

Radiology Administrator's

Compliance & Reimbursement Insider

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Beware of Compliance Problems Associated with 'Scan Brokers'

"Scan brokers"—companies that contract with radiology facilities to provide MRI and CT services (usually at a reduced rate) to patients that the broker supplies—are proliferating. And signing up with these brokers is becoming more appealing to some radiology practices because the costs of operating CT and MRI at less than full capacity are so high. But there are potential compliance problems associated with these arrangements.

Although using a scan broker can be an effective way to establish and operate an imaging facility that might otherwise be a financially marginal undertaking, you must take care in structuring your arrangement with the broker to minimize your compliance risks, says New York health care attorney Jay Silverman. We'll explain the compliance risks that are associated with using scan brokers.

Arrangement May Violate Medicare Rules

Scan brokers get the patients they send you different ways. They may have an agreement with a local Medicaid or worker's compensation administrator, in which case most of the patients the broker sends you will be covered by those programs. Or the broker may approach large self-insured employers to provide services to their employees. Some brokers may advertise to the general public.

But regardless of the way the broker solicits the patients it sends you, if you're a Medicare provider, you must structure your relationship with the broker very carefully, Silverman warns. There are several ways that a relationship with a scan broker can get you into trouble:

False claims act violation. The Medicare fee schedule pays physicians the lesser of the physician's usual and customary charge or the Medicare allowable charge. In normal circumstances, the physician's usual and customary charge will be higher than the Medicare allowable charge—so almost all physicians' offices end up billing Medicare the allowable charge. But if you offer a Medicare-covered service to a scan broker at less than the Medicare allowable charge, you're effectively lowering your customary charge—at least as far as Medicare is concerned. If you then continue to bill Medicare for the same services to its patients at the Medicare allowable charge, your Medicare carrier may interpret those claims as false claims because you're misrepresenting your usual and customary charge.

"Physicians should understand that 'usual and customary' doesn't really mean what you would expect—it's not the amount you typically charge but the lowest amount you've agreed to accept for a given service," Silverman explains.

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SCAN BROKERS (continued from p. 1)

Even if you're not prosecuted for submitting false claims, the Medicare carrier can make a demand for repayment, Silverman says.

"Substantially in excess" clause violations. What if the scan broker brings you only non-Medicare patients? If you're a Medicare provider, you can still get into trouble. That's because Medicare rules bar a physician from charging Medicare "substantially in excess" of what she routinely charges others for the same service. So again, if you're giving the scan broker's patients a discount—even if these patients aren't covered by Medicare—and you're charging them "substantially less" than you charge Medicare for the same service, you've violated Medicare rules, Silverman notes.

Contracting with excluded providers. Companies that offer services to health care providers—like scan brokers—sometimes hire, or even are owned by, health care professionals who have been excluded from the Medicare program. It's very important that you check the OIG's Web site to make sure that none of the principals or employees of the scan broker you consider doing business with are excluded. Even if the patients the broker plans to provide you aren't Medicare patients, you risk your own status in the Medicare program if you contract with an excluded provider, Silverman remarks.

So ask the broker for a list of employees and any subcontractor or agent that it will employ so you can check to make sure that these individuals aren't excluded. And get a written statement from the scan broker, warranting that none of the principals, employees, or subcontractors of the company are, or have been, excluded, Silverman advises.

What if you find that the company, or a principal, employee, or subcontractor of the company, is on the Medicare exclusion list? Or what if the company won't give you a statement saying that its employees and subcontractors aren't excluded? The most prudent course is not to do business with that company, Silverman says. At the very least, consult an experienced health care attorney, who can look at the ins and outs of the arrangement you propose to see whether it's prudent.

Insider Says: The list of excluded providers is updated quarterly. Go to www.oig.hhs.gov, and click on "exclusions database" on the left side of the page. That will allow you to search by company name, person's name, and Social Security number.

