Avoid Kickbacks and Inducements When Marketing to Patients Covered by a Government Health Care Program

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AVOID KICKBACKS AND INDUCEMENTS WHEN MARKETING TO PATIENTS COVERED BY A GOVERNMENT HEALTH CARE PROGRAM

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It is a "tried and true" marketing activity in the real world. A business will offer a gift to induce a prospective customer to walk through the door. Or a business will institute a "refer a friend" program in which an existing customer will receive a gift in exchange for "referring a friend." Unfortunately, pharmacies are not in the real world.

Unlike auto parts stores or widget companies, pharmacies must deal with myriad anti-fraud statutes that restrict what they can do with existing and prospective customers. Let me explain. The Medicare anti-kickback statute states that a provider cannot give anything of value to a person in exchange for the referral of a Medicare beneficiary, or in exchange for "arranging for the referral" of a Medicare beneficiary. T his is a criminal statute, meaning that if you violate it, you may end up honing your gardening skills in Club Fed. The federal beneficiary inducement statute states that a provider cannot give anything of value to a Medicare beneficiary to induce the beneficiary to purchase/rent a Medicare-covered item from the provider. There is a "nominal value" exception to the inducement statute which states that a provider can give a gift to a beneficiary so long as the gift has a retail value of $10 or less; and if a beneficiary receives multiple gifts from a provider, over a 12 month period the multiple gifts (in the aggregate) cannot have a retail value in excess of $50. The gift needs to be a non-cash equivalent item (i.e., it should not be a gift card or gift certificate). The inducement statute is a civil statute, meaning that if you violate it, you may have to pay a lot of money to the government.

So what does all of this mean for the pharmacy? Let me give you some examples. A pharmacy ("ABC Pharmacy") cannot advertise that if a Medicare beneficiary switches from his current pharmacy to ABC, then ABC will give the beneficiary an $89 Tom Brady football jersey. However, ABC can offer to give a $9.99 New England Patriots coffee mug to the beneficiary if he switches to ABC. Let's say that ABC opens up a new location and sponsors a week-long open house. ABC wishes to have a drawing in which the winner will receive an $800 iPad. Assume that about 300 people put their names in the hopper. Further assume that any person in the community can register for the drawing. What the participant is being given by ABC is the chance to win. What is that chance worth? The answer is $2.66, which is well below $10. The risk of this type of open house drawing being considered to be a prohibited inducement is quite low. On the other hand, this type of drawing would have a high degree of risk if, for example, ABC decides to have an open house (and a drawing) once a quarter or the drawing is limited to physicians and other potential referral sources.

Let us now look at "refer a friend." ABC wishes to promote to its existing customers that if they refer a friend, then ABC will give the referring customer a $25 Tom Brady t-shirt. The beneficiary inducement statute does not come into play because the gift is being given to an existing customer......not to a prospective customer. However, the anti-kickback statute comes into play.

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