

July 3, 1997

[Name and Address redacted]

Re: Free Computers, Facsimile Machines and Other Goods

Dear [Name redacted]:

This letter is in response to your letter of April 3, 1997, concerning the provision of certain free goods and services. Specifically, your letter requested guidance as to whether the provision of free fax machines, free computers and free fax lines by a supplier of transtelephonic monitoring services to physicians who refer patients to such supplier implicates the Medicare and Medicaid anti-kickback statute. 42 U.S.C. § 1320a-7b(b).

This office has established a procedure for formally responding to requests for advice concerning the anti-kickback statute for a specific arrangement that either is in existence or is one in which the requester in good faith plans to undertake. See 42 C.F.R. § 1008.15; 62 Fed. Reg. 7350, 7358. The request for such an opinion must come from a party that is a participant in the arrangement. Since your request does not concern a particular arrangement, we cannot provide you with a formal opinion. However, we can make some general observations regarding the practices described.

In general, the anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of items or services for which payment may be made in whole or in part by a Federal health care program. 42 U.S.C. § 1320a-7b(b). In other words, the statute prohibits payments made purposefully in exchange for referrals of business which is paid for by a Federal health care program. Violation of the anti-kickback statute is a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. The Department of Health and Human Services may also exclude individuals who violate the anti-kickback statute from the Medicare and Medicaid programs.

The OIG has stated on numerous occasions its view that the provision of free goods by a seller to an actual or potential referral source can violate the anti-kickback statute depending on the circumstances. For example, with respect to free computers, we observed in the preamble to the 1991 safe harbor regulations:

"A related issue is the practice of giving away free computers. In some cases the computer can only be used as part of a particular service that is being provided, for example, printing out the results of laboratory tests. In this situation, it appears that the computer has no independent value apart from the service being provided and that the purpose of the free computer is not to induce an act prohibited by the statute. . . . In contrast, sometimes the computer that is given away is a regular personal computer, which the physician is free to use for a variety of purposes in addition to receiving test results. In that situation the computer has a definite value to the physician, and, depending on the circumstances, may well constitute an illegal inducement." 56 Fed. Reg. 35978 (July 29,1991)

We are aware that many suppliers, not simply transtelephonic monitoring suppliers, are providing various kinds of multi-use equipment to customers pursuant to various written and unwritten arrangements, typically with a condition that such equipment is only to be used in connection with their service. However, in determining whether a free or "loaner" computer or fax machine constitutes illegal remuneration, the substance -- not the form -- of the transaction controls and any reasonably foreseeable "misuse" of the equipment implicates the entity providing the equipment as well as the user. Simply put, if the equipment is used by the recipient for any purpose other than in connection with the ordered service, there is potential illegal remuneration and potential liability for both parties to the transaction.

Frankly, we are concerned that many of these arrangements are shams. Not only is there often no substantial business need for the equipment, but also there is no attempt to police the arrangement to ensure that the "restrictions" are being followed. While it may theoretically be possible to conceive an arrangement in which such general purpose equipment would have no independent value to the referral source, we view all such arrangements with skepticism. In particular, we examine

- the criteria used by the supplier of the equipment to determine which customers receive the equipment;
- the ownership of the equipment;
- the location and access to the equipment at the customer's place of business;
- the procedures used by the customer and supplier to police unauthorized use of the equipment;
- the value added to the core service being provided by the additional general purpose equipment; and
- the number and extent of similar arrangements with other parties.

Finally, we point out that in addition to potential criminal liability under the anti-kickback statute, there is legal authority that any claim tainted by a kickback arrangement is a "false or fraudulent" claim under the Federal False Claims Act, 31 U.S.C. 3729, *et seq.* See *U.S. ex rel. Pogue v. American Healthcorp. Inc.*, 914 F. Supp. 1507 (M.D. Tenn. 1996). Parties to such arrangements risk exposure not only to the government but also to *qui tam* suits by their employees and customers' employees.

If you can provide us with specific details on the particular parties involved and the arrangements into which they have entered, we will pass the information along to the investigative branch in the appropriate region.

Very truly yours,

/s/

Kevin G. McAnaney

Chief, Industry Guidance Branch