Scan Brokers Can Bring Other Compliance Risks

Sometimes a practice will limit its arrangements with scan brokers solely to services not covered by Medicare—or even services not covered by any insurance. Doing that will keep you out of trouble with Medicare, but there are still other traps for the unwary, Silverman cautions:

Improper advertising. Some scan brokers will offer to provide other management services such as marketing. This is common when the scan broker provides patients for self-referred and self-paid services like "virtual colonoscopy" and full-body scans, Silverman points out. Some scan brokers' marketing tactics can be quite aggressive and may violate state medical

licensing board restrictions on advertising, Silverman says. For example, some states have laws barring testimonial advertising by health care providers. And even states that don't have such laws do have medical boards that may frown on aggressive advertising as unprofessional. Plus advertising that seems overly aggressive may offend your referral sources, and so you may find that your regular radiology practice suffers.

If your agreement with a scan broker includes marketing services, make sure you have the right to review all advertising prior to its use, and to decline any advertising you're not comfortable with, Silverman advises. Give the advertising to your health care attorney to review to make sure that it doesn't violate of any laws in your state. And carefully consider the culture of your medical community before using any advertising—you might find that even if you gain new patients through advertising, your practice may suffer over the long term if your refer-

ral sources start sending their patients elsewhere, Silverman says.

“Corporate practice of medicine” prohibitions. If you agree to an arrangement with a scan broker that includes management services, you run the risk that the broker will in essence wind up owning—not just running—your facility. Silverman knows of cases where scan brokers offered to: finance the purchase of equipment, lease the property, staff the facility, market the services, and handle the billing. In these cases, the radiologists merely got a “read fee” for each scan they interpreted. “All the radiologists had to do was show up and read the scans,” he says. That may sound appealing to some radiologists, but it's a compliance nightmare waiting to happen, Silverman says.

Many states bar nonprofessionals from owning medical service providers or directly providing medical services. The brokers try to get around this by putting all fixed assets in the radiologists' names and billing

under the radiologists' provider numbers. But the fact remains that any close look at the arrangement will reveal that the broker is, in fact, the holder of the assets associated with the facility, and the broker is directly benefiting from the provision of medical services. “Yet, it's the medical licenses of the radiologists that will be on the line if such an arrangement comes under scrutiny,” Silverman says.

Silverman advises his clients to avoid doing business with brokers who want to finance the equipment and provide all associated management services. “If all the radiologist is going to be doing is reading scans, then she's better off seeking a position as an employee at a radiologist-owned and -managed facility—then at least she's not endangering her license and her provider number,” he says. ■

Insider Source

Jay Silverman, Esq.: Ruskin Moscou & Faltischek PC, East Tower, 15th Fl., 190 EAB Plz., Mineola, NY 11556.

How to Bill for Additional Services with Breast Biopsies

Correctly billing all the services associated with breast biopsies can be a confusing task. That's because there are several different techniques that radiologists and surgeons can use to perform biopsies of the breast. And there are additional services that can be billed depending on the technique the physician selects. For example, sometimes imaging of the breast during or after biopsy is a separately billable and payable service—and sometimes it's not, says Atlanta radiology reimbursement expert Jackie Miller.

Keeping track of which services are separately billable can be confusing. But if you don't get it right, or if

you use the wrong code, you may get unnecessary denials or lose out on reimbursement you're entitled to.

We'll give you a quick rundown on what you can and can't bill for when doing breast biopsies. And we'll tell you which CPT codes to use for separately billable procedures.

Radiologist Performs Biopsy

When the radiologist performs a biopsy, use either CPT* code 19102 or 19103 (for vacuum-assisted or rotating biopsy devices), Miller says. Don't use code 19100; it's for biopsies performed without imaging guidance.

Imaging guidance. A radiologist may submit a claim for imaging guidance during biopsy, and it will be paid as a separate service, Miller says. Use one of the following CPT codes, depending on the modality selected:

- 76095—if the radiologist uses stereotactic guidance;
- 76096—if the radiologist uses mammographic guidance;
- 76360—if the radiologist uses CT guidance;
- 76393—if the radiologist uses MR guidance; or
- 76942—if the radiologist uses ultrasound guidance.

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BREAST BIOPSIES (continued from p. 3)

Clip placement. Placement of a metallic clip in the breast to mark the biopsy site is also a separately billable service, Miller points out. Use CPT code 19295 for clip placement.

