

NAVIGATING THE MAZE

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INDUCEMENTS AND INCENTIVES

According to Investopedia, marketing is about product, place, price, and promotion. Promotion often includes activities such as offering rewards, discounts, or free products. A search of the marketing techniques on the internet provides a multitude of advice of how to incentivize customers. What most people do not realize is that in healthcare many of the common practice methods of incentivizing customers or inducing referrals is illegal based upon concerns that the practice could affect both the quality and cost of care.

SOCIAL SECURITY ACT

Section 1128A of the Social Security Act very clearly indicates that organizations may not offer or transfer remuneration that is likely to influence someone to order or receive care from a particular provider, practitioner, or supplier for services that are either paid or partially paid for under title XVII or a State health care program. Section (h)(i)(6) of the Act further defines remuneration to include

"...the waiver of coinsurance and deductible amounts (or any part thereof), and transfers of items or services for free or for other than fair market value." The Act describes five exceptions to the definition of remuneration.

1. Non-routine, unadvertised waivers of copayments or deductible amounts based on individualized determinations of financial need or exhaustion of reasonable collection efforts
2. Properly disclosed differentials in a health insurance plan's copayments or deductibles
3. Incentives to promote the delivery of preventive care
4. Any practice permitted under an anti-kickback statute safe harbor, and
5. Waivers of copayment amounts in excess of the minimum copayment amounts under the Medicare hospital outpatient schedule¹



In August 2002, the Office of Inspector General issued a special advisory bulletin, *Offering Gifts and Other Inducements to Beneficiaries*. In this bulletin, the OIG indicates that offering valuable gifts to beneficiaries that would influence their choice of Medicare or Medicaid provider, raises concerns both surrounding quality and cost.² "Providers may have an economic incentive to offset the additional costs attributable to the giveaway by providing unnecessary services or by substituting cheaper or lower quality services."³ "The use of giveaways to



attract business also favors large providers with greater financial resources for such activities, disadvantaging smaller providers and businesses."⁴ The OIG further explains that the language in the Act is very broad and given their responsibility to enforce the prohibitions, they felt the need to outline the acceptable practices. The OIG refers to four principles,

1. Medicare and Medicaid providers can offer inexpensive gifts and services, other than cash or cash equivalents without violating the statute. Inexpensive gifts are those that have a retail value or no more than \$10 individually or \$50 annual aggregate.
2. More expensive items or services can be offered if they fit into five statutory exceptions
3. Exceptions are being considered as it relates to complimentary local transportation and for free goods in connection with participation in certain clinical studies, and
4. The OIG will entertain requests for advisory opinions related to the prohibition on inducements to beneficiaries.⁵

The OIG, in December 2002, provided further direction in the form of a letter clarifying their position on the provision of complimentary local transportation. The letter states that "Free local transportation valued at no more than \$10 per trip and \$50 per patient in the aggregate on an annual basis is permissible under section 1128A(a)(5)."⁶ The letter also lists specific conditions that a hospital-based complimentary transportation program must meet in order to be exempt. To review those exemptions, the letter can be accessed at <https://oig.hhs.gov/fraud/docs/alertsandbulletins/LocalTransportation.pdf>.

More recently, on December 7, 2016, the OIG issued a *General Policy Statement Regarding Gifts of Nominal Value to Medicare and Medicaid Beneficiaries*. In the new policy, the OIG has increased the retail value of “nominal” to be \$15 per item or \$75 in aggregate per patient on an annual basis.⁷

PENALTY

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Organization leaders, staff who perform marketing, and staff who develop programs or work to resolve customer complaints should be well versed in the elements of the law. The Act is clear in that claims of ignorance do not lead to an exemption from penalty. The term “should know,” is referred to eleven times in Section 1128A (a) (1-10). The term, as described in the Act is as follows:

- (7) The term “should know” means that a person, with respect to information—
 - (A) acts in deliberate ignorance of the truth or falsity of the information;
 - or
 - (B) acts in reckless disregard of the truth or falsity of the information,and no proof of specific intent to defraud is required.⁸

Violations of the Act implicate Civil Monetary Penalty Liability. This can include a penalty of \$15,270 per item or service for a beneficiary that was offered or received remuneration and an assessment of not more than three times the amount claimed for each item or service, or three times the amount of the remuneration.⁹ The Department of Justice may also decide to prosecute under the anti-kickback statute. This could lead to criminal liability; exclusion; false claims act liability; and high penalties including treble damages.¹⁰

CONCLUSION

Marketing in healthcare is very different from marketing in other areas of the business world. Specific rules related to the gifting of products or services to those individuals who are beneficiaries of the Medicare or Medicaid program exist. Violations of these rules come with stiff penalties and claims of ignorance of the rules are not an adequate defense. Protect yourself and your organization by mak-



ing sure leaders and those developing programs or manage organizational risk are fully aware of the rules and where to find them. Any questions related to whether a program or practice would violate the anti-kickback statute or Section 1128A of the Social Security Act should be directed to your legal team.

¹ Office of Inspector General Special Advisory Bulletin, pg 2. Available at <https://oig.hhs.gov/fraud/docs/alertsandbulletins/sabgiftsandinducements.pdf>

² Idem

³ Idem pg. 1

⁴ Idem pg. 1

⁵ Idem

⁶ OIG Letter outlining complimentary local transportation. Available from: <https://oig.hhs.gov/fraud/docs/alertsandbulletins/LocalTransportation.pdf>

⁷ Office of Inspector General Policy Statement Regarding Gifts of Nominal Value to Medicare and Medicaid Beneficiaries. Available from" <https://oig.hhs.gov/fraud/docs/alertsandbulletins/OIG-Policy-Statement-Gifts-of-Nominal-Value.pdf>

⁸ Civil Monetary Penalties, available from https://www.ssa.gov/OP_Home/ssact/title11/1128A.htm

⁹ Wright, Jill. (2017, September 8) Presentation at the HCCA Boston Regional Conference: *Beneficiary Inducements and Financial Relationships with Patients*. Available at https://www.hcca-info.org/Portals/0/PDFs/Resources/Conference_Handouts/Regional_Conference/2017/boston/Wrightprint3.pdf

¹⁰ Idem

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