

FROM THE DIRECTOR

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FEDERAL ANTI-KICKBACK STATUTE

The following may be a useful resource, but is not intended to be a treatise on federal fraud and abuse laws or answer specific legal questions of providers. Rather, it serves as a basic understanding of the federal Anti-Kickback statute (AKS) and Civil Monetary Penalties law (CMPL) as they may apply to providers. MMAC encourages you to consult with your legal counsel for specific advice.

The federal AKS and CMPL are two important tools used by the federal Department of Health and Human Services Office of Inspector General (OIG) to combat health care fraud and abuse. Both the AKS and the CMPL apply to transactions reimbursed by Federal health care programs, including Medicare and Medicaid. The AKS is a criminal law, while the CMPL is a civil law. Violations of the AKS include administrative penalties, fines of up to \$50,000 per kickback plus three times the amount of the kickback, and potential jail time. A violation of the AKS is also an automatic violation of the CMPL. Violations of the CMPL result in administrative penalties and fines of \$10,000 to \$50,000 per violation. Administrative penalties for both can, and in some cases must, result in exclusion from participation in Federal health care programs.

The AKS prohibits the knowing and willful payment and receipt of remuneration to induce or reward patient referrals or the generation of business involving any item or service payable by Federal health care programs. This is true where even one purpose of the remuneration is to reward the referral of services or induce further referrals. "Remuneration" for the purposes of the AKS includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind. This definition includes money, but can also include free rent, grass-cutting, shopping, transportation, and waiver of co-payments or co-insurance for Federal health care program beneficiaries. Congress and the Secretary of Health and Human Services have developed protections for certain arrangements that have come to be known as safe-harbors. Arrangements that might otherwise be illegal under the broad proscription of the AKS can be protected by meeting the requirements set forth in the safe-harbors.

The CMPL addresses, among other things, the transfer of or offer to transfer remuneration to a Medicare or state health care program (including Medicaid) beneficiary. Penalties can result where the benefactor knows or should know that remuneration is likely to influence the beneficiary to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, by Medicare or a state health care program (including Medicaid). "Remuneration" for the purposes of the CMPL includes transfers of items or services for free or for other than fair market value. It can also include waiver of even part of the beneficiary's co-insurance or deductible amounts. It does not include anything that promotes access to care and poses a low risk of harm to patients and Federal health care

programs. The OIG has previously taken the position that nominal incentives are not prohibited by the CMPL and defined nominal as no more than \$10 per item or \$50 total on an annual basis.

Federal health care fraud and abuse laws like the AKS and CMPL seek to reduce the overutilization of services, reduce government health care costs caused by the overutilization of services for Federal health care program beneficiaries, and shift the focus of medical care to what is most medically appropriate for the patient rather than what is most lucrative for the health care provider. Because of the potential penalties associated with violations of the AKS and CMPL, awareness of these laws is vital for health care providers. Compliance with the AKS and CMPL is highly fact-specific, and so health care providers are encouraged to consult with legal counsel when questions arise.

LIMITATIONS

The limitations applicable to this Memorandum include the following:

- This Memorandum has no application to, and cannot be relied upon by, any individual or entity and does not affect the legal rights of, or procedures available to, the public or any segment thereof.
- This Memorandum may not be introduced into evidence in any matter involving an entity or individual.