

July 1, 1997

[Name and Address Redacted]

Re: Provision of Free Goods and Services

Dear [Name Redacted]:

Your letter of June 4, 1997, concerning the provision of free goods and services, was forwarded to me by [ ]. Specifically, your letter requested a legal opinion as to whether the provision of free fax machines, the provision of consultant pharmacists for free or at a reduced fee, and the provision of gifts by pharmacies to current or prospective nursing home customers 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 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 who 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 practices you describe are similar to certain practices discussed in the preamble to the discount "safe harbor" final rule. 56 Fed. Reg. 35952. In this guidance, this office said the following regarding the practice of giving free computers to potential referral sources:

"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. 35952, 35978 (July 29, 1991).

We can discern no reason why any different analysis would apply to the question of fax machines, consulting services, or gifts given to referral sources either for free or at a cost below fair market value. Where the intent of the parties is to induce or encourage the referral of Federal program business, the statute would appear to be violated by such a practice.

We hope this information is helpful.

Sincerely,

/s/

Kevin McAnaney

Chief, Industry Guidance Branch