

OIG Provides New Guidance on Free Transportation

Michael F. Schaff, Esquire*

Alyson M. Leone, Esquire

Wilentz Goldman & Spitzer PA

Woodbridge, NJ

We often hear from our physician clients that they would like to provide their patients with an easy way to travel to their facility for medical procedures. Providing free transportation to patients or their family members, however, is fraught with regulatory peril. On March 6, 2009, the Department of Health and Human Services Office of Inspector General (OIG) issued Advisory Opinion 09-01¹ providing clarification on the provision of complimentary local transportation by healthcare facilities.

Law

In general, providing free transportation services to patients implicates both the Civil Monetary Penalty (CMP) law² and the Anti-Kickback Statute.³ The CMP law provides for a penalty against any person who “offers or transfers remuneration to any individual . . . to influence such individual to order or receive from a particular provider . . . any item or service for which payment may be made, in whole or in part, under [Medicare or Medicaid].” A violation of the CMP law may result in a penalty of up to \$10,000 for each item or service, an assessment of up to three times the amount claimed for each such item or service, and exclusion from participation in Medicare and Medicaid. The Anti-Kickback Statute provides that “whoever knowingly and willfully offers or pays [or solicits or receives] any remuneration . . . to induce such person—to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . . shall be guilty of a felony, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.”

Notwithstanding the CMP law, legislative history shows that Congress did not intend to impose penalties against people offering free local transportation of nominal value. The OIG has determined that complimentary transportation that has a value of no more than \$10 per trip or \$50 per patient in the aggregate annually is of “nominal value,” and therefore is not a violation of the CMP law.⁴

New Guidance

The recent OIG Advisory Opinion analyzed complimentary local transportation provided by a skilled nursing facility for friends and families of its residents. The OIG identified several general observations that are relevant in examining free transportation services offered by providers or suppliers that furnish items or services payable by federal healthcare programs to potential referral sources, including beneficiaries who self-refer:



- **Transportation offered in a manner related to referrals.** The selection of patients related to the volume or value of federal healthcare program business is suspect.
- **Luxury or specialized transportation.** The OIG specified that luxury or specialized transportation such as limousines, airline tickets, or ambulance transports is more likely to be an improper inducement.
- **Geographic area for transportation.** Local transportation is less suspect than transports that are a longer distance. In particular, free transportation that is used to expand the provider's historical service area is problematic.
- **Availability of other means of transportation.** The OIG will consider whether services are offered in areas lacking public transportation or areas without affordable alternatives.
- **Marketing or advertising.** There is a greater risk that the free transportation is being offered as an inducement for referrals when it is marketed or advertised.
- **Transportation destination.** Free transportation to or from the provider's facility may be acceptable, but free transportation to a different provider is suspect.
- **Treatment of the costs of the free transportation.** The costs of the free transportation should be borne by the provider and not shifted to federal healthcare programs.
- **Other characteristics.** Where federally payable items and services will be provided to passengers, it raises concerns that the provider could be using the free transportation services to gain access to beneficiaries, possibly to provide services that are unnecessary or inappropriate.

The OIG cautioned that although free transportation may have important and beneficial effects on patient care, it may also be a part of fraudulent or abusive schemes that lead to inappropriate

steering of patients, overutilization, and the provision of medically unnecessary services. Therefore, arrangements involving free transportation must be evaluated on a case-by-case basis and may require the review of additional factors.

In concluding that free transportation provided by the skilled nursing facility to friends and family of its residents would not constitute grounds for the imposition of civil monetary penalties under the CMP law or administrative sanctions under the Anti-Kickback Statute, the OIG enumerated the following reasons:

- The transportation would not be for residents to obtain federally payable items or services from the nursing facility or for the benefit of the nursing facility's referral sources.
- The free services are provided to friends and families of all residents, not selectively to targeted populations of federal healthcare program beneficiaries.
- The type of transportation—a van owned by the nursing home and driven by its employee—is reasonable.
- The services will only be offered locally.
- The services will only be advertised locally and marketing will be reasonably limited.
- The availability of local public transportation is limited and a toll bridge separates the nursing facility from part of its primary service area.
- The transportation is consistent with the nursing home's mission to provide residents with quality care through increased companionship.
- The cost for the services will not be claimed on any cost report or claim, or otherwise shifted to any federal healthcare program.

