

Understanding the Basics of Medicare and Medicaid Fraud and Abuse

According to the Office of Inspector General (“OIG”) website, health care fraud in America is approximately a \$4 billion industry. As fraud and abuse claims continue to rise, more and more physicians are taking preventative measures to ensure they are not in violation of any federal health laws. Over the years, fraud and abuse claims, particularly Stark law and the Anti-Kickback Statute, have earned increased attention as the number of violators of such laws have risen.

The OIG has taