

ANTI-KICKBACK REGULATIONS

Pub. L. 100-93, §14(a), Aug. 18, 1987, 101 Stat. 697, provided that: "The Secretary of Health and Human Services, in consultation with the Attorney General, not later than 1 year after the date of the enactment of this Act [Aug. 18, 1987] shall publish proposed regulations, and not later than 2 years after the date of the enactment of this Act shall promulgate final regulations, specifying payment practices that shall not be treated as a criminal offense under section 1128B(b) of the Social Security Act [42 U.S.C. 1320a-7b(b)] and shall not serve as the basis for an exclusion under section 1128(b)(7) of such Act. Any practices specified in regulations pursuant to the preceding sentence shall be in addition to the practices described in subparagraphs (A) through (C) of section 1128B(b)(3)."

§ 1320a-7c. Fraud and abuse control program**(a) Establishment of program****(1) In general**

Not later than January 1, 1997, the Secretary, acting through the Office of the Inspector General of the Department of Health and Human Services, and the Attorney General shall establish a program—

(A) to coordinate Federal, State, and local law enforcement programs to control fraud and abuse with respect to health plans,

(B) to conduct investigations, audits, evaluations, and inspections relating to the delivery of and payment for health care in the United States,

(C) to facilitate the enforcement of the provisions of sections 1320a-7, 1320a-7a, and 1320a-7b of this title and other statutes applicable to health care fraud and abuse, and

(D) to provide for the modification and establishment of safe harbors and to issue advisory opinions and special fraud alerts pursuant to section 1320a-7d of this title.

(2) Coordination with health plans

In carrying out the program established under paragraph (1), the Secretary and the Attorney General shall consult with, and arrange for the sharing of data with representatives of health plans.

(3) Guidelines**(A) In general**

The Secretary and the Attorney General shall issue guidelines to carry out the program under paragraph (1). The provisions of sections 553, 556, and 557 of title 5 shall not apply in the issuance of such guidelines.

(B) Information guidelines**(i) In general**

Such guidelines shall include guidelines relating to the furnishing of information by health plans, providers, and others to enable the Secretary and the Attorney General to carry out the program (including coordination with health plans under paragraph (2)).

(ii) Confidentiality

Such guidelines shall include procedures to assure that such information is provided and utilized in a manner that appropriately protects the confidentiality of the information and the privacy of individuals receiving health care services and items.

(iii) Qualified immunity for providing information

The provisions of section 1320c-6(a) of this title (relating to limitation on liability) shall apply to a person providing information to the Secretary or the Attorney General in conjunction with their performance of duties under this section.

(4) Ensuring access to documentation

The Inspector General of the Department of Health and Human Services is authorized to exercise such authority described in paragraphs (3) through (9) of section 6¹ of the Inspector General Act of 1978 (5 U.S.C. App.) as necessary with respect to the activities under the fraud and abuse control program established under this subsection.

(5) Authority of Inspector General

Nothing in this chapter shall be construed to diminish the authority of any Inspector General, including such authority as provided in the Inspector General Act of 1978 (5 U.S.C. App.).

(b) Additional use of funds by Inspector General**(1) Reimbursements for investigations**

The Inspector General of the Department of Health and Human Services is authorized to receive and retain for current use reimbursement for the costs of conducting investigations and audits and for monitoring compliance plans when such costs are ordered by a court, voluntarily agreed to by the payor, or otherwise.

(2) Crediting

Funds received by the Inspector General under paragraph (1) as reimbursement for costs of conducting investigations shall be deposited to the credit of the appropriation from which initially paid, or to appropriations for similar purposes currently available at the time of deposit, and shall remain available for obligation for 1 year from the date of the deposit of such funds.

(c) "Health plan" defined

For purposes of this section, the term "health plan" means a plan or program that provides health benefits, whether directly, through insurance, or otherwise, and includes—

(1) a policy of health insurance;

(2) a contract of a service benefit organization; and

(3) a membership agreement with a health maintenance organization or other prepaid health plan.

(Aug. 14, 1935, ch. 531, title XI, §1128C, as added Pub. L. 104-191, title II, §201(a), Aug. 21, 1996, 110 Stat. 1992; amended Pub. L. 111-148, title VI, §6403(c), Mar. 23, 2010, 124 Stat. 766.)

REFERENCES IN TEXT

The Inspector General Act of 1978, referred to in subsec. (a)(4), (5), is Pub. L. 95-452, Oct. 12, 1978, 92 Stat. 1101, which is set out in the Appendix to Title 5, Government Organization and Employees. Paragraphs (3) through (9) of section 6 of the Act probably mean para-

¹ See References in Text note below.

graphs (3) through (9) of section 6(a) of the Act, which set out various activities authorized to be performed by Inspectors General.