Diagnostic mammogram after biopsy and clip placement. Radiologists often perform a mammogram after doing a biopsy and placing the clip, to confirm that the procedure was done correctly. Sometimes this is separately billable and payable; sometimes it's not, Miller explains. It depends on the modality used:

- 76095—stereotactic guidance includes mammography, so the mammogram isn't separately billable;
- 76096—mammographic guidance includes mammography, so the mammogram isn't separately billable;

■ 76360, 76393, and 76942—if the radiologist uses CT, MR, or ultrasound guidance, then the mammogram *is* separately billable, Miller says. Bill the mammogram using the code for diagnostic mammograms—76090.

X-ray of biopsy specimen.

Sometimes the radiologist takes an X-ray of the biopsy specimen to confirm that the specimen contains the calcifications that led to the biopsy. That X-ray is separately billable—use CPT code 76098, Miller advises.

Surgeon Performs Biopsy

When a surgeon performs the biopsy, the radiologist can't bill for it. But there may be other services that the radiologist can bill for, Miller notes. For example, use CPT codes 19290-19291, as appropriate, to bill for

needle insertion to mark the biopsy site for the surgeon. The imaging guidance for placement of the needles is also separately billable. Use the appropriate codes above for stereotactic guidance, mammographic guidance, or ultrasound guidance, Miller advises.

Insider Says: Don't use the needle core biopsy codes to bill for aspiration of a breast cyst, Miller remarks. Use codes 19000-19001 plus the applicable imaging guidance code. ■

Insider Source

Jackie Miller: Per-Se Technologies Consulting Group, 2840 Mount Wilkinson Pkwy, Atlanta, GA 30339.

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Adopt Guidelines for Dealing with Drug and Medical Device Manufacturers

Drug and medical device manufacturers may offer rewards or inducements, such as lavish gifts, trips, or expensive dinners, to physicians who might use or prescribe their devices or drugs. And some physicians have come to expect these perks as one of the fringe benefits of their jobs. But recently relationships between physicians and drug manufacturers have come under scrutiny from the government, professional organizations of physicians, and even insurance companies.

We'll tell you what the law says about physicians' dealings with drug and medical device manufacturers. And we'll describe the recent OIG Compliance Program Guidance for Pharmaceutical Manufacturers, which has a lot to say about these manufacturers' relationships with physicians.

We'll also explain the voluntary code of conduct that the drug manufacturers adopted recently. Plus, we'll give you a Model Memo (on p. 7) that's based on the OIG Compliance Guidance and the voluntary code. It gives some pointers about what's okay to accept from a drug or device manufacturer's representative—and what isn't okay to accept. You can adapt the Model Memo and distribute it to your physicians and other clinicians to make sure that your practice doesn't end up in trouble.

How Accepting Rewards or Inducements Can Get You in Trouble

There are two ways you can get in legal trouble if you accept a reward or inducement from a drug or medical

device manufacturer whose products you may use or prescribe.

Antikickback law. The antikickback law bars a physician from getting a financial inducement or reward from a manufacturer in return for prescribing the manufacturer's drug or using its device if the drug or device is reimbursable under Medicare, Medicaid, or any other government-sponsored health insurance program. The purpose of this law is to ensure that physicians act in the best clinical interests of their patients—not according to their own financial interests, says San Francisco attorney Judy Waltz.

According to the OIG, a drug company violates the antikickback law if it offers a benefit to a physician and one of the purposes of the benefit is to induce the physician to prescribe

a certain drug—even if there are other, legitimate reasons to give the physician the benefit, says Waltz. And both the giver of the illegal benefit and the recipient risk antikickback penalties. A physician who violates the federal antikickback law may face criminal prosecution, monetary penalties, and exclusion from Medicare, Medicaid, and the other government sponsored health insurance programs, Waltz warns.

State medical licensing boards.

Even if a drug or device isn't reimbursable under Medicare, you can still find yourself in legal trouble. The medical practice laws in many states bar a physician from putting his financial interests before his patients' best clinical interests, explains New York health care attorney Matthew Kupferberg. State licensing boards often get reports about unusual patterns of prescribing or device usage from insurance companies, hospitals, pharmacies, and even competitors, he says. If the physician also got a benefit for using or prescribing the drug or device, the board may assume that the physician was putting his interests ahead of the patient's—even if the benefit actually didn't influence the decision to use the product at all.

Plus, the AMA has issued an opinion about ethical relationships with manufacturers, and some state boards consider any departure from the AMA's recommendations as evidence of wrongdoing, Kupferberg notes.

Insider Says: You can find the AMA's ethics opinion on its Web site at www.AMA-Assn.org. Click on "Ethics," then on "Council of Ethical and Judicial Affairs," and then on "Code of Medical Ethics." Click on the subheading "New Opinions and CEJA Reports," and then scroll down to Opinion 8.061.

OIG's Position

The OIG has been concerned for quite some time about aggressive marketing by drug and device manufacturers, says Washington, D.C., health care attorney Ankur Goel. In 1994, the OIG issued a special fraud alert on drug marketing. The alert warned that the OIG would investigate manufacturers and physicians who participated in certain drug marketing schemes that rewarded physicians for their prescribing practices.

More recently, in April 2003, the OIG issued its Compliance Program Guidance for Pharmaceutical Manufacturers. This compliance guidance emphasizes the potential for fraud in a manufacturer's relations with people in a position to influence sales of its products, including physicians. Although the compliance guidance was written for the benefit of drug manufacturers, several of the practices it identifies as risk areas should be a concern for physicians as well. These include:

- "Switching" arrangements, in which a manufacturer pays a physician for each patient who changes prescriptions to a drug produced by that manufacturer;
- Asking for or receiving gifts, entertainment, or personal services from drug manufacturers; and
- Entering into "consulting" or "research" arrangements with drug manufacturers—unless actual research is being conducted, results are properly calculated, data integrity is maintained, and the manufacturer is periodically informed of the results through some standardized reporting mechanism.

In addition, Goel points out that the Justice Department has prosecuted physicians for selling drugs they received as free samples and for billing sample drugs to the Medicare program. States are now beginning to look

more carefully at the cost of Medicaid prescription drug benefits. Closer scrutiny by state authorities into physician/drug manufacturer relationships is likely to follow, Goel reports.

Insider Says: To read the special fraud alert, go to www.oig.hhs.gov/fraud/docs/alertsandbulletins/121994.html. To read the compliance guidance, go to www.oig.hhs.gov, click on "Fraud Prevention and Detection," on the right hand side of the page, and then click on "Compliance Guidance." There you'll find the final version of the Compliance Program Guidance for Pharmaceutical Manufacturers, as well as all the other compliance program guidance documents the OIG has published.

What Drug Industry Code of Conduct Recommends

The OIG's compliance program guidance notes that manufacturers that follow the Pharmaceutical Research and Manufacturers of America (PhRMA) voluntary code of conduct for marketing to physicians are likely to stay out of trouble. So this code of conduct may help physicians determine whether a particular offer by a drug or medical device manufacturer is proper, Waltz remarks.

The code of conduct says that interaction between a drug manufacturer's representative and a physician should focus on informing the physician. Specifically, the code of conduct says:

- Calls on physicians shouldn't include entertainment like sporting events, spa visits, or "dine and dash" (lavish dinners followed by brief lectures).

- Drug manufacturers may provide financial support to the sponsors of continuing education seminars, but shouldn't pay for individual seminar participants to attend.

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■ Drug manufacturers may retain as consultants physicians with particular experience and expertise valuable to a particular program or trial. But it's inappropriate to retain a physician as a consultant as a reward for prescribing a drug.

■ Drug manufacturers may give educational and practice-related items to physicians if the items are for the benefit of patients and worth less than \$100 per item. Other gifts are inappropriate.

Insider Says: You can find the voluntary code of conduct and a press release and "backgrounder" on the code on the PhRMA Web site at www.phrma.org. From the home page click on "PhRMA Adopts New Marketing Code on Interactions with Health Professionals." That will take you to the press release, which contains links to the backgrounder and the code of conduct.

Give Your Staff Guidelines on Relationships with Drug Manufacturers

It's clear that regulatory scrutiny of relationships between physicians and drug manufacturers is on the increase. So you need your physicians and staff to be especially careful about accepting inducements or other benefits from these companies. Yet physicians and drug manufacturers must work together to produce good data and better products for the benefit of patients—and this will often involve some payment or benefit to the physician in return for her time or expertise.

Goel suggests that physicians think carefully about what a drug manufacturer wants in return for a gift, benefit, or inducement. One way to figure that out is to look at who in the company is making the offer. If the marketing department makes the pro-

posal, it's reasonable to assume that the motivation behind the proposal is to sell more product. In that case, the physician should think twice. But if the proposal comes from the research and development side and seems likely to generate good data or increased clinical experience and expertise, the arrangement may be appropriate.

To give you some concrete guidelines to follow, we've developed a Model Memo based on the OIG's compliance guidance and PhRMA's code of conduct. You can adapt it and distribute it to your staff—including all the physicians and other clinicians in your practice. This memo says what is and isn't proper to accept from a drug or medical device manufacturer. The memo should come from your practice's compliance officer or CEO—that is, from someone whose authority is clear, Waltz suggests. Like our Model Memo, yours should:

Explain reason for memo.

Inform the staff that the relationships between drug and medical device manufacturers and physicians are coming under intense scrutiny by regulators and insurance companies. Say that your practice wants to avoid even the appearance of impropriety in its dealings with these manufacturers—so you're setting out certain guidelines for all employees to follow.

Set out guidelines. Then, go through the types of rewards and inducements that a drug or medical device manufacturer may offer and your guidelines for accepting each.

► *Meals and entertainment.*

Advise your staff members not to accept: complimentary meals at fancy restaurants; invitations to golf outings; free tickets to sporting events, plays, or concerts; complimentary spa or resort visits; or invitations that allow them to bring a spouse or guest free of charge [Memo, par. 1].

But tell staff members they may accept complimentary meals at moderately priced restaurants as long as the bulk of the conversation or presentation over the meal is educational in nature—that is, informs the staff member about the clinical efficacy of a drug or device and how it might benefit the patients in your practice. And tell staff members to document in their personal records who attended the meal and the substance of the conversation.

► *Samples.* Warn staff members not to take large amounts of free samples. That could be construed as a reward for prescribing the drug, and it's hard to convince an investigator that you're just trying out a drug if you've accepted a large stockpile for free. Instead, tell staff members to accept only enough free samples to evaluate the costs and benefits of the sample drug in the short term, Goel suggests. That way they won't be open to claims that they're using these samples on patients for whom the product may not be the most appropriate choice, or that the samples are a "payment" [Memo, par. 2].

► *Free trips.* Tell physicians and clinical staff members not to accept free travel from any manufacturer. The only exception may be if the physician will be a featured speaker at a conference or seminar that the manufacturer is sponsoring. But in that case, the staff member must have expertise in his topic, and the research he's reporting must be legitimate, Waltz cautions. Require staff members to get your compliance officer's or attorney's okay before accepting any free travel offers, Waltz advises [Memo, par. 3].

► *Gifts.* Tell your staff members that any gifts they accept from a drug or medical device manufacturer must be worth less than \$100 in the agree-

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MODEL MEMO

Give Staff Guidelines on Relationships with Manufacturers

Here's a Model Memo that we put together with the help of San Francisco health care attorney Judy Waltz. It gives staff members guidelines on what is—and what isn't—appropriate to accept from a drug or medical device manufacturer. You can

adapt this memo and distribute it to your staff. The memo should come from your practice's CEO or compliance officer—someone with authority, so your staff will know your practice takes the guidelines seriously.

GUIDELINES FOR DEALING WITH MANUFACTURERS

To: All clinical staff
From: Frederick Physician, CEO, Metro Radiology

From time to time, representatives working for manufacturers of drugs, medical equipment, and medical devices may solicit the physicians and other clinicians in this practice. Many of these representatives provide valuable knowledge and information to the practice, helping us provide excellent patient care. We are confident that none of the staff of Metro Radiology would allow a perk from a manufacturer to compromise or influence patient care. However, relationships with manufacturers can lead to the appearance of impropriety if not carefully structured. Accordingly, all clinical staff are asked to adhere to the following guidelines in their interactions with both the manufacturers of drugs and medical devices and their representatives.

