# Anti-Kickback, Stark and the Affordable Care Act

As the Affordable Care Act continues to reward enterprises such as Accountable Care Organizations that (i) improve the health experience of patients, and (ii) operate efficiently by reducing costs, a health care practitioner should not lose sight on schemes that could run afoul of prohibited self-referral or anti-kickback laws. Since 1972, Congress prohibited practitioners from entering into "kickback" arrangements if such arrangements involved a paid referral that related to the Medicare Program. As enforcement of the anti-kickback law has expanded to include self-referrals as a prohibited activity, the anti-kickback and self-referral laws now cover the Medicaid and Tricare Programs . In fact, 2016 is expected to be a busy year with respect to enforcement of Stark and Anti-kickback violations.

As the year continues to unfold, it is important to be reminded generally what (i) anti-kickback and (ii) self-referral means in the ever changing economics of providing health care. In general, the anti-kickback prohibition or specifically Section 1320a-7b of Title 42 of the United States Code prohibits any person from:

(i) knowingly and willfully

(ii) soliciting, receiving, offering to pay, or paying any

(iii) remuneration (including any kickback, bribe, or rebate) in return for

(a) referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made under a federal health care program, or

(b) purchasing, leasing, ordering, arranging any good, facility, service, or item for which payment may be made under a federal health care program. (42 U.S.C.A. §1320a-7b(b).)

The anti-kickback statute has been interpreted to cover and prohibit any arrangement where one purpose of the remuneration is to obtain money for the referral of services or to induce further referrals even if there are many other legitimate purposes of the remuneration. (United States v. Kats, (9th Cir. 1989) 871 F.2d 105.)

The self-referral (i.e. Stark) or Section 1395nn of the United States Code prohibits a "physician" from making referrals for certain "designated health services" to an entity with which the physician has a "financial relationship" unless an exception applies. (See 42 U.S.C.A. §1395nn(a)(1).) The term "physician" includes a doctor of dental surgery or of dental medicine who is legally authorized to practice dentistry in the state in which he or she performs such function. (42 U.S.C.A. § 1395x.) A "financial relationship" includes an ownership or an investment interest in an entity or a compensation arrangement between the physician or dentist and the entity. (42 U.S.C.A. §1395nn(a)(2).)

Under the Stark law, "designated health services" or "DHS" is defined to include clinical laboratory services; physical therapy services; occupational therapy services; radiology services; radiation therapy services and supplies; durable medical equipment and supplies; parenteral and enteral nutrients, equipment, and supplies; prosthetic, orthotics, and prosthetic devices and supplies; home health services; outpatient prescription drug; inpatient and outpatient hospital services; and outpatient speech-language pathology services. (42 U.S.C.A. § 1395nn(h)(6).)

In essence, Stark and anti-kickback are intended to eliminate financial influences that could result when a physician has some economic interest in transactions that involve her patients and the care that is provided. Since health care practitioners are entrusted with the health of their patients, referrals must not be influenced by possible economic gain for simply making the referral. To do so, would increase health care costs, cause unnecessary treatment and an over utilization of health care services to the patient's and the taxpayer's detriment.

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