courtesy visits to non-hospice patients.
7. Waiver of cost-sharing.

OIG Policy Regarding Waiver of Cost-Sharing

OIG has stated that it will not hold providers or suppliers accountable if they waive the retroactive beneficiary liabilities if the following conditions are met:

1. The waiver only applies to the time period for which the retroactive payment is applicable – providers and suppliers must collect all cost-sharing amounts for services rendered after this time based on the increased payment rate.

OIG Policy Regarding Waiver of Cost-Sharing

2. The waiver only applies to the increase in the cost-sharing amount and not to the original cost-sharing amount that should have been collected.
3. The provider or supplier must apply the waiver to all beneficiaries regardless of services, item or diagnosis.
4. The waiver cannot be advertised.
5. The waiver cannot be conditioned on the provision of items, supplies or services.

OIG Policy Regarding Waiver of Cost-Sharing

On June 25, 2010, the OIG published a policy regarding the Waiver of Beneficiary Cost-Sharing Amounts that are attributable to a Provider or Supplier's Retroactive Increase in Payment Rates.
http://oig.hhs.gov/fraud/docs/alertsandbulletins/Retroactive_Beneficiary_Cost-Sharing_Liability.pdf

If a provider's or supplier's payment rate increases, that leads to an increase in the beneficiary's cost-sharing amount.

OIG 2011 Hospice Work Plan

Hospice utilization in the nursing facility.

- OIG will be reviewing the characteristics of nursing facilities with high hospice utilization. OIG will also be reviewing the business relationships, and marketing practices and materials of hospices with high nursing facility utilization.
- OIG will review services provided by hospices and nursing facilities to hospice patients residing in the nursing facilities. Reviews will include services provided by hospice aides, coordination of care, services to be provided by each entity, and payment arrangement.

CMP: Civil Sanction

Civil Money Penalties (CMPs) – 42 U.S.C. § 1320a-7a

- ◆ \$10,000 to \$50,000 for each claim and cost report
- ◆ Know or should know claim is false
- ◆ Damages three times amount claimed
- ◆ Exclusion from Medicare and Medicaid

Objective 4

1. Describe good marketing practices.
2. Compliance Strategies.
3. How to get help.

Good Marketing Practices

1. Market what you do.
2. Have scripts for problematic situations.
3. Train staff to know kickback risks.
4. Policy regarding gifts/items/space/services.
5. Don't exaggerate, and don't dump on the competition.
6. Don't promise services.
7. Back-up your quality measures.
8. Welcome compliance officer review.
9. Audit your marketers and their accounts.

Compliance Program – Address Marketing Issues

1. Compliance Standards & Procedures.
2. Steps to Detect and Prevent Offenses.
3. Oversight Responsibilities – Compliance Officer.
4. Due Care in Delegating Discretionary Authority.
5. Employee Training.
6. Monitoring & Auditing.
7. Enforcement & Discipline.
8. Response & Prevention.

Strategies for Compliance

1. Compliance Officer and Compliance Program.
2. Pay attention to government enforcement activities and guidance on websites.
3. Use good judgment in all negotiations and relationships.
4. Maximize openness and disclosure.
5. Compliance Officer – Do spot check of message marketers are sending to community, referral sources, caregivers, and physicians.

When a Marketing Policy Goes “Wrong”

1. Conduct internal investigation under attorney client privilege and enact plan for correction.
2. Reach out and repair the damage.
3. Re-examine priorities.
4. Resist inappropriate marketing demands from referral sources.
 - SNF demands aide, TV, (GIP Level of Care, continuous care from Hospice in exchange for referrals of residents to hospice).
 - Discharge planner of hospital demands expensive gift during holiday season.

Marketing: Legal Guidance

1. Attorney-Client Privilege – Consultants.
2. Audit the Financial and Cost Report Consultants.
3. Health Care Attorney Expertise.
4. OIG Fraud Alerts and Bulletins.
5. Advisory Opinions.
6. Mandatory Disclosure.

Who Can You Contact for Help?

1. Federal:

- a. CMS – condition of participation violation, *i.e.*, steering and patient choice, admission.
- b. OIG – risk areas, inducement, kickbacks.
- c. FTC – “*unfair or deceptive acts or practices in or affecting commerce.*”

Who Can You Contact for Help?

2. State:

- a. Department of Health – state laws, *i.e.*, steering and patient choice, admission.
- b. Medical Office of the Inspector General – inducement, kickbacks.
- c. State Attorney General Office – state laws against unfair and deceptive practices, antitrust issues.
- d. Consumer Protection.

Who Can You Contact for Help?

3. Private Action:

- a. Informal with Health Care Attorney.
- b. Formal with Health Care Attorney:
 - Lawsuit for tortuous interference with business, libel, contract dispute.

Privacy Concerns in Marketing

1. Patient expectations of privacy from health care providers.
2. Misuse of patient rosters.
3. Photos, references to cases.
4. HIPAA and state privacy laws.
5. Obtain an authorization from patient for marketing.
6. Contracts with vendors should contain clause requiring prior written approval for press release, media ads, or any form of publicity or marketing about contract arrangement. HITECH Business Associate Agreement requirement.

**Legal Aspects of Marketing:
Advantages and Consequences**

QUESTIONS?

Thank you

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