GUIDELINES

1. MEALS AND ENTERTAINMENT. Do not accept complimentary meals and entertainment unless they are moderately priced, reasonable for educational purposes, and benefit the practice's ability to deliver excellent patient care. If you accept a complimentary meal and/or entertainment opportunity from a manufacturer's representative, document the medical issues discussed and how what you learned will benefit the practice.

Examples:

- It is *not* appropriate to accept a representative's invitation to play golf at his country club, have dinner at an expensive restaurant, or visit a spa or resort.
- It is *not* appropriate for spouses and/or guests to join you at a manufacturer's invitation. Should you accept any such invitation, you must pay your own way and the way of any of your guests.
- It *is* appropriate to accept an invitation to a meal at a moderately priced restaurant to discuss clinical indications of a new drug and see a slide presentation about its efficacy. Document who was there and the substance of the presentations and discussions.

2. SAMPLES. Free samples of drugs or devices can benefit our patients and assist our practice. However, do not accept unreasonable quantities of free samples from manufacturers. An unreasonable quantity is a quantity in excess of that which permits you to evaluate the costs and benefits of the drug or device in the short term.

3. TRAVEL. In general you may not accept free or subsidized travel or travel awards (such as frequent flyer miles or hotel reward points) from a manufacturer. Occasions when you will be lecturing or providing training at a manufacturer-sponsored event may be an exception. However, any such exception must be approved in advance by the practice's attorney and/or compliance officer.

4. GIFTS. You may accept small or token gifts from manufacturers provided that the aggregate value of the gifts in any calendar year does not exceed \$100, and the gifts benefit the practice and patient care.

Examples:

- You may *not* accept gifts of liquor, tickets to theater or sporting events, or personal services, regardless of value.
- You *may* accept a gift of a prescription pad, anatomical model, pen, pocket flashlight, or appointment books, to give a few examples.

5. GRANTS AND CONSULTING OPPORTUNITIES. Any offer of a study grant or consulting opportunity must be brought to the attention of the compliance officer and/or attorney to determine whether it may be accepted.

DEALING WITH MANUFACTURERS

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gate and must in some way benefit patient care. For example, it might be okay to accept an anatomical model, prescription pad, or pocket flashlight. It's harder for someone to argue that a manufacturer's gift influenced your prescribing or use patterns if the gift is of nominal value.

Also tell your staff not to accept any gifts that aren't related to patient care or don't benefit patients, even inexpensive gifts. For example, a \$25 bottle of liquor isn't acceptable,

because it's for the personal use of the recipient and doesn't benefit patients [Memo, par. 4].

► *Study grants and consulting opportunities.* If one of your physicians is eminent in his field or practices a subspecialty that's of special interest to a manufacturer, then a solicitation to provide consulting services or participate in clinical studies may be legitimate. But some manufacturers have used offers of "study grants" and "consulting opportunities" to disguise cash payments or other inappropriate benefits given physicians in return for

minimal work, says Goel. To make sure an offer is legitimate, require the staff member to present it to your attorney or compliance officer before accepting it. And insist on a written agreement that spells out what the manufacturer expects for its money [Memo, par. 5]. ■

Insider Sources

Ankur Goel, Esq.: McDermott Will & Emery, 600 13th St NW, Washington, DC 20005.

Matthew Kupferberg, Esq.: Arent Fox Kintner Plotkin & Kahn, PLLC, 1615 Broadway, New York, NY 10019.

Judy Waltz, Esq.: Foley & Lardner, 1 Maritime Plz., 6th Fl., San Francisco, CA 94111.

Discounts for Cash Can Lead to Compliance Problems

To reduce administrative costs and expand their patient base, some radiology practices have begun offering discounts for patients who pay in cash. These discounts may appropriately reflect the savings that the practice realizes by not having to submit a claim to an insurer and wait for reimbursement. But if the patient getting the discount is covered by insurance, and in certain other circumstances, offering the discount can land the practice in hot water.

