

January 18, 1995

Dick L. Sedefian
Manager, Program Security Department
Empire Blue Cross Blue Shield
622 Third Avenue
New York, New York 10017-6758

Dear Mr. Sedefian:

This letter responds to your inquiry dated October 25, 1994. You have asked three questions which are stated and answered below.

Question 1:

Is present application of the self-referral prohibition limited to financial relationships entered into after July 1, 1992 for clinical laboratories or x-ray and imaging services, and after March 1, 1993 for pharmacy services?

Answer 1:

No. The Health Care Practitioner Referrals Act, codified at Public Health Law (PHL) Article 2, Title II-D, Sections 238 through 238-e, prohibits a practitioner from making a referral for three kinds of services if the practitioner or an immediate family member has a financial relationship with the provider of the referred services. The three kinds of services are clinical laboratory, x-ray and imaging, and pharmacy.

With regard to clinical laboratory services, and x-ray and imaging services, there are two effective dates depending on when the financial relationship arose. If the relationship did

not exist until on or after July 1, 1992 then referrals are banned as of March 1, 1993. If the relationship existed before July 1, 1992 then referrals are not banned until July 1, 1995.

There are also two effective dates for referrals for pharmacy services. If the financial relationship did not exist until on or after March 1, 1993 then referrals are banned as of September 1, 1993. If the financial relationship arose before March 1, 1993 then referrals are not prohibited until July 1, 1995. As of July 1, 1995 a financially interested practitioner may not refer for any of the three services no matter when the financial relationship between practitioner and provider arose.

Question 2:

What is the definition of "...for the employment of the immediate family member.."? [See 10 NYCRR 34.7(b)(1) and (c)(1)]. Also what determines the percentage of 20% vs. 40%?

Answer 2:

You are inquiring about the meaning of one of the exceptions to the self-referral ban. An exception exists when the financial relationship is that the referring practitioner's immediate family member is employed by the provider, and certain conditions are met. See PHL 238-a.5(b)(viii), and 10 NYCRR 34.7(b)(1). Immediate family member is defined at PHL 238(8) and 10 NYCRR 34.2(h). The term includes parents, children, step-relatives, grandparents and grandchildren, and in-laws. The term employment means that the immediate family member works for the provider and receives compensation.

One of the conditions which must be met in order that the employment is not considered a prohibiting financial relationship, is that the percentage of the provider's business attributable to referrals by all interested practitioners is not greater than 20 percent. To determine the 20 percent you would consider the provider's total business and determine what percentage of that can be attributed to referrals from all practitioners who have financial interests in the provider. If all interested practitioners refer less than 20 percent of the overall business, then the provider's employment of the practitioner's immediate family member is not a bar to the practitioner's referral.

Even if all the conditions are not met, the provider's employment of an immediate family member does not bar referrals

if the percentage of total business referred by interested practitioners is less than 40 percent, and the parties apply for and receive an exception. See 10 NYCRR 34.7(c).

Question 3:

Consider the following fact pattern: Practitioner A and/or group practitioner A have a financial interest in one of the three designated providers. Patients are being referred by the practitioner/group practitioner to the laboratory, imaging facility and/or pharmacy. In scenario one, said facilities receive referrals from practitioners and groups other than practitioner A and/or group A. In scenario two, the only referrals which the provider accepts are from the financially interested practitioner and/or group.

- a. Is either scenario permissible?
- b. In either scenario is a certain percentage of referrals permissible?
- c. What effect does the commencement date of the financial relationship have on the applicability of the prohibition?

Answer 3:

a. Neither scenario is permissible. It makes no difference whether the provider accepts outside referrals. However, there are two exclusions to the self-referral ban which are relevant to your question. These are exclusions for practitioners' services and in-office ancillary services. See PHL 238-a(2)(a), (b).

An interested practitioner may refer to a provider if the referred services will be performed personally by or under the supervision of another practitioner in the same group practice. Group practice must meet the definition set forth at PHL 238(5). The exclusion is determined solely by the statutory criteria. It is immaterial whether referrals from outside the group practice are accepted as long as they are not from interested practitioners.

The in-office ancillary services exclusion applies when a referring practitioner or members of his or her group practice perform the referred services personally or supervise their

employees, and the referred services are performed in a building where the referring practitioner or group members furnish services other than the referred services, or which is the centralized location for the provision of referred services for the group, and certain billing requirements are met. Again, the statutory criteria control and it is immaterial whether outside referrals are accepted by the provider as long as they are from non-interested practitioners.

As you are likely aware, there is a federal self-referral statute, the Stark law, codified at 42 USC Section 1395nn, which is similar but not identical to our state statute, and contains similar exclusions. I am enclosing a copy of an opinion issued by the Health Care Financing Administration (HCFA) which states that a physician whose laboratory meets the in-office ancillary exclusion may accept referrals from other physicians who do not have a financial interest in the laboratory.

b. No.

c. See answer 1 above.

Sincerely,

Harriet B. Oliver
Attorney