

Supplier Discounts Offered to Healthcare Providers is Risky Business

June 7, 2010

While the debates surrounding healthcare reform polarized the country earlier this year, there was one reform everyone agreed was necessary: Rooting out fraud and abuse from Medicare, Medicaid, and other federal healthcare programs. As a result of that agreement, additional resources were allocated to discover and prosecute fraud. Accordingly, healthcare facilities and suppliers need to be especially vigilant that their actions are not violating state or federal law. For example, healthcare facilities receiving discounts from suppliers should familiarize themselves with the current legal and regulatory climate surrounding supplier discounting practices. The acceptance of an improper supplier discount could result in legal sanctions against the facility and the supplier under both federal and state law. The acceptance of improper discounts could potentially violate the Federal Anti-Kickback Statute (the "AKS"), and result in criminal penalties, civil monetary sanctions and/or exclusion from federal healthcare programs.

The AKS makes it a criminal offense to knowingly or willfully pay, offer, solicit or receive anything of value in exchange for the ordering or purchasing of items or referrals of patients for services reimbursable under Medicare or Medicaid.¹ The AKS is violated where remuneration (i.e. the transfer of anything of value) is paid purposefully to induce or reward referrals of items or services payable by Medicare or Medicaid.

When medical suppliers, including, for example, portable x-ray suppliers, offer a discount to a healthcare provider for services that are ultimately reimbursed by a federal healthcare program, the discount is subject to scrutiny under the AKS unless it meets the AKS Discount Exception (the "Exception") or the AKS Discount Safe Harbor (the "Safe Harbor"), each discussed below. Discount arrangements with certain healthcare providers, such as skilled nursing facilities that are reimbursed by the Medicare or Medicaid at a per diem rate, could be particularly suspect under the AKS. According to the Federal government, because the per diem reimbursement rate incentivizes healthcare providers to shop for the lowest-cost service provider, such discounts offered by a supplier could potentially violate the AKS, exposing both parties to civil and criminal penalties.

The Discount Exception and Safe Harbor

To avoid these potential consequences, suppliers and healthcare providers must carefully review the rules governing the Exception and the Safe Harbor. These rules have evolved over the last decade and, while the rules continue to need some clarification, healthcare providers are now able to structure appropriate supplier discounts with increased confidence that they do not violate the law. Under the Exception, for example, the AKS does not apply to a discount if the provider properly discloses the reduction in price and appropriately reports the reduction to a federal healthcare program.² Thus, the Exception recognizes that discounts benefit the federal healthcare program in general, but only if the discount is passed on to the Federal government.

The Safe Harbor similarly requires proper documentation of discounts by suppliers and healthcare providers and, upon request, disclosure of discounts to the Federal government. The Safe Harbor applies only to "discounts," defined as a reduction in the amount a buyer is charged for an item or service based on an "arms-length transaction." Where discounted prices are substantially below market costs, an inference may arise that the transaction is not arms-length, and the healthcare provider and the supplier may be subject to additional scrutiny under the AKS.

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The Safe Harbor does not apply to the following types of discounts: (1) cash payment or cash equivalents; (2) supplying one good or service without charge or at a reduced charge to induce the purchase of a different good or service, unless the goods and services are reimbursed by the same federal healthcare program using the same methodology and the reduced charge is fully disclosed to the federal healthcare program and accurately reflected where appropriate; (3) a reduction in price applicable to one payer but not to Medicare, Medicaid or other federal healthcare programs; (4) a routine reduction or waiver of any coinsurance or deductible amount owed by a program beneficiary; (5) warranties; (6) services provided in accordance with a personal or management services contract; or (7) other remuneration, in cash or in kind, not explicitly fitting within the definition of a discount set forth above. These categories of discounts may be especially problematic under the AKS, and a healthcare provider should consider restructuring such discounts or passing on the cost savings to the Federal government in order to avoid potential penalties under the AKS.

Best Practices

Supplier discounts must be carefully reviewed and structured appropriately to avoid violating the AKS. For example, any discount arrangement between a supplier and a healthcare provider should clearly establish the discounted price for the services. The healthcare provider must not be required to use the supplier exclusively for the discounted services, and the agreement cannot prevent the healthcare provider from entering into contracts with other suppliers. The agreement or arrangement can also not require that the healthcare provider refer third-party business, such as Medicare or Medicaid patients, to the supplier in return for the discounts.

Discounts that are below a supplier's cost of providing services are particularly suspect under the AKS and should be avoided. The discount itself should not be limited to Medicare Part A services, but instead must also be offered to Medicare Part B services (or vice-versa). In addition, healthcare providers should request documentation of the supplier's reasons for offering a discount.

If a supplier's discount sounds "too good to be true," healthcare providers are advised to thoroughly inspect and document the supplier's reasons for offering a discount. If in doubt over whether a discount is permissible, the provider should talk to an attorney who is an expert in this area of the law prior to acceptance. Given the criminal and civil penalties of the AKS and related statutes, and the Federal government's recent increase in investigations and prosecutions of healthcare fraud, healthcare providers and suppliers must take extra precautions to make sure the discounts they may provide or receive are properly structured and appropriately disclosed.

¹ Michigan also has its own corollary to the AKS (MCL § 400.604 and MCL § 752.1004), though the language is different than the federal AKS. The Michigan statutes apply to payments made by any health insurer or health plan. A violation of the state statute is a felony, punishable by imprisonment for not more than 4 years, a fine of not more than \$50,000, or both.

²Despite the Exception and the Safe Harbor, it is still possible that a supplier could violate section 1128(b)(6)(A) of the Social Security Act (known as the "Usual and Customary Rule") if its request for payment under Medicare or Medicaid is substantially in excess of such supplier's usual charges or costs. A severe discount on charges to Skilled Nursing Facilities may result in the supplier's usual and customary cost being lower than the charge for services billed directly to Medicare or Medicaid. This could potentially lead to the supplier's exclusion from federal healthcare programs. The

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federal government, however, has not traditionally used this rule as a way to prohibit suspected AKS violations.