We'll explain the various complicated laws and regulations—such as Medicare rules, state antikickback laws, private insurance contracts, and even HIPAA—that make offering cash discounts a minefield for the unwary. We'll point out the traps so that you can make an informed decision about whether offering discounts for cash is ever worthwhile.

Cash Discounts to Medicare Patients Violate Rules

Medicare rules make it nearly impossible to offer cash discounts to a patient covered by Medicare, says Washington, D.C., health care attor-

ney William Sarraille. If you offer this discount, there are several different ways to get into trouble:

False Claims Act violations. The Medicare physician fee schedule pays physician practices the lesser of either the Medicare allowable charge for the service or the physician's actual charge. In essentially every case where a discount is offered to a Medicare beneficiary, the Medicare allowable charge will then be lower than the physician's actual charge. Offering a discount in effect lowers the physician's actual charge to an amount below the Medicare fee schedule for the service. If you don't report the discount on the Medicare claim form, you'll be paid on the higher fee schedule, rather than the lower, actual charge. And that's potentially a false claim. Sarraille cautions that practices with a pattern of submitting false claims can face fines of up to three times the aggregate amount of the false claims—plus up to \$11,000 in penalties per false claim submitted and exclusion from the Medicare program.

HIPAA violations. Although most practices are familiar with the HIPAA privacy provisions, Sarraille

points out that there are fraud and abuse components of HIPAA, too. One such HIPAA provision is meant to discourage patient inducements. It says that it's unlawful to offer any benefit to a Medicare patient if the provider knows or should have known that the benefit was likely to affect the patient's choice of a federal health care program provider. Giving a Medicare patient a discount for paying in cash may be a prohibited benefit under this provision, Sarraille says. Violation can lead to civil monetary penalties and potential exclusion from the Medicare program.

"Substantially in excess" clause. You can even get into trouble if you're a Medicare provider offering a discount to private-pay patients, Sarraille says. Medicare rules bar a provider from charging Medicare "substantially in excess" of what it routinely charges others for the same service. If a practice regularly offers a private-pay patient a discount that results in the patient's being charged substantially less than the Medicare allowable charge for the same service, the practice risks violating this rule. If the

practice offers discounts that result in a substantially lower charge than the Medicare allowable rate for more than 50 percent of the services the practice offers, the practice clearly risks civil monetary penalties and exclusion from the program, Sarraille warns.

Private Payors Discourage Discounts, Too

Many of the same issues that affect cash discounts in the Medicare context arise with private payors, too, Sarraille remarks.

Insurance fraud. Some private payors require patients to make a copayment of 20 percent of the physician charge. If the physician offers the patient a discount on his copayment but doesn't accordingly adjust the amount billed to the insurance company, state insurance fraud laws may apply. Private insurers have stepped up efforts to identify and investigate physicians who offer these discounts to patients without reporting the discounts to the insurers, Sarraille reports. He advises practices to notify all their payors in writing about their cash discount policy.

"Most favored nation" clauses. Some payors' provider agreements have a clause that requires the provider automatically to give the payor the lowest price that the provider offers to anyone else. Offering certain patients discounts for cash can violate this clause and endanger your relationship with the payor.

"Out-of-network" penalty waivers. Some managed care plans allow their patients to see physicians that aren't in the plan's network—but doing so costs the patient more than if the patient had selected a provider from within the network. Some practices attempt to attract patients by offering discounts that effectively eliminate this out-of-network penalty. These penalty "waivers" are often disguised as discounts for cash, Sarraille says. A pattern of offering these discounts may lead to charges of insurance fraud under some state laws, and several states have laws that specifically bar the practice, he warns.

State Laws May Bar or Restrict Discounts

Many states have laws that are similar to the federal antikickback law—that

is, they bar physicians from offering, paying, or accepting anything of value in return for the referral of a patient for medical services. The federal law applies only to physicians and requires that the medical services referred be reimbursable under a federally funded health care program.

