How to comply with the Anti-Kickback Statute

By Patricia L. Yeatts, J.D., legal counsel, Medical Association of Georgia

The 1972 federal Anti-Kickback Statute was designed to protect patients and the federal health care programs (e.g., Medicare and Medicaid) from fraud and abuse. It prohibits the exchange or offer of anything of value in an effort to influence or reward the referral of federal health care program business. A violator of this statute can be charged with a felony and the Office of Inspector General (OIG) of the Department of Health and Human Services (HHS) has the authority to issue civil penalties in addition to the criminal penalties. And the law contains several safe harbor provisions (i.e., specific exceptions that do not violate the law), so compliance can be convoluted.

OIG and the Department of Justice (DOJ) recently both took action related to physician compensation arrangements under the Anti-Kickback Statute. The OIG and the DOJ have upped their efforts to punish physicians for Medicare and Medicaid violations. Therefore, it is important for physicians to have private counsel review any existing or impending compensation arrangements (e.g., medical directorships) to ensure that they comply with the law.

In June, OIG released an alert that addressed physician compensation arrangements. It stated that physicians who enter into compensation arrangements must ensure that these arrangements reflect fair market value for services they provide. A compensation arrangement may violate the Anti-Kickback Statute if even one purpose of the arrangement is to compensate a physician for his or her past or future referrals of public payer business. OIG also created a new specialty litigation unit that will be enforcing the False Claims Act by levying civil monetary penalties and excluding health care providers from participation in Medicare and Medicaid.

OIG recently settled claims under its Civil Monetary Penalties Law (CMPL) with 12 physicians who had entered into medical directorships and office staff arrangements with an imaging facility. OIG alleged that the arrangements constituted improper compensation under the Anti-Kickback Statute for a number of reasons, including that the payments were based on the physicians’ volume or value of referrals and did not reflect fair market value for the services performed.

OIG also said that the imaging center paid the salaries of the physicians’ front office staff. The physicians or physician groups involved were each fined between $50,000 and $200,000. In total, OIG collected more than $1.4 million in penalties from 11 physicians – while the twelfth physician was excluded from federal health care programs for three years.

This wasn’t the first time this imaging facility had been fined. In 2012, the facility entered into a $650,000 settlement under the False Claims Act concerning allegations that it employed physicians under fake medical director agreements to induce patient referrals. The imaging center placed its own full-time employees as “referral coordinators” in certain physicians’ offices under the pretext of assisting patients to obtain the images that were ordered. However, the government alleged that these employees were in fact performing office functions on behalf of the physician, which constituted improper remuneration that was meant to induce referrals. As part of the settlement, the imaging facility agreed to be excluded from federal health care programs for six years.

Following its June alert, OIG announced a five-year federal health care program exclusion of the owner of a Florida home health agency for alleged violations involving physicians and their spouses. OIG maintains that the home health agency violated the Anti-Kickback Statute by hiring eight physicians’ spouses for marketing jobs that involved few, if any, actual services in exchange for securing the physicians’ Medicare referrals. OIG held that the eight spouses were not bona fide employees of the home health agency and did not qualify for safe harbor protection.
DOJ also has announced a large anti-kickback settlement of $17 million with another home health agency in Florida. DOJ says the home health agency allegedly hired numerous physicians as medical directors to perform various jobs at seven locations. The facilities had several such medical directors under contract at any given time, paying each several thousand dollars monthly. DOJ alleges that the physicians were actually being paid for their patient referrals to the home health facilities – referrals that increased exponentially once the medical directors were put on the payroll.

What steps can physicians take to comply?

When a physician enters into any financial relationship or agreement, it is important to ensure that the agreements are compliant with all fraud and abuse laws – including the Anti-Kickback Statute. Examples of suspect financial relationships include physicians who invest in health care business ventures, physicians who are recruited by hospitals, physicians who serve as medical directors at multiple health care entities, and physicians who have relationships with pharmaceutical and medical device vendors (e.g., getting paid “consulting fees”). The following are examples of questions that physicians should ask when they enter into a financial agreement...

1. What services are you supposed to perform?
2. Will you actually be performing these services and are they necessary?
3. Will your compensation for these services be consistent with fair market value?
4. Will the number of referrals increase or greatly fluctuate as a result of this agreement?
5. Will you be required to document the actual services performed to receive compensation?

There are several good resources that physicians can reference when they consider entering into a financial relationship. For example, OIG has published A Roadmap for New Physicians that includes summaries of the fraud and abuse laws, including the Anti-Kickback Statute. It also contains tips and examples to help physicians avoid violating the statutes.

What are the exceptions or “safe harbors”?

HHS issued Safe Harbor Regulations, which set forth several legitimate arrangements that are exempt from Anti-Kickback Statute prosecution or sanctions if the safe harbor provisions are satisfied. And there are a lot of safe harbor exemptions, including employment arrangements, investment interests, personal services and management contracts, deductible and copay waivers, investments in group practices, ambulatory surgical centers (ASC), electronic health records (EHR), and space and equipment leases.

The safe harbor for personal services and management contracts is relevant when considering medical directorship arrangements. This exemption allows that an illegal “remuneration,” as provided by 1128B of the Anti-Kickback Statute, does not include any payments that are made by a “principal to an agent as compensation for the services of the agent” as long as the safe harbor requirements under 42 C.F.R. § 1001.952(d) are met. This would allow a physician to sign a contract as a medical director or enter into a similar arrangement as long as the safe harbor requirements are satisfied.

What are the penalties?

There are criminal and civil penalties for violating the Anti-Kickback Statute. Criminal penalties include fines of up to $25,000 per violation and a prison term of up to five years per violation. OIG may also ban providers from participating in federal health care programs under their exclusion authorities, and it can impose additional civil monetary penalties of up to $50,000 per violation plus an assessment of up to three times the amount of the payment.

It is important to be familiar with all federal and state fraud and abuse laws, especially the Anti-Kickback Statute. It is also imperative for physicians to seek private legal counsel to review existing or pending compensation arrangements or financial relationships – such as medical directorships – to ensure that they comply with the law. MAG members can contact Yeatts at pyeatts@mag.org with questions or for referrals for private attorneys.

References

1 Anti-Kickback Statute § 42 U.S.C. § 1320a-7b (1972)
3 Id.
4 Id.