



# MARKETING TRAPS FOR HEALTHCARE PROVIDERS

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# WARNING

Marketing strategies that are common in other industries are illegal in the healthcare industry!

# BEWARE RELEVANT LAWS

- Fraud and abuse laws
  - Anti-Kickback Statute
  - Civil Monetary Penalties Law
  - Ethics in Patient Referrals Act (“Stark”)
  - Eliminating Kickbacks in Recovery Act
  - Medical Practices Act
- HIPAA and patient privacy
- Consumer protection laws
- Telemarketing laws
- State laws
- Others?

Application may depend on:

Parties involved

Types of items or services

Govt or private payers

Intent



# FREEBIES OR DISCOUNTS TO PATIENTS

- Gifts to patients (e.g., gift basket, gift card, basket of products for new mothers, etc.)
- “Refer a friend” incentive
- Free or discounted service (e.g., free screening)
- Free equipment, supplies or drugs
- Free meals
- Free transportation
- Parking reimbursement
- Waiver of copay or deductible
- Write offs
- “Refer a friend” incentive
- Paying premiums
- Anything else of value that does not reflect fair market value (“FMV”)

May create problems if it would induce patient to order or receive additional items or services

# FREEBIES OR DISCOUNTS TO PATIENTS

Govt beneficiaries: may offer free or discounted items if:

- Remuneration is not likely to influence the beneficiary to order or receive items or services payable by federal or state health care program.  
(42 USC 1320a-7a(a)(5))
- Item or service is of low value, i.e.,
  - Each item or service is less than \$15, and
  - Aggregate is less than \$75 per patient per year.

(OIG Bulletin, *Offering Gifts and Inducements to Beneficiaries* (8/02); 66 FR 24410-11; OIG, *Policy Statement Regarding Gifts of Nominal Value* (12/7/16))

# FREEBIES OR DISCOUNTS TO PATIENTS

Govt beneficiaries: may offer free or discounted items if:

- Financial need
  - Good faith determination that beneficiary has financial need or after reasonable collection efforts have failed;
  - Not offered as part of any advertisement or solicitation;
  - Not tied to provision of other federal program business; and
  - Reasonable connection between item or service and medical care of beneficiary.

*(42 CFR 1320a-7a(i); 42 CFR 1003.110; see also OIG Bulletin, Hospital Discounts Offered to Patients Who Cannot Afford to Pay Their Hospital Bills)*

# FREEBIES OR DISCOUNTS TO PATIENTS

Govt beneficiaries: may offer free or discounted items if:

- Incentives to promote delivery of preventative care as determined by HHS in regulations.
- Payments meeting AKS safe harbor.
- Any other remuneration that promotes access to care and poses a low risk of harm to patients and federal health care programs.
- Retailer coupons, rebates or rewards offered to public.
- Certain other situations.

(42 USC 1320a-7a(i); 42 CFR 1003.110)



# FREE TESTS OR SCREENING

## Govt beneficiaries:

- OIG has approved free screening services or tests (e.g., free blood pressure check by hospital) where:
  - Not conditioned on the use of any items or services from any particular provider.
  - Patient not directed to any particular provider.
  - Patient not offered any special discounts or follow-up services.
  - If test shows abnormal results, visitor is advised to see his or her own health care professional.

(Adv. Op. 09-11, but note that *Advisory Opinions are not binding* )

- Some services may fit within CMPL exception for:
  - Certain preventative services.
  - Services that promote care and pose low risk of fraud or abuse.
- Independent foundation or entity may be able to provide such services, but be careful.

# FREE TRANSPORTATION

Govt beneficiaries: may offer transportation if:

- Not likely to induce services.
- Promotes access to care and poses low risk of fraud and abuse.
- < \$15 per trip and \$75 per patient per year.
- AKS safe harbor applicable to local transportation or shuttle service. (42 CFR 1001.952(bb))
  - Check specific requirements.

# WAIVING COPAYS OR DEDUCTIBLES; INSURANCE-ONLY BILLING

- Govt beneficiaries: may waive or discount copays or deductibles if:
  - Fit within AKS safe harbor applicable to PPS inpatient services.  
(42 CFR 1001.952(k))
  - Waive or discount after
    - good faith determination that patient is in financial need, or
    - unable to collect after reasonable collection efforts.
  - Not offered as part of any advertisement or solicitation;
  - Do not routinely waive copays or deductibles; and  
(42 USC 1320a-7a(i)(6); 42 CFR 1003.110; *see also* Adv. Op. 12-16)
- Private payers: likely violates private payer agreements.