AMENDMENTS

2010—Subsec. (a)(1)(C) to (E). Pub. L. 111-148 inserted “and” at end of subpar. (C), substituted period for “, and” at end of subpar. (D), and struck out subpar. (E) which read as follows: “to provide for the reporting and disclosure of certain final adverse actions against health care providers, suppliers, or practitioners pursuant to the data collection system established under section 1320a-7e of this title.”

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111-148 effective on the first day after the final day of the transition period defined in section 6403(d)(5) of Pub. L. 111-148, see section 6403(d)(6) of Pub. L. 111-148, set out as a Transition Process; Regulations; Effective Date of 2010 Amendment note under section 1320a-7e of this title.

§ 1320a-7d. Guidance regarding application of health care fraud and abuse sanctions

(a) Solicitation and publication of modifications to existing safe harbors and new safe harbors

(1) In general

(A) Solicitation of proposals for safe harbors

Not later than January 1, 1997, and not less than annually thereafter, the Secretary shall publish a notice in the Federal Register soliciting proposals, which will be accepted during a 60-day period, for—

- (i) modifications to existing safe harbors issued pursuant to section 14(a) of the Medicare and Medicaid Patient and Program Protection Act of 1987 (42 U.S.C. 1320a-7b note);
- (ii) additional safe harbors specifying payment practices that shall not be treated as a criminal offense under section 1320a-7b(b) of this title and shall not serve as the basis for an exclusion under section 1320a-7(b)(7) of this title;
- (iii) advisory opinions to be issued pursuant to subsection (b); and
- (iv) special fraud alerts to be issued pursuant to subsection (c).

(B) Publication of proposed modifications and proposed additional safe harbors

After considering the proposals described in clauses (i) and (ii) of subparagraph (A), the Secretary, in consultation with the Attorney General, shall publish in the Federal Register proposed modifications to existing safe harbors and proposed additional safe harbors, if appropriate, with a 60-day comment period. After considering any public comments received during this period, the Secretary shall issue final rules modifying the existing safe harbors and establishing new safe harbors, as appropriate.

(C) Report

The Inspector General of the Department of Health and Human Services (in this section referred to as the “Inspector General”) shall, in an annual report to Congress or as part of the year-end semiannual report required by section 5 of the Inspector General

Act of 1978 (5 U.S.C. App.), describe the proposals received under clauses (i) and (ii) of subparagraph (A) and explain which proposals were included in the publication described in subparagraph (B), which proposals were not included in that publication, and the reasons for the rejection of the proposals that were not included.

(2) Criteria for modifying and establishing safe harbors

In modifying and establishing safe harbors under paragraph (1)(B), the Secretary may consider the extent to which providing a safe harbor for the specified payment practice may result in any of the following:

- (A) An increase or decrease in access to health care services.
- (B) An increase or decrease in the quality of health care services.
- (C) An increase or decrease in patient freedom of choice among health care providers.
- (D) An increase or decrease in competition among health care providers.
- (E) An increase or decrease in the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations.
- (F) An increase or decrease in the cost to Federal health care programs (as defined in section 1320a-7b(f) of this title).
- (G) An increase or decrease in the potential overutilization of health care services.
- (H) The existence or nonexistence of any potential financial benefit to a health care professional or provider which may vary based on their decisions of—

- (i) whether to order a health care item or service; or
- (ii) whether to arrange for a referral of health care items or services to a particular practitioner or provider.

(I) Any other factors the Secretary deems appropriate in the interest of preventing fraud and abuse in Federal health care programs (as so defined).

(b) Advisory opinions

(1) Issuance of advisory opinions

The Secretary, in consultation with the Attorney General, shall issue written advisory opinions as provided in this subsection.

(2) Matters subject to advisory opinions

The Secretary shall issue advisory opinions as to the following matters:

- (A) What constitutes prohibited remuneration within the meaning of section 1320a-7b(b) of this title or section 1320a-7a(i)(6) of this title.
- (B) Whether an arrangement or proposed arrangement satisfies the criteria set forth in section 1320a-7b(b)(3) of this title for activities which do not result in prohibited remuneration.
- (C) Whether an arrangement or proposed arrangement satisfies the criteria which the Secretary has established, or shall establish by regulation for activities which do not result in prohibited remuneration.
- (D) What constitutes an inducement to reduce or limit services to individuals entitled