

# IT 'Gifts' Could Constitute Antikickback Violations

BY NELLIE BRISTOL  
Contributing Writer

WASHINGTON — Suspension of antikickback laws to encourage adoption of health information technology could compromise physicians' referral patterns, William Vaughan, senior policy analyst for the Consumers Union, testified at a hearing of the House Energy and Commerce subcommittee on health.

"When a hospital system offers an IT

package to a nonaffiliated physician group, it hopes the ease of communication between them (and the goodwill generated by the gift) will encourage referrals to its facilities, regardless of whether the facility is the best quality or best value facility for the patient," Mr. Vaughan testified.

The hearing focused on legislation to promote electronic health records (EHRs) and other health IT topics. In his opening statement, panel Chairman Nathan Deal (R-Ga.) said the subcommittee is working

to ensure continuation of the innovation and investment being made in EHRs by the private sector. "We need to be cautious of large regulatory proposals," he said.

Rep. Deal said he is committed to moving health information promotion legislation forward this year. He added that it likely would be in the form of a combination of proposals and not any specific measure already introduced.

Several pending bills would create safe harbors in antikickback laws for health in-

formation technology. The move is intended to help physicians with the enormous cost of the systems. One bill, H.R. 4157, is sponsored by Rep. Nancy Johnson (R-Conn.), chairman of the House Ways and Means subcommittee on health and by Rep. Deal. The proposed legislation would clarify conditions under which provision of health information technology and related training by a hospital to a physician "shall not be considered a prohibited payment ... made as an inducement to reduce or limit services to certain individuals," according to a summary of the bill.

As an alternative to constraining the laws, Mr. Vaughan proposed reforms in the physician payment system that would allow physicians to elect a temporary increase in Medicare practice expense payments to be repaid out of improved office productivity savings. The antikickback preemption is supported by The American Clinical Laboratory Association (ACLA). In testimony before the panel, ACLA President Alan Mertz said the action is needed to standardize requirements found in different states and to reassure health care providers.

"We recognize that physicians, hospitals, and other providers routinely cite the fear of legal action/debarment from Medicare as one of the biggest deterrents toward adoption of health IT," Mr. Mertz said.

He added, however, that the preemptions should be "crafted carefully" to make sure "providers will continue to compete on the services they are providing and not, for instance, on the size of a monitor."

He advocated that clinical labs be among providers exempt from the statutes for health IT dissemination "because of the critical role laboratories have and continue to play in facilitation of health IT adoption in the health care community."

Several witnesses promoted the use of pay for performance under federal health programs to spur the dissemination of electronic health records. "Actually, pay-for-performance programs represent a clear argument for payers to provide some of the financing for health IT—because in order to pay for performance you have to be able to rank performance and quality in the delivery of care, and to do that efficiently you need sophisticated information capabilities embedded in the health care system," said Don Detmer, president and CEO of the American Medical Informatics Association.

But even blanket availability of health IT doesn't guarantee dissemination of EHRs, Mr. Detmer argued. "Ultimately, IT comes down to health care workers and patients being sufficiently skilled to take advantage of the opportunities for improved care and efficiency and access that health information technology and an interconnected national health information infrastructure can provide," he said.

Another key to the successful dissemination of the EHRs is the assurance of patient privacy, witnesses said. James Pyles, counsel for the American Psychoanalytic Association, said health information technology should include meaningful informed patient consent, a private right of action, and an opt out for some or all personal information. ■

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