But some state laws are broader, Sarraille explains. Many don't distinguish between services reimbursable under government-funded health insurance programs and self-pay or private-pay services. And some govern kickbacks made to patients, not just to physicians. Under these broad state antikickback laws, an out-of-network penalty waiver dressed up to look like a cash discount could be considered a kickback to induce the patient to choose your practice, Sarraille remarks. But if the cash discount is structured as a good-faith effort to reflect lower billing and collections costs associated with cash payments, it shouldn't be considered a kickback, he notes. ■

Insider Source

William A. Sarraille, Esq.: Sidley Austin Brown & Wood, 1501 K St. NW, Washington, DC 20005; (202) 202-736-8000.

ASK THE INSIDER

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Modifying Business Associate Contracts to Comply with Final Security Regs

Q We're still negotiating the business associate language required by HIPAA's privacy regulations for some of our vendor contracts. Now that HIPAA's security regulations are final, do we have to add the business associate provisions they require?

A No, says health care attorney Reece Hirsch, you aren't required to add the security regulations' business associate provisions yet. In fact, there are two key reasons why it may be a good idea to hold off including the additional business associate provisions:

You don't want to risk noncompliance with the privacy regs. In most cases, the HIPAA privacy regulations require you to already have specific provisions in your new business associate contracts. (If you already had a contract in place with your business associate as of last October, the regulations may give you more time, depending on the date of contract renewal.) But you don't have to comply with the security regulations until April 21, 2005. "You don't want to risk noncompliance with the privacy regulations just to get in a few paragraphs on security that aren't yet required,"

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says Hirsch. Contracts you sign now will most likely come up for renewal before April 21, 2005, the security regulations' compliance date. This would give you the opportunity to include the new business associate provisions later.

Some clarification still needed. Even if the privacy regulations' deadline isn't an issue, it might still be a good idea to hold off, Hirsch advises. The business associate requirements in the security regulations are fairly straightforward for the most part, adding only a few provisions to the privacy regulations' requirements. But, warns Hirsch, there's at least one requirement that must be clarified before you include it in a business associate contract—the obligation of a business associate to report “any security incident” that it becomes aware of.

The definition of “security incident” in the security regulations is very broad and includes things not typically defined as a security incident, such as attempted security breaches. Before the final security regulations came out, says Hirsch, most companies didn't consider an attempted security breach to be a security incident. Instead, most companies reported and responded only to actual breaches. But the definition of security incident in the final security regulations changes that.

The problem is that adding this definition to your contracts as it now stands will leave you in a bind. Business associates aren't likely to tell you about attempted breaches, no matter what's in the contract, says Robyn Meinhardt, a health care attorney specializing in information security. For example, a billing company may have hundreds of probes to its system each day—none of which result in an actual breach. The company probably won't notify you of each probe, says Meinhardt, because most organizations only pay serious attention to actual unauthorized entries.

This means that you won't be notified until someone actually gets into the billing company's system and gains access to electronic protected health information (EPHI). But if you know that the business associate isn't complying with the provisions and telling you about each attempt, warns Meinhardt, you must demand that it correct this contract violation. If it fails to do so, the security regulations require you to terminate the contract.

Experts are confident that HHS will provide more guidance on the security regulations' definition of security incident by the compliance date. Hirsch believes that HHS will probably draft sample language for business associate contracts that will meet the requirements of the security regulations. For now, though, you're probably better off leaving the provisions out.

Insider Says: You may not even need to include the business associate provisions required by the security regulations in all of your business associate contracts. The security regulations apply only to *electronic* PHI. If you give your business associate PHI that's not electronic (for example, paper copies of PHI), or if your business associate gets or creates PHI for you that's not electronic, the security regulations won't affect the business associate contract at all. ■

Insider Sources

Reece Hirsch, Esq.: Sonnenschein Nath & Rosenthal, 685 Market St., 6th Fl., San Francisco, CA 94105; rhirsch@sonnenschein.com.

Robyn Meinhardt, Esq.: Foley & Lardner, 1999 Broadway, Ste. 2270, Denver, CO 80202; rmeinhardt@foleylaw.com.

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For more information about the cases and/or laws referred to in this issue, show your lawyer the legal citations listed below.

- False Claims Act: 31 USC §3729 *et seq.* (1986).