# PROMPT PAY DISCOUNTS

- Govt beneficiaries: OIG has approved prompt pay discounts if:
  - Amount of discount relates to avoided collection costs.
  - Offered to all patients for all services without regard to patient's reason for admission, length of stay, or DRG.
  - Not advertised so as to solicit business.
  - Notified private payers of program.
  - Costs not passed to Medicare, Medicaid or other payers.

(56 FR 35952; Adv. Op. 08-3)

- Private pay patients: may violate payer agreements.

# SELF-PAY DISCOUNTS

- Providers may generally charge different patients different amounts.
  - Negotiated rates for payers.
  - Negotiated rates or discounts for self-pay patients.
- Limitations:
  - Some states limit ability to charge different rates.
    - Charging insurers more than self-pay patients.
    - Charging self-pay patients more than insurers.
  - Perhaps facilities that submit cost reports.
    - See Provider Reimbursement Manual 15.1 at § 2203 (charge structure should be “applied uniformly”).
  - FQHCs.
    - See MLN, *Federally Qualified Health Centers*, ICN 006397 (1/18) (“Charges must be uniform for all patients”).
  - In some states, payer contracts may contain “most favored nation” clauses requiring providers to give their best rates.
    - Self-pay or other discounts may affect “usual and customary” charges.

# MEDICARE “SUBSTANTIALLY IN EXCESS” RULE

- OIG may exclude provider who charges Medicare “substantially in excess” of the provider’s usual charges.

(42 USC 1320a-7(b)(6); 42 CFR 1001.701(a)(1)).

- Test: whether the provider charges more than half of its non-Medicare/Medicaid patients a rate that is lower than the rate it charges Medicare.
- OIG has stated that it would not use the rule to exclude or attempt to exclude any provider or supplier that provides discounts or free services to uninsured or underinsured patients.

(See OIG Adv. Op. 15-04; OIG Letter dated 4/26/00, available at <http://oig.hhs.gov/fraud/docs/safeharborregulations/lab.html>)

# CASH INSTEAD OF BILLING PAYERS

- Medicare and private payers generally prohibit billing patients for covered services (except for copays or deductibles).

But...

- HITECH Act prohibits provider from using or disclosing PHI if the patient (or other person) pays for the episode of care and instructs provider not to submit to payer unless law requires disclosure.

(42 CFR 164.522(a)(1)(vi))

- Exception to Medicare payment rule.
- Overrules contrary contract language.
- Does not apply where state law requires the disclosure, e.g., Medicaid or private payers.

(78 FR 5628)

# DRAWING FOR A PRIZE

- Govt beneficiaries:
  - Maybe okay if value of chance to win is nominal (e.g., value of prize ÷ number of participants).
  - More suspect if have to purchase care for chance to win.
  - No guarantees.
- Private pay patients:
  - Check state laws, including:
    - Sweepstakes
    - Raffle rules
    - Lotteries



# FREEBIES OR DISCOUNTS TO PROVIDERS OR OTHER REFERRAL SOURCES

- “Refer a friend” offers (e.g., free gift card, free x-box, discounted service, etc.)
- Thank you gifts.
- Support or subsidies. May constitute:
- Kickbacks in exchange for receiving or referring services.
- Inducements for patient services.
- Free use of hospital space, equipment or personnel.
- Professional courtesies.
- Paying more than FMV for services.
- Paying for services that are not needed.
- Others....

May constitute:

- Kickbacks in exchange for receiving or referring services.
- Inducements for patient services.

# FREEBIES TO PROVIDERS OR OTHER REFERRAL SOURCES

- Referral source for govt program business:
  - Stark applies if involves physician or family member unless fit within safe harbor. (See 42 CFR 411.357)
  - AKS and CMPL apply if “one purpose” is to induce referrals unless fit within safe harbor. (See 42 CFR 1001.952)
  - Applies to giver or receiver.
- Referral source for private pay business:
  - OIG has cautioned that carving out govt programs from specific program may not protect the parties if there are other referrals for federal programs between parties.
  - May violate state laws.

