

Louisiana State Board of Medical Examiners
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***** STATEMENT OF POSITION *****

Referrals for Imaging Services

June 2005

The Louisiana State Board of Medical Examiners has the authority and responsibility to interpret and enforce La. Rev. Stat. 37:1745 (the “anti-kickback law”) as it applies to physicians licensed to practice medicine in Louisiana. The Board has recently become aware that Louisiana physicians are participating in certain business arrangements that, in the Board’s opinion, violate the anti-kickback law. Specifically, it is the Board’s opinion that an arrangement under which a referring physician “leases” and/or purchases the full complement of technical and professional services necessary to provide imaging services to the physician’s patients on an unscheduled, per-use basis for less than the referring physician’s reimbursement from the patient or the patient’s third-party payer, as set forth below, violates the anti-kickback law. The Board is providing this guidance on its interpretation and enforcement of the anti-kickback law to assist Louisiana licensed physicians in conducting their business affairs.

The anti-kickback law provides in pertinent part that “No health care provider shall offer, make, solicit, or receive payment, directly or indirectly, in cash or in kind, for referring or soliciting patients.” Board regulations interpreting the anti-kickback law provide that “A physician shall not knowingly and willfully solicit, receive, or accept any payment, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring a patient to a health care provider for the furnishing or arranging for the furnishing of any health care item or service.”¹

The arrangements that are the subject of this guidance typically involve an owner of diagnostic imaging equipment (a “Company”) that makes all the equipment, personnel, supplies and other items or services necessary to provide MRI or other imaging services (collectively, the “Services”) available to a referring physician at the Company’s facilities on a turn-key, as-needed basis for a pre-determined, per-use fee. The referring physician orders an MRI or other diagnostic imaging service for a patient and refers the patient to the Company’s facilities. The Company provides the Services. The Company then bills and collects for the Services from the patient or the patient’s third-party payer, excluding Medicare or Medicaid, using the referring physician’s provider number. The

¹ La. Admin. Code 46:XLV, § 4205(B). The Board’s regulations further define the terms “payment”, “referral”, “health care provider” and “health care item”. La. Admin. Code 46:XLV, § 4203. It is sufficient to note that these terms, as defined by regulation, support the Board’s analysis as set forth in this guidance.

Company then deposits the collections attributable to the Services, less the Company's fee, in the referring physician's account. The referring physician retains the difference between the amount collected from the patient or third-party payer and the amount paid to the Company for the Services.

The Louisiana anti-kickback statute is similar in scope to its federal counterpart.² Federal law, however, regulates activities, arrangements and transactions intended to induce referrals for goods or services paid for in whole or in part by governmental payers, while the Louisiana Law is applicable to all payers—private and governmental alike. At the same time, any payments, remuneration, practices or arrangements that qualify as “safe harbors” under the federal anti-kickback statute are also protected under the general exception to the Louisiana anti-kickback law for arrangements that satisfy federal safe harbor standards (the "General Exception").³ To analyze whether an arrangement violates the Louisiana anti-kickback law, then, the Board is guided by federal law and regulations, as well as Advisory Opinions issued by the Office of the Inspector General ("OIG") of the United States Department of Health and Human Services.

The Board is not aware of any safe harbor or OIG Advisory Opinion under the federal anti-kickback statute that would protect the business arrangements described above. Indeed, these business arrangements typically do not apply to services covered by governmental payers, and may even prohibit the physician from referring federal program patients to the Company, no doubt in recognition that the arrangement could violate the federal anti-kickback statute if applied to a governmental payer. While the failure to satisfy a safe harbor does not necessarily mean that an arrangement is unlawful *per se*, it does not qualify for the General Exception. Thus, the Board must determine whether the referring physician in these business arrangements is receiving a payment in return for referring a patient to the Company for the provision of health care services in violation of Louisiana anti-kickback law.

In applying the Louisiana anti-kickback law, the Board recognizes that physicians owe a fiduciary duty to patients to exercise their professional judgment in providing, furnishing, prescribing, recommending or referring patients for health care items and services without regard to personal financial recompense. Accordingly, the expressed purpose of the anti-kickback law is to prevent payments by or to a physician as a financial incentive for the referral of patients to other physicians or health care providers for diagnostic or therapeutic services or items.⁴

In the Board's opinion, a physician entering an arrangement with a Company as described above would receive a payment in exchange for the physician's referral to a health care provider for health care items and services in violation of Louisiana Law. The referring physician's payment is the amount collected from his or her patients and their third-party payers over and above the discounted rate the physician pays the Company. By foregoing the opportunity to collect full reimbursement for the Services from patients and third-party payers, the Company is effectively sharing the profit from the Services with the referring physician. In the Board's opinion, the excess payment

² 42 U.S.C. §1320a-7b(b).

³ See: La. Rev. Stat. §37:1745C(1), (2); La. Adm. C. 46XLV§ 4207B.

⁴See: La. Adm. C. 46XLV.4201B, *Declaration of Purpose*.

retained by the referring physician is simply remuneration to the physician in exchange for the physician's referral to the Company for the Services. A physician participating in such an arrangement would, thus, be subject to disciplinary action by the Board.⁵

Please note that this guidance is limited to arrangements described above. We do not mean to suggest that all arrangements under which physicians provide imaging services to their patients by leasing and/or purchasing the capability to provide those services violate the anti-kickback law. Different business structures, such as equipment leases and personal services arrangements that satisfy federal anti-kickback safe harbor standards, would require a different analysis. We will continue to address such issues as they arise on a case-by-case basis.

⁵Pursuant to La. Adm. C. 42XLV§.4209, violation of the Section 4205 is deemed to constitute a violation of R.S. 37:1285 providing cause for the board to suspend or revoke, refuse to issue, or impose probationary or other restrictions on any license or permit held or applied for by a physician culpable of such violation. *See also*: La. Rev. Stat. §37:1745C(3).