Summary of Previous Guidance

On November 17, 2000, the OIG issued Advisory Opinion 00-7,⁵ stating that it would not impose a penalty under the CMP law or sanctions under the Anti-Kickback Statute against a hospital providing free transportation services to certain patients who have been referred to the hospital for extended courses of treatment. In the Advisory Opinion, the OIG identified several risk factors in determining whether free transportation violated the law, including many of the same factors they included in their recent Advisory Opinion.

In August 2002, the OIG issued a Special Advisory Bulletin on offering gifts and other inducements to beneficiaries to advise the healthcare industry as to the scope of acceptable practices under the CMP law. In the Bulletin, the OIG stated that it was considering soliciting public comment on the possibility of a regulatory "safe harbor" exception under the CMP law for complimentary local transportation offered to beneficiaries residing in the provider's primary service area. The exception would permit some free, local transportation of greater than nominal value. However, it would not allow luxury or specialized transportation including limousines or ambulances.

On December 9, 2002, the OIG solicited public comments on the possible development of an exception under the CMP law for complimentary local transportation greater than nominal value.⁶ Specific areas of interest that the OIG sought comment on included many of the same factors set forth in their current Advisory Opinion. To date, no exception under the CMP law for complimentary local transportation has been adopted.

Also on December 9, 2002, the OIG issued a letter addressing complimentary local transportation provided by a hospital. In the letter, the OIG reiterated that free local transportation provided by a hospital that costs no more than \$10 per trip and \$50 per patient in the aggregate on an annual basis does not violate the CMP law. Again, the OIG stated that it was considering developing a regulatory exception for some complimentary local transportation of greater than nominal value offered to beneficiaries residing in a provider's primary service area. The OIG clarified in the letter that until it adopts an exception or indicates that it does not intend to adopt such exception, the OIG would not impose administrative sanctions for violations of the CMP law in connection with hospital-based complimentary transportation programs that were in existence prior to August 30, 2002, provided they met certain specifications.

For a more detailed discussion of previous guidance regarding the provision of complimentary local transportation, please see our article titled "Can ASCs Provide Free Transportation?," published in the June 2006 issue of the *Physician Organizations* newsletter.

Conclusion

Although the OIG had previously issued guidance on the provision of free local transportation by hospitals and transportation that does not exceed nominal value, the OIG's most recent Advisory Opinion provides much-anticipated guidance to non-hospital-based providers. Ambulatory surgery centers and physician practices may consider whether structuring their transportation programs within the parameters of the OIG's list of general observations would be sufficient to satisfy both the CMP law and the Anti-Kickback Statute. Before implementing a free transportation program, however, facilities and practitioners are urged to consult their own healthcare attorney concerning their situation and any specific legal questions that they may have to evaluate the benefits and risks of such a program.

**Michael F. Schaff is a shareholder and chair of the healthcare and corporate departments and Alyson M. Leone is an associate at Wilentz Goldman & Spitzer PA, Woodbridge, NJ.*

1 Advisory Opinion No. 09-01 (Dep't of Health and Human Servs. Office of Inspector Gen. Mar. 6, 2009).

2 42 U.S.C. 1320-7a(a)(5).

3 42 U.S.C. 1320-7b(b).

4 65 Fed. Reg. 24400, 24411 (Apr. 26, 2000).

5 Advisory Opinion 00-7 (Dep't of Health and Human Servs. Office of Inspector Gen. Nov. 17, 2000).

6 67 Fed. Reg. 72892-72894 (Dec. 9, 2002).