# SUBSIDIZING OTHER PROVIDER'S MARKETING EXPENSES

- Referral source for govt program business:
  - “Are you marketing their practice or yours?”
  - Stark applies if and to extent marketing non-employed physician’s practice; possible safe harbors include:
    - Non-monetary compensation < \$416+/year.
    - Recruitment safe harbor.  
(42 CFR 411.357)
  - AKS and CMPL apply if “one purpose” is to induce referrals from the subsidized practitioners.

# LISTING NON-EMPLOYED PROVIDERS ON HOSPITAL'S WEBSITE

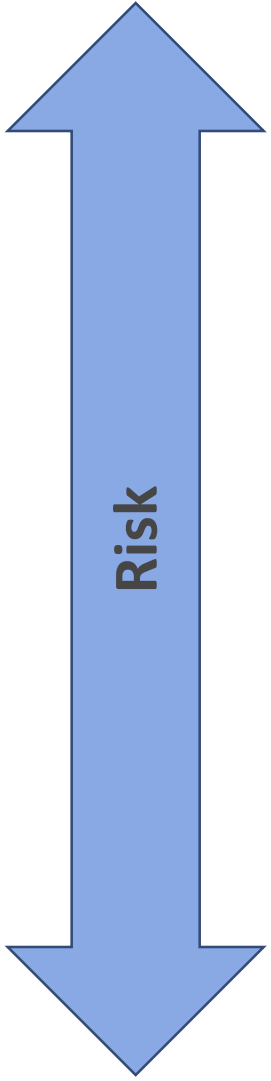
- Referral sources for govt program business:
  - Stark applies to listing physicians who refer business.
    - Simple listing of medical staff on hospital's website is an "incidental benefit" excepted from Stark.
    - Advertising or promoting a physician's private practice on a hospital website is not an excepted incidental benefit, so hospital would need to fit within another Stark exception or charge fair market value for advertising.

(69 FR 16113)

# JOINT MARKETING WITH OTHER PROVIDERS

- Referral source for govt program business:
  - Stark applies if marketing non-employed physician's private practice; possible safe harbors include:
    - Payments by a physician at fair market value.
    - Non-monetary compensation < \$416+/year.
    - Recruitment safe harbor.  
(42 CFR 411.357)
  - AKS and CMPL apply if “one purpose” is to induce referrals from the other practitioners.

# JOINT MARKETING WITH OTHER PROVIDERS



- Marketing physician's private practice?
  - Does the joint marketing...
    - Focus on hospital service or physician's practice?
    - Contain physician's private contact info?
    - Contain info about physician's private practice?
    - Promote physician's services away from hospital?
- Marketing hospital's practice?

# JOINT MARKETING WITH OTHER PROVIDERS

- Make sure each party pays their fair share.
  - Relative advertising time benefiting that party.
  - Relative advertising space benefiting that party.
  - Relative focus of the advertisement.
- Make sure arrangement is documented appropriately.
  - Practitioner agrees to reimburse or pay the hospital (or other provider) for respective share.
  - Parties each contract separately with marketing company.

# PAYING INDEPENDENT CONTRACTORS BASED ON COMMISSION

- Govt beneficiaries or programs:
  - To fit within AKS safe harbor, compensation must:
    - Be set in advance
    - Not based on the volume or value of referrals.

(42 CFR 1001.952(d))

- OIG: “We are aware of many examples of abusive practices by sales personnel who are paid as independent contractors.... We believe that if individuals and entities desire to pay a salesperson on the basis of the amount of business they generate, then to be exempt from civil or criminal prosecution, they should make these salespersons employees where they can and should exert appropriate supervision for the individual’s acts.” (54 FR 3093).



# “WHITE COAT” MARKETING



# “WHITE COAT” MARKETING

- Govt program beneficiaries or business:
  - OIG has expressed concern over advertising through which a trusted healthcare provider recommends a product or service.
  - Lower risk where marketing is:
    - Not by healthcare professionals.
    - Accurate.
    - Not deceptive.
    - Passive.
    - Provided in general broadcast media, not targeted to the particular patient.

(OIG Adv. Op. 02-12)
- Private pay business:
  - Beware deceptive advertising.

# HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (“HIPAA”)



# HIPAA

- Generally cannot use or disclose protected health information (“PHI”) without the patient’s written, HIPAA-compliant authorization unless exception applies.
  - Applies to internal use as well as external disclosures, including marketing your own patients.
  - Applies to any individually identifiable health info, including but not limited to:
    - Names, addresses, phone numbers, account numbers, URLs, and IP addresses;
    - Photos, images, or videos; and
    - Any info that may reasonably identify the individual.

(45 CFR 160.103 and 164.500 et seq.)

# HIPAA: TREATMENT V. MARKETING

## Treatment or Operations

✓ **Does not require authorization.**

- Communicating for purposes of treatment.
- Communicating about your own products or services.

unless remuneration given for the communication.

- Face-to-face communication.
- Promotional gift of nominal value.

(45 CFR 164.501 and .506)

## Marketing

✓ **Requires authorization.**

- Communicating about another entity's product unless for treatment and no remuneration given.
- Communicating about your own product or service if remuneration is given for communication.

(45 CFR 164.501, .506, and .508)

# HIPAA: FUNDRAISING

- Subject to certain conditions, a covered entity may disclose the following PHI to a business associate or institutionally related foundation for purpose of raising funds for its own benefit without an authorization:
  - Name, address, contact info, age, gender and birth date;
  - Dates of healthcare provided to the individual;
  - Department of service information;
  - Treating physician;
  - Outcome information; and
  - Health insurance status.
- May only disclose the minimum necessary.

(45 CFR 164.514(f)(1); 78 FR 5618-22)

# HIPAA: FUNDRAISING

- To use PHI for fundraising, covered entity:
  - Must include statement notifying individual of fundraising in covered entity's notice of privacy practices.
  - With each fundraising communication, must provide clear and conspicuous opportunity to opt out of fundraising.
    - Method for opting out cannot cause undue burden or more than nominal cost (e.g., toll-free number, e-mail).
  - May not condition treatment or payment on participation in fundraising.
  - May not make fundraising communications to individuals who opt out.
  - May notify individuals of method to opt back in.

(45 CFR 164.512(f)(1))

# HIPAA: BUSINESS ASSOCIATES

- If covered entity contracts with outside entity (“business associate”) to help with marketing efforts involving PHI, parties must execute a business associate agreement (“BAA”).
  - BAA requires business associate to comply with certain HIPAA requirements.
  - BAA may include additional requirements.
- Business associate must execute BAA with any subcontractors that the business associate uses.
- Business associates and subcontractors must comply with relevant HIPAA requirements regardless of whether a BAA is executed.

(45 CFR 164.502 and .504)



# HIPAA: SECURITY

- Covered entities and business associates must implement specified safeguards to protect e-PHI.
  - Administrative safeguards
  - Physical safeguards
  - Technical safeguards, including “a mechanism to encrypt [e-PHI] whenever deemed appropriate.”

(45 CFR 164.308-.312)

- *Are your e-mails or texts to client compliant with HIPAA security rule?*

# E-MAILS OR TEXT

- Remember other laws affecting e-mail or text marketing, e.g.,
  - Controlling the Assault of Non-Solicited Pornography and Marketing Act (“CAN-SPAM”)
    - Affects content
    - Affects manner in which e-mail sent
    - Requires unsubscribe options(15 USC 7701 et seq.)
  - Telephone Consumer Protection Act (“TCPA”)
    - Discussed below
  - State laws

# RESPONDING TO NEGATIVE REVIEWS

***Just because the patient discloses  
info does not mean that you can!***



**FOR IMMEDIATE RELEASE**

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**Contact: HHS Press Office**

**202-690-6343**

[media@hhs.gov](mailto:media@hhs.gov)

[archive](#) →

## Dental Practice Pays \$10,000 to Settle Social Media Disclosures of Patients' Protected Health Information

Elite Dental Associates, Dallas ("Elite") has agreed to pay \$10,000 to the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services and to adopt a corrective action plan to settle potential violations of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule. Elite is a privately-owned dental practice located in Dallas, Texas, providing general, implant, and cosmetic dentistry.

On June 5, 2016, OCR received a complaint from an Elite patient alleging that Elite had responded to a social media review by disclosing the patient's last name and details of the patient's health condition. OCR's investigation found that Elite had impermissibly disclosed the protected health information (PHI) of multiple patients in response to patient reviews on the Elite Yelp review page. Additionally, Elite did not have a policy and procedure regarding disclosures of PHI to ensure that its social media interactions protect the PHI of its patients or a Notice of Privacy Practices that complied with the HIPAA Privacy Rule. OCR accepted a substantially reduced settlement amount in consideration of Elite's size, financial circumstances, and cooperation with OCR's investigation.

"Social media is not the place for providers to discuss a patient's care," said OCR Director, Roger Severino. "Doctors and dentists must think carefully about patient privacy before responding to online reviews."

# RESPONDING TO NEGATIVE REVIEWS

- Do NOT disclose protected health info in online response.
  - HIPAA prohibits unauthorized use or disclosure of protected health info, including:
    - Fact that a person is or was a patient.
    - Info that could reasonably identify the patient.
  - There is no HIPAA exception for responding to a patient complaint online.
  - Patient does not waive HIPAA privacy rights by posting info online.

# RESPONDING TO NEGATIVE REVIEWS

- Options for responding:
  - Ignore it.
  - Encourage and emphasize positive reviews.
  - Contact patient to resolve concerns or obtain consent to respond.
  - Respond generically.
    - Do not confirm or deny that complainant was a patient, or include any info about the patient or patient encounter.
    - May explain policies or practices without reference to patient.
  - Contact online company to request removal of complaint.
  - If review is defamatory, may threaten lawsuit.

# TELEMARKETING



# TELEMARKETING

- Telephone Consumer Protection Act (“TCPA”)
    - Generally prohibits prerecorded calls to a residence or prerecorded or autodialed calls to a wireless number without recipient’s prior express consent.
    - Exempts prerecorded healthcare related calls to residential and likely wireless numbers.
      - Such calls are subject to HIPAA
- (47 USC 227; 47 CFR 64.1200 et seq.; FCC Order 12-21)
- Does not apply to autodialed or prerecorded non-telemarketing calls, e.g., non-profit organizations, political purposes, or other non-commercial purposes.



# TELEMARKETING

- Telemarketing Consumer Fraud and Abuse Prevention Act and FCC Telemarketing Sales Rules.
  - Prohibits deceptive and abusive telemarketing practices, including pre-recorded calls without recipient's prior written consent.  
(15 USC 6101 et seq.; 16 CFR 310.1 et seq.)
- Anti-Solicitation Statute
  - Applies to DMEPOS (discussed below)  
(42 USC 1395m(a)(17); 42 CFR 424.57)
- Additional state laws may apply.

# FALSE OR DECEPTIVE ADVERTISING

# FALSE OR DECEPTIVE ADVERTISING: MEDICAL PRACTICE ACTS

- Wyoming Medical Practices Act prohibits:
  - Advertising the practice of medicine in a misleading, false or deceptive manner.
  - Making false or misleading statements regarding the licensee's skill or the efficacy or value of his treatment.
  - Obtaining any fee or claim for payment of a fee by fraud or misrepresentation.
  - Engaging in conduct intended to or likely to deceive, defraud or harm the public.
  - Representing that a manifestly incurable disease or condition can be permanently cured or that any disease or condition can be cured by a secret method, procedure, treatment, medicine or device if the representation is untrue.

(WSA 33-26-402)

# FALSE OR DECEPTIVE ADVERTISING: CONSUMER PROTECTION ACTS

- Federal Trade Commission Act
  - Prohibits false, deceptive or misleading advertising.
- Wyoming Consumer Protection Act prohibits false or deceptive actions in consumer transactions, e.g.,:
  - Represents that merchandise has a source, origin, sponsorship, approval, accessories or uses it does not have.
  - Represents that he has a sponsorship, approval or affiliation he does not have.
  - Represents that merchandise is of a particular standard, grade, style or model, if it is not.
  - Makes false or misleading statements of fact concerning the price of merchandise.

(WSA 49-12-105)

# FALSE OR DECEPTIVE ADVERTISING: TESTIMONIALS AND ENDORSEMENTS

- FTC has issued guides concerning the use of endorsements and testimonials in advertising.

(16 CFR part 255)

- “[T]estimonials of patients as to the physician’s skills or the quality of the physician’s professional services tend to be deceptive when they do not reflect the results that patients with conditions comparable to the testimoniant’s condition generally receive. Objective claims regarding experience, competence, and the quality of physicians and the services they provide may be made only if they are factually supportable. Similarly, generalized statements of satisfaction with a physician’s services may be made if they are representative of the experiences of that of physician’s patients.”

(AMA CEJA Ethics E-5.02)

# QUESTIONS?



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