



## COMPLIANCE INSTITUTE FOR BEHAVIORAL HEALTH PROVIDERS

December 16, 2013

### **The Holidays: Gifting and Gift Policies**

By: [Neda M Ryan](#)

During the holidays, it is not uncommon for behavioral health entities and their staff to receive or give gifts to vendors, consumers, or other third parties. While gifting is not necessarily illegal, it is important that entities are aware of the laws surrounding gifting and that their gift policies properly reflect the requirements of those laws. Specifically, two key laws implicated by gift giving are the Federal Anti-Kickback Statute ("AKS") and the State and Federal Physician Self-Referral Law ("Stark").

The AKS is most implicated when anything of value is offered or given, or solicited or received, to, or from, an individual or entity receiving Federal healthcare funds. Remember: state Medicaid programs receive funding from the Federal government; therefore, for purposes of Federal fraud and abuse laws, Medicaid is a Federal program. Specifically, the AKS is a criminal statute prohibiting:

- The knowing and willful
- Offer, payment, solicitation, or receipt of anything of value
- To induce or reward patient referrals or the generations of business
- Involving items or services payable by the Federal healthcare programs.

As may be apparent, the AKS can apply to almost any transaction between a behavioral health organization and another party. Luckily, the Department of Health and Human Services ("HHS") Office of Inspector General ("OIG") has promulgated certain safe harbor regulations that allow parties to engage in relationships that would otherwise constitute AKS violations. Those relationships falling within the AKS safe harbor are presumed lawful; however, those relationships not falling within the safe harbor are not necessarily illegal, but will require review of the specific facts and circumstances.

# CLARK HILL

**For more information  
contact:**

[Gregory W. Moore](#)  
(248) 988-5842  
[gmoore@clarkhill.com](mailto:gmoore@clarkhill.com)

[Peter J. Domas](#)  
(248) 988-5870  
[pdomas@clarkhill.com](mailto:pdomas@clarkhill.com)

[Neda M. Ryan](#)  
(248) 988-5884  
[nryan@clarkhill.com](mailto:nryan@clarkhill.com)

Although no specific safe harbor applies to gift giving, generally, the OIG has also issued certain Advisory Opinions and other guidance in which it advises what types of situations or factors may incur less scrutiny and what types of steps entities may take to mitigate their exposure to risk. Namely, giving or receiving non-monetary gifts of nominal value, tracking the giving or receipt of gifts from each person or entity, and having annual limits on the value of gifts given or received all play a role in mitigating risk to the behavioral health entity.

Additionally, those behavioral health entities that employ or contract with physicians must be aware of the State and Federal Stark laws. Stark generally prohibits:

- Physician referrals
- Of Medicare or Medicaid beneficiaries
- To entities with which they, or members of their immediate family, have a financial relationship
- For certain services called "designated health services."

Under Stark, a financial relationship may involve providing anything of value to a referring physician. Similar to AKS, the HHS Centers for Medicare and Medicaid Services ("CMS") has promulgated certain regulatory exceptions that, relationships falling squarely within will not be deemed improper. Unlike AKS, however, a relationship falling outside of an exception is deemed illegal. The applicable Stark exception is the Non-Monetary Compensation Exception. This exception permits physicians to furnish items of value (non-monetary items) up to an annual limit, which is adjusted for inflation. This year's annual limit is \$380 and for 2014 it is \$385.

When determining whether it is appropriate to furnish or receive gifts to, or from, consumers, vendors, and other third parties, it is important to bear in mind the following:

- The Compliance Officer, or another designated person, should be notified of all gifting activities and, where appropriate, monitor, track, and evaluate those activities from a compliance perspective;
- Gifts to potential-referral sources should not involve cash; rather, such gifts should be non-monetary and nominal in value;
- The volume or value of the gifting should not correlate with the volume or value of the potential-referrals;
- Gifts to consumers should be limited to \$10 per gift and \$100 in the aggregate annually; and
- Gifts implicating Stark must be limited to \$380, in 2013, and \$385, in 2014.

Over this holiday season, it is a good time for all behavioral health entities to revisit their gift policies and ensure they include, at a minimum, the following:



A clear definition of what constitutes a "gift", including monetary (i.e., cash and cash-equivalents, like gift cards) and non-monetary items.



A plain statement that the entity does not tolerate the offering, paying, soliciting, or receipt of anything of value in exchange for referrals.



A procedure in which employees must follow prior to sending gifts to, or after receiving gifts from, consumers, vendors, or other third parties.



Specific provisions addressing gifting to consumers versus gifts to vendors and/or other outside persons or entities.



When applicable, specific provisions addressing physicians and gift giving procedures applicable to them.



Permissible gifting, if applicable.

As always, following a release of any policy, an entity's workforce must be adequately educated on the provisions of the new policy to ensure full and proper compliance. For more information or for assistance on developing policies, conducting internal audits or risk assessments, and/or educating your workforce on your policies, please contact [Greg Moore](#), [Neda Ryan](#), or [Peter Domas](#). We wish you, your organizations, and your families a very happy holiday season this year.

**About Clark Hill**

Clark Hill PLC is an entrepreneurial full-service law firm that provides business legal services, government and public affairs, and personal legal services to our clients throughout the country. With offices in Arizona, Delaware, Illinois, Michigan, New Jersey, Pennsylvania, Washington, D.C. and West Virginia, Clark Hill has more than 300 attorneys and professionals. For more information about our firm and our services visit [www.clarkhill.com](http://www.clarkhill.com)