Guidance for DACs on advertisements, competitions and marketing

Activity which may be deemed “inducements for prescriptions”

Summary of the legal position and additional provisions that BHTA members have undertaken to abide by

1. NHS appliance contractors are individual entities who compete with each other commercially for providing appliances to patients. There is strong competition for the provision of stoma products and urology products. Unlike the normal purchaser/provider relationship, the consumer or patient is not paying for the product, but has the power to nominate from competing appliance contractors which of them shall be his or her dispensing contractor. The patient’s choice must depend therefore on efficiency and convenience rather than cost. In this competitive field, there is an incentive for contractors to seek to influence that choice by adding inducements of one sort or another to the advantage of the patient.

2. This danger is recognised in the current National Health Service (Pharmaceutical and Local Pharmaceutical Services) Regulations 2013, which states in Schedule 5:

   ‘Inducements etc.
   20.
   (1) An NHS appliance contractor (C) (including C’s staff) must not give, promise or offer to any person any gift or reward (whether by way of a share of or dividend on the profits of the business or by way of discount or rebate or otherwise) as an inducement to or in consideration of a person (X)—
   (a) presenting an order for appliances on a prescription form or repeatable prescription; or
   (b) nominating C as X’s dispensing contractor (or one of them) in X’s PDS patient details.
   (2) Promising, offering or providing a home delivery service is not a gift or reward for the purposes of sub-paragraph (1).
   (3) [*not applicable as referring to the farming out of patients between contractors for reward*]’

3. Gifts and rewards as inducements are therefore strictly forbidden. The wording of Regulation 20 (1) is important: a gift or reward to *any* person breaches the provision: it does not have to be made just to the patient as the person who chooses the contractor, ie ‘X’. An indirect inducement therefore will breach the prohibition.

4. On the question of gifts, Schedule 5 contains another Regulation which introduces a measure of confusion. Regulation 11 (3) provides:

> '(3) In any case where a specified appliance is provided (whether by home delivery or otherwise), C must provide a reasonable supply of appropriate supplementary items (such as disposable wipes and disposal bags)……..'

These 'appropriate supplementary items' are not part of the prescription and the contractor provides them at its own expense. If it did not do so, then the patient would have to provide his/her own.

5. Further guidance is to be found in the Patients Industry Professionals Forum Collaborative Standards which sets out quality standards for the handling of prescriptions at 5.3:

> 'Wipes and Disposal Bags/Complimentary Items:
> 1. Free wipes and disposal bags provided with first delivery;
> 2. Subsequent provisions as ordered/required by the patient;
> 3. Complimentary items should be relevant to the patient's care (eg night bag stands);
> 4. Complimentary items should be appropriate to the patient's personal circumstances (eg paediatrics).'

6. If it is not only legitimate but a requirement that supplementary items are supplied without charge to the patient, where is the line to be drawn? There is a clear distinction between items given freely for the comfort and convenience of the patient in the use of the appliance provided, and items or rewards which have no connection with those appliances.

7. The BHTA Code of Practice stipulates that:

> '4.1 In marketing and promotional activities, in addition to having due regard for current legislation, care must be taken to ensure any gifts related to purchase of a product or service are directly relevant to that purchase and of a nature that cannot be construed as inappropriate or disproportionate.'

8. Applying these standards, it is clear that those items which are ancillary to the use of the appliances are not prohibited. Of note, however, is that if complimentary items are supplied only on a second or third order, first it suggests that such items are not essential and therefore not truly ancillary, and secondly, that they are a reward for repeat orders.

This is a field where the customer is not paying personally but in effect directing the use of public funds. If in any way marketing techniques involve the possibility of misuse, whether directly or indirectly in the shape of increased costs to the NHS, then they are forbidden.

Examples of items offered
The following are deemed entirely relevant to the patient's care and use of the products in question:

- Toiletry bag to keep products clean and separated from other personal toiletries
- Waterproof, washable mattress covers and bed pads are an essential if a product fails to function correctly
- Radar keys for access to disabled toilets throughout the country where products can be changed and disposed of is entirely relevant
- Travel wallet and certificate

To avoid any doubt, these items should simply be listed as part of the service, not referred to as complimentary / gifts. They should be available as standard, not as a reward for second or third, or repeat orders.

Items where relevance to the patient's care and use of the products in question is not so evident and the question of inducement arises:

- Swim suits and shorts
- Weekend travel and storage bags

Contractors must be absolutely sure they can defend items as being "ancillary to the products actually being supplied by the Home Delivery Service", even where these are not hugely expensive items, and in an ordinary commercial transaction they would be readily offered as an inducement.

Discount offers
Where a discount is offered which is conditional upon the patient being a customer it is public money (the prescription) which qualifies the patient to receive the discount and this would be an inducement. (The same reasoning applies to pharmacy loyalty points schemes - the pharmacy customer cannot acquire loyalty points for presenting a prescription.) An offer from a third party, passed on by the contractor for the sole benefit of the contractor's patient customers, would qualify as an indirect inducement.

Free samples
These do not come within the ambit of a gift or reward.

Relationship with charities
Contractors can support charities with direct donations and advertise the connection as such, but they may not give the charity a reward or commission as a percentage of orders received as this would be an indirect inducement for prescriptions.

Using the same argument, partnerships between charities and contractors must be a true relationship with joint responsibility, ie sharing out the profits of the enterprise as partners and both being responsible for the losses, rather than the charity being a receiver of commission, which would be an indirect inducement for prescriptions.

Competitions/Prizes
If, for example, an offer is run on an exhibition stand where "everyone's a winner" and any member of the public or healthcare professional at an exhibition can collect a freebie and enter a competition for a prize at a stand, regardless of whether or not a prospective customer, this would be acceptable. This qualifies as a general promotion to the public at large to raise profile or engender goodwill, providing they don't have to sign up as a customer to enter. Offering of a prize which is only available to patient customers of the home delivery service would therefore not be acceptable, as the purpose of holding the competition or the draw would be to induce the patient to choose that particular delivery service as opposed to competitors.

Relationship with professionals
The BHTA Code of Practice says:

'16.11 Due regard must be given to the Bribery Act 2010, ie care must be taken to ensure no bribe of any kind (including for example, and without limitation, a facilitation payment, a donation, or excessive hospitality or commission payments) is offered, given to, or placed upon any public servant (eg Local Authority or NHS staff member), or their employer, as an inducement to prescribe, supply, administer, recommend or buy any product or service.

Gifts in the form of promotional aids and prizes, whether related to a particular product or of general utility, may be distributed to members of the health professions and to appropriate administrative staff, provided that the gift or prize is inexpensive and relevant to the practice of their profession or employment. All activity involving sponsorship and hospitality must be considered carefully and steps be taken to ensure it is legal, relevant, proportionate and reasonable. Code members must abide by any guidance issued by the UK public sector on these matters, plus the guidelines on "Interactions with Healthcare Professionals and Healthcare Organisations" set out in Part 1 of the Medtech Europe Code of Ethical Business Practice. (If these conflict with each other, the UK guidance will take precedence for activity in the UK.)'

When considering competitions and prizes aimed at health professionals, it must therefore be remembered that it is an offence to offer a financial or other advantage to induce a person to perform a relevant function or activity improperly. Simply requiring the person entering for a prize to provide personal information and agree to receive promotional material on products and services would not constitute bribery.

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