

## **Restocking after the Fee Schedule**

In the mid to late 1990's ambulance "restocking" was a common practice. An ambulance arriving at an emergency room would often be "restocked" with the items used in treating the patient during transit. The hospital would give these items, such as gloves and medications, to the ambulance at no charge. However, this practice was questionable in light of the Anti Kick-Back Act's prohibition against giving or receiving anything of value in exchange for patient referrals. Theoretically, an ambulance service could have been induced to use one hospital over another simply because of the free items received from the hospital that "restocked". This theory was adopted by the government in 1997 in an advisory opinion (Number 97-6), in which they stated that such an arrangement could lead to "improper steering" and "unfair competition". This arrangement likely gained more scrutiny than most referral arrangements because of the special circumstances present in the ambulance industry. The main circumstance being that a mere referral is not the concern; the ambulance literally has the opportunity to deliver a patient to any facility that the ambulance wishes to use as its destination, especially where several hospitals are located in similar proximity.

In 1998, an ambulance services requested another formal advisory opinion from the Department of Health and Human Services' (DHHS) Office of Inspector General (OIG). The response to that request was issued in September of 1998 as Advisory Opinion Number 98-13. In that opinion, the OIG reiterated that an agreement between a hospital and an ambulance service to restock all ambulances arriving at the hospital with all items used during the patients transport would be a violation of the Anti Kick-Back Act if the intent of the arrangement was to induce the delivery of patients to the hospital. However, the OIG stated that they would not impose sanctions against the ambulance service or the hospital under the specific terms of the proposed arrangement. The OIG stated that the facts of the specific restocking program described in the 1998 request were different than the program described in the 1997 request. The new program was part of a state wide effort to ensure the quality of care given to patients, and therefore was not as likely to be used to induce referrals. Therefore, the OIG stated that under those *specific* facts, there

would be no penalties assessed against the participating ambulance services and hospitals.

As with any Advisory Opinion, the OIG limited their decision to the specific facts and parties requesting the opinion. Therefore, while offering some guidance into what was legal and illegal in the ambulance restocking debate, the Opinion was of little use to other services. In order for other services to get a similar Advisory Opinion that they could rely on, they would have to make their own request describing the circumstances of their particular arrangement. Getting such an Opinion takes up to a year and can easily cost over \$5,000.

In June of 2000, the OIG took a more generally applicable stance, and issued an official “Safe Harbor” for the restocking of ambulances. Safe Harbors are special rules that, if complied with, approve certain procedures or practices even though they may raise Anti Kick-Back Act concerns. Actually, there were two separate Safe Harbors issued in regard to the restocking issue, but the first required fair market value payment for any items restocked, which made the transaction a purchase instead of a gratuity. Purchases for fair market value have never been considered to be a bribe or kick-back, so this first Safe Harbor was really of no significance. However, the second Safe Harbor, which was based on the arrangement described in the 1998 Advisory Opinion, allowed for free restocking under seven conditions, summarized as follows:

- 1) all ambulance companies must be eligible for restocking (the hospital can not pick and choose between companies);
- 2) the arrangement has to be part of a regional EMS system;
- 3) the arrangement must be in writing;
- 4) *the receiving entity(hospital) must not bill any federal program for any drug or supply;*
- 5) *the ambulance company must not bill the government separately for the items;*
- 6) both the receiving entity and the ambulance company must keep records of all items transferred; and
- 7) both parties must be in compliance with all other state and federal laws.

For those companies willing to jump through these hoops, you may have been legally participating in a restocking program for the past several years. However, if there have not been some changes made in your restocking program after April 1 of this year, then you, or your hospital partner, may have cause for concern. As of April 1, 2002, there is a new fee schedule for the payment of ambulance services provided to Medicare patients. The fee schedule no longer allows for many items to be billed separately in most states. Therefore, supplies, medications, and oxygen are deemed to be paid for as part of the base rate for the type of service rendered. Since hospitals also get reimbursed on a per diem basis depending on the condition of the patient, these items or drugs may be considered as being paid for twice.

Especially important is the distinction in ALS levels which depends on the amount of drugs administered during the course of treating the patient. The more drugs used, the more the base reimbursement rate may be, therefore it appears that Medicare is raising rates specifically to cover the use of these additional drugs, thereby paying for the ambulance company for them. On the other hand, if your company is still participating in a restocking program, you may be getting those drugs replaced for free by a hospital while at the same time having them paid for by Medicare. This would create a windfall for the ambulance service, and one likely not anticipated by the OIG when the Safe Harbor was created.

Without further guidance from the OIG, there is really no way to know how they will interpret this issue. To get such guidance, an ambulance service will likely have to request yet another advisory opinion, or perhaps a clarification of the current Safe Harbor in light of the implementation of the Fee Schedule. As set out above, obtaining an advisory opinion can be a long and expensive process, and even though published in the Federal Register, the opinion can only be relied on by the requesting company. Therefore, a clarification of the current Safe Harbor would be the safest prospect for the ambulance service industry as a whole.

Keep in mind that the regulations and laws referenced in this article are all Federal and deal with Medicare and other Federal (and in some circumstances State) health care insurance programs. However, as a practical matter, it is difficult to separate patients based on insurance coverage, therefore these regulations and laws effect how most services do business in general.

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