

Kickback Notice

Memorandum

Date : March 3, 2017

To : Executive Directors
FSMB Member Boards

From : Claudette Dalton, MD, Chair, Ethics and Professionalism Committee

During its deliberations and conversations with the FDA and representatives from state boards of pharmacy, the Ethics and Professionalism Committee has become aware of some alarming trends in prescribing that may be occurring in your state. These practices may violate federal and state anti-kickback and fraud laws, as well as violate provisions related to prescribing as set forth in your state's medical practice act. After careful review, the Committee believed that the nature of these practices, and their growing prevalence, warranted a notice to the State Medical Boards ahead of the Committee's final report and recommendations to the House of Delegates.

Three business arrangements that have been described to the Committee include the following:

1. Some compounding pharmacies are hiring marketing firms to approach medical practices with proposals to offer "bonuses" to the practice if they prescribe through that pharmacy. However, the prescriptions are routed through call centers. These approaches may be made to office staff as well as directly to physicians. Although characterized as "bonuses", these arrangements may be classified as kickbacks under federal and state law. This mischaracterization has prompted investigations and prosecutions some states. Other pharmacies "hire" office staff as contract workers.
2. Another related, and equally concerning practice, uses these same call centers to route prescriptions to specific pharmacies that have contracts with the patient's insurer. Drug combinations may be altered at the pharmacy to find an insurer who will reimburse for that combination. Modification of the prescriptions is done outside the purview of pharmacists and results in exorbitant reimbursements of thousands for what may have been sold for dollars at the local pharmacy. It should be noted here that we are not referring to approved formulary changes in hospital or institution-based pharmacies.
3. Pharmacies involved with these deceptive business practices have also been found to change labels on medications in order to provide the originally prescribed medication using a label that results in maximum reimbursement from an insurer. Although some pharmacies have approved authority to make formulary changes, those without that authority have used this tactic for pecuniary gain.

On behalf of the Committee, I hope you find this material timely and helpful as your board continues to work with your licensees in addressing the legal and ethical issues surrounding prescribing. At this point in its work, the Committee is not ready to advocate a definitive course of action to address these practices and will continue to study the related issues for its final report. But in the interim, the

Committee encourages your State Medical Board to work with your State Board of Pharmacy to ascertain if any such practices are occurring in your state and, if so, how best to inform your licensees that involvement in such practices may result in both civil and criminal penalty.

If you would like additional information or have any queries, please contact Mark Staz at mstaz@fsmb.org. Also, if your board has taken any action related to kickbacks or has been made aware of practices such as those described above, this would be helpful information for the FSMB as we conduct our research on this issue.