

## New anti-kickback safe harbor protects local patient transportation



Rick L. Hindmand | Wednesday, December 21, 2016

A new anti-kickback safe harbor that takes effect Jan. 6, 2017, will allow health care providers to provide free or discounted local transportation to their patients without triggering potential exposure under the federal anti-kickback statute.

On Dec. 7, 2016, the Department of Health and Human Services (HHS) Office of Inspector General (OIG) issued a final rule establishing new anti-kickback safe harbors for:

- [Certain waivers or reductions by pharmacies](#) or ambulance providers of patient cost-sharing (e.g., copayment, coinsurance and deductible) obligations
- Remuneration between Medicare Advantage (MA) organizations and FQHCs
- Medicare coverage gap drug discounts
- Free or discounted local transportation

The final rule also revises the existing definition of “remuneration” under civil monetary penalty (CMP) regulations and makes a technical correction to the safe harbor for referral services.

### Transportation Safe Harbor

The transportation safe harbor protects free or discounted local transportation if the conditions under either alternative “shuttle service” or “established patient” subsections are satisfied. The transportation safe harbor can protect round trip transportation between a patient’s home and the eligible entity, and applies to vouchers as well as transportation provided directly by an eligible entity.

Several common conditions apply under both the shuttle service and established patient safe harbor provisions:

- The local transportation must be made available by an “eligible entity,” which is defined broadly as any individual or entity, other than one that primarily supplies health care items. This definition excludes durable medical equipment suppliers, pharmaceutical companies and pharmacies, but includes health

## New antikickback safe harbor protects local patient transportation

---

care service providers, such as hospitals, physicians, dialysis facilities, physical therapists, laboratories, ambulatory surgery centers, skilled nursing facilities and home health agencies. In its commentary, the OIG noted that this definition also includes many types of entities that do not directly render health care services to patients, such as Medicare Advantage organizations, managed care organizations, accountable care organizations, clinically integrated networks and charitable organizations, subject to the condition that they not shift the cost to federal health care programs or payers.

- Air, luxury and ambulance transportation do not qualify for this safe harbor.
- Marketing and advertising restrictions apply, subject to slight variation.
- Both alternative provisions restrict the transportation to a 25 mile area, or 50 miles for rural areas.
- The eligible entity that makes the transportation available must bear the costs of the transportation and not shift the burden of the costs to any federal health care program or to any other payers or individuals.

In order to be protected under the safe harbor subsection for established patients, the following additional conditions must be satisfied:

- The availability of the free or discounted transportation services must be set forth in a policy that the eligible entity applies uniformly and consistently, and must not be determined in a manner related to the past or anticipated volume or value of federal health care program business.
- The following marketing restrictions must be satisfied:
  - The eligible entity does not publicly market or advertise the free or discounted local transportation services.
  - No marketing of health care items or services occurs during the course of the transportation or at any time by drivers who provide the transportation.
  - Drivers or others arranging for the transportation are not paid based on the number of beneficiaries transported.
- The free or discounted transportation must be limited to individuals who are “established patients” of the eligible entity that is providing the free or discounted transportation (if the eligible entity provides health care services) and established patients of the health care provider or supplier to or from which the individuals are transported. The safe harbor regulation defines “established patient” as a person who either has selected and initiated contact with the provider or supplier to schedule an appointment, or has previously attended an appointment with the provider or supplier.
- The transportation is within 25 miles of the health care provider or supplier to or from which the patient is transported, or within 50 miles if the patient resides in a rural area.
- The transportation is provided for the purpose of obtaining medically necessary items or services.

Transportation in the form of “shuttle service” (defined as a vehicle that runs on a set route with a set schedule) will satisfy the shuttle service alternative if the arrangement satisfies the following conditions:

- The following restrictions must be met:
  - The shuttle service is not marketed or advertised (other than

- posting necessary route and schedule details).
- No marketing of health care items or services occurs during the course of the transportation or at any time by drivers who provide the transportation.
  - Drivers or others arranging for the transportation are not paid based on the number of beneficiaries transported.
  - The shuttle service must be restricted to the eligible entity's local area, which the regulation specifies to mean that there are no more than 25 miles (50 miles in rural areas) from any stop on the route to any stop where health care items or services are provided

Some commenters recommended placing additional restrictions on transportation for dialysis patients, such as allowing dialysis facilities to qualify for the safe harbor only for patients who lack reliable transportation or for infrequent use. The OIG, however, expressly refused to place additional restrictions on the use of the safe harbor for specific patient populations. Moreover, the OIG noted that dialysis patients contribute to increasing costs of nonemergency ambulance services and would benefit from local transportation.

The OIG emphasized in its commentary that transportation is not permitted to be used as a recruiting tool, and explained that the safe harbor can protect transportation that is offered to patients who contact the health care provider on their own initiative (directly or through a care manager), but will not protect health care providers who offer transportation to a patient who has not yet selected the provider.

### **Proceed with caution when providing patient transportation**

This new safe harbor protects a broad range of local transportation arrangements so that patients can make their appointments. It is crucial, however, to carefully structure transportation arrangements and related policies and procedures in order to avoid falling outside the local transportation safe harbor and perhaps creating potential anti-kickback and false claims exposure.

To learn more about the new anti-kickback safe harbors, contact the attorney listed below.



**Rick L. Hindmand**

Team member bio