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HHS Clarifies Effect of Anti-Kickback Rules on Insurance Exchange Products

Since the Patient Protection and Affordable Care Act (PPACA) became law, a gnawing question for healthcare providers and their lawyers has been whether the federal anti-kickback statute applies to patients who purchase subsidized health insurance products on the new state or federal healthcare exchanges. Specifically, the anti-kickback regulations apply to “federal healthcare programs” that are defined to include the following:

“any plan or program that provides health benefits, whether directly through insurance, or otherwise, which is funded directly, *in whole or in part*, by the United States Government ... ” (emphasis added).¹

Given this broad definition, many believed the U.S. Department of Health and Human Services (HHS) would classify subsidized healthcare exchange products as “federal healthcare programs.” Such a decision would, in effect, make the federal anti-kickback statute apply to commercial insurance because providers would have had no way of knowing whether a patient’s insurance from, for instance, Blue Cross or another commercial payor was purchased and subsidized through a PPACA exchange.

On Wednesday some clarity was provided. In a letter dated Oct. 30, 2013, to Rep. Jim McDermott, HHS Secretary Kathleen Sebelius stated that her department:

“does not consider qualified health plans (QHPs), other programs related to the federally facilitated marketplace, and other programs under Title I of the Affordable Care Act to be federal healthcare programs.”

Consequently, subsidized health insurance products under PPACA are not “federal healthcare programs.” And since they are not federal healthcare

programs, the anti-kickback statute will not apply to payments that providers receive from subsidized insurance products.

A note of caution, however, is in order. The HHS Office of Inspector General (OIG) has repeatedly stated that carving out federal healthcare program patients will not immunize the parties in the transaction from anti-kickback statute risk.² Specifically, the OIG has repeatedly warned against this practice when the providers involved in the transaction will have other federal healthcare program referrals between them.

Further, HHS's decision does not mean that the exchange-purchased insurance products themselves are beyond federal oversight. In her letter, Sebelius went on to explain that the OIG "has jurisdiction under the Inspector General Act of 1978 to audit, investigate and evaluate the HHS-administered programs in Title I of the Affordable Care Act." The secretary explicitly mentioned that Congress has:

"expressly provided that the False Claim Act applies to any 'payments made by through or in connection with an Exchange if payments include Federal funds.' "

She went on to point out that depending on the conduct in question, other federal and state criminal and civil laws could apply.

In other words, with respect to the False Claim Act, we presume the insurers on the exchanges are subject to liability since they will be receiving federal funds. Whether a provider's claim to such an insurer will be subject to False Claim Act liability is less clear. Specifically, we do not know from HHS' letter whether HHS or the OIG believes that the provider's reimbursement from an exchange insurer includes "federal funds" simply because the premium payment was funded in whole or in part by the federal government.

¹ 42 U.S.C. §1320a-7b(f) (2013).

² See Advisory Opinion No. 13-03, Department of Health and Human Services Office of Inspector General (Issued June 7, 2013).

What This Means to You

In any event, this clarification from HHS regarding the anti-kickback statute is welcome news. On the other hand, from an overall compliance risk perspective, the landscape has not meaningfully changed for providers seeking to "carve out" federal compliance risks.

Contact Information

If you have questions concerning this or any other healthcare issues, please contact your Husch Blackwell attorney or one of our Healthcare, Life Sciences & Pharmaceuticals attorneys.