

Anti-Kickback Statute Not Applicable to Title I ACA Facilitated Healthcare Programs

With the initiation of open enrollment in the Affordable Care Act's (ACA) Health Exchange Marketplace ("Exchanges") on October 1, 2013, several inquiries have arisen from stakeholders related to potential regulatory implications of the Exchanges on healthcare entities and providers. In particular, on August 6, 2013, Congressman Jim McDermott submitted a letter to Kathleen Sebelius, Secretary of the U.S. Department of Health and Human Services (HHS), requesting that the HHS clarify whether *qualified health plans* (QHP) established under the ACA would be considered "*federal health care programs*" under the Anti-kickback Statute.¹ In her response, Sebelius stated that, after consultation with the U.S. Department of Justice, it was determined that "*the [HHS] does not consider QHPs, other programs related to the Federally-facilitated Marketplace, and other programs under Title I of the Affordable Care Act to be federal health care programs.*"²

Under the federal Anti-kickback Statute (AKS), a *federal health care program* is defined as "*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...*"³ The statute was originally designed to prevent unlawful compensation to entities that influence referrals for any federal healthcare program. While the announcement by Sebelius excludes the need to analyze QHP and Exchange insurer relationships under the AKS,⁴ it does not necessarily exclude providers' liability under the False Claims Act. As a result, the overall federal compliance risks have not significantly changed (or decreased) for providers.⁵

Implications for stakeholders include more freedom for commercial marketplace providers and plans in the development of marketplace networks and compensation arrangements. In addition, consumers may continue to benefit from industry participants that provide support in the form of waiving co-payments or providing coupons.⁶ However, while HHS' ruling appears to have removed barriers for third-party payors to provide fiduciary support to consumers by making premium payments to QHPs, a subsequent ruling released on November 4, 2013 indicated that HHS "*discourages this practice*" with an intent to monitor its use due to concerns that "*...it could skew the insurance risk pool and create an unlevel field in the*

Marketplaces."⁷ Towards this end, McDermott's letter also inquired as to how HHS will prevent fraud or non-compliance among QHPs with existing regulations.⁸ In response, Sebelius noted that HHS is implementing "*strong measures*" and "*robust oversight*" of relevant programs, and they will level appropriate civil and criminal penalties, including decertification, as needed for findings of non-compliance.⁹ Many of the regulations regarding quality assurance and consumer protection regarding QHPs were discussed in more detail in a September 2013 Health Capital Topics article.¹⁰

¹ "Will qualified health plans represent federal health care programs", By Jim McDermott, To Kathleen Sebelius, August 6, 2013

² "RE: Will qualified health plans represent federal health care programs", By Kathleen Sebelius, To Jim McDermott, October 30, 2013

³ "Criminal Penalties for Acts Involving Federal Health Care Programs", 42 USC § 1320a – 7b

⁴ "Dodging the AKS: Secretary Sebelius Concludes Marketplace Plans are not 'Federal Health Care Programs'", By Julie Kass, AHLA Practice Group Email Alert, November 1, 2013 (Received 11/2/13)

⁵ "HHS Clarifies Effect of Anti-Kickback Rules on Insurance Exchange Products", By Joseph V. Geraci, Husch Blackwell LLP, October 31, 2013, <http://www.huschblackwell.com/hhs-clarifies-effect-of-anti-kickback-rules-on-insurance-exchange-products/> (Accessed 11/2/13)

⁶ "United States: HHS Clarifies that ACA Qualified Health Plans Are Not Subject to Federal Anti-Kickback Statute; Expresses Concern About Providers Paying Premiums For Enrollees", By Jeremy Earl, Ankur J. Goel, and Joan Polacheck, McDermott, Will & Emery, November 7, 2013,

<http://www.mondaq.com/unitedstates/x/273530/Healthcare/HHS+Clarifies+that+ACA+Qualified+Health+Plans+Are+Not+Subject+to+Federal+AntiKickback+Statute+Expresses+Concern+About+Providers+Paying+Premiums+For+Enrollees> (Accessed 11/14/13)

⁷ "Third Party Payments of Premiums for Qualified Health Plans in the Marketplaces", By the DHHS, November 4, 2013, p. 1

⁸ *Ibid*, By Jim McDermott, To Kathleen Sebelius, August 6, 2013

⁹ *Ibid*, by Kathleen Sebelius, To Jim McDermott, October 30, 2013

¹⁰ "CMS Releases Final Rule on Health Exchanges", By Health Capital Consultants, Health Capital Topics, Vol 6, Issue 9, September 2013



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