

American Assn. of Doctors of Optometry, Inc.

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May 2, 2016

Mr. Thomas Fessler, Esq.
General Counsel, Vision Service Plan
3333 Quality Drive
Rancho Cordova, CA 95670-7985

Re: Proposed VSP Frame Reimbursement Program

Dear Mr. Fessler,

I am writing you on behalf of the doctors represented by the American Association of Doctors of Optometry (the "AADO"), many of whom are contracted VSP Network Doctors. On behalf of those VSP providers, the AADO is very concerned about the legal/criminal implications, and more generally the undermining of the doctor-patient relationship, from VSP's proposed changes to its frame reimbursement policy.

First, let me be sure we are speaking of the same thing and the program VSP has proposed is properly understood. If there are any errors in my understanding, please do not hesitate to correct any misunderstanding.

For more than twenty years, VSP has reimbursed a network doctor for covered frames furnished to a VSP beneficiary an amount equal to the wholesale price of that frame as published in the ubiquitous Frames catalog, or the company's wholesale price list if the frame was not listed in Frames. That reimbursement policy will change as of July 1, 2016. After July 1, 2016, VSP will reimburse only 80% of the wholesale price of the frame *unless* the frame is either a Marchon or Altair frame, or the doctor has purchased at least \$6,000 of Marchon/Altair frames in the prior twelve months. Of course, Marchon and Altair are frame lines wholly owned by VSP. Specifically, VSP's new frame policy, as stated in the provider manual, now states:

When billing us for listed frame companies/lines, please use the frame price indicated on the manufacturer's wholesale price list or the Frames catalog list as the wholesale cost. If the manufacturer is not listed on VSP's Frame Companies/Lines List, use your acquisition price when indicating the wholesale cost for in-network frames.

You'll be reimbursed based on the wholesale equivalent of the patient's retail allowance for Marchon and Altair frames. Effective July 1, 2016, for all other frames, you'll be reimbursed at 80% of the patient's wholesale equivalent frame allowance. If your net purchases of Marchon and Altair frames are equal to or more than \$6,000 LTM, you will be reimbursed at 100% of the patient's wholesale equivalent frame allowance for all frames.

So, VSP is reducing frame reimbursement to 80% of the wholesale price, unless it's a VSP frame that is being furnished, or unless the provider purchases \$6,000 worth of VSP frames in the prior year. Put another way, under the new policy, VSP will reimburse its contracted network providers 20% more for frames they furnish to VSP beneficiaries if the frame is from one of the VSP-owned frame companies or if the provider purchases \$6,000 or more in frames from the VSP-owned frame companies in the prior year.

It is clear that VSP is creating, through this policy, a direct and immediate financial reward and incentive to induce its network providers to furnish VSP-owned frames to the provider's VSP patients (and others). The provider's patients, of course, are unaware that their doctor receives a higher reimbursement if the patient purchases a Marchon or Altair frame, or if the doctor is selling \$6,000 or more a year of those frames. In other words, the patients are not aware that VSP provides a substantial (and far reaching) financial incentive (aka, "kickback") for its "independent" providers to "recommend" Marchon and Altair frames.

I believe this VSP program constitutes an illegal kickback scheme in violation of 42 U.S. Code § 1320a-7b (the Federal "Anti-Kickback Statute"). A doctor's participation by receipt of the benefit (section (1) below), as well as VSP's offer (section (2) below) to pay it, appear to constitute a Federal crime punishable by up to five years in prison. The Anti-Kickback Statute provides, in relevant part (bold/italics added):

(b) Illegal remunerations

(1) Whoever knowingly and willfully solicits or *receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—*

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

(2) Whoever knowingly and willfully *offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—*

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

VSP is offering to pay a 20% higher frame reimbursement to doctors that (a) furnish patients with Marchon or Altair frames, and/or (b) purchase \$6,000 worth of Marchon or Altair frames annually. This 20% premium is remuneration in exchange for furnishing patients with VSP frames, and/or remuneration in exchange for purchasing frames from VSP. As you know, many VSP beneficiaries receive their VSP benefits under Federal health care programs administered by VSP, specifically Medicaid/Medi-Cal, and/or Medicare/Medicare Advantage programs.

There are, of course, a number of exceptions to the Anti-Kickback Statute, stated in section (3), (A) – (G). I do not believe any of those exceptions apply to this scheme by VSP to induce the sale of its frames through financial rewards to its providers for buying and selling its products. If you believe otherwise, please let me know which exception and why it applies.

Accordingly, the AADO requests that VSP *immediately* rescind this program before it goes into effect, that VSP reinstate its former policy, that it reimburse providers for furnishing frames as it always has, and that it do so without special or "enhanced" reimbursement to the provider for furnishing VSP-owned frame lines.

Most importantly, and potential illegality aside, AADO strongly believes doctors should be free to recommend and furnish products to their patients that are best for their patients, including their VSP patients, without the conflict of interest created by VSP's payment of a kickback or "incentive" for recommending or furnishing VSP-owned products to both VSP and non-VSP patients.

The idea of VSP tying its vision care plan reimbursement rates to the amount of revenue VSP earns from the doctor's sales of VSP-owned frames, using vision care plan reimbursement as a tool to grow VSP frame sales (which itself raises questions of illegal anti-trust "tying" of products), is not only illegal, but it is inconsistent with decades of VSP policy, and with preserving the independence of, and trust in, the doctor-patient relationship, and should not be condoned. With that in mind, the AADO asks that VSP, a non-profit organization and the largest vision plan provider in the United States, look beyond its own profit-driven motives and consider the detrimental impact its policies may have when the doctor-patient relationship is undermined through the use of "back-door" financial incentives for pushing VSP-owned products on unwitting patients. Marchon and Altair frames should sell based on their merit as quality products, and not because their sales are tied to vision care plan reimbursement incentives and penalties.

Very truly yours,

Craig S Steinberg, O.D., J.D.
Executive Director, AADO

Cc: U.S. Dept. of Justice; California Dept. of Managed Care; Office of the California Attorney General; General Counsel, American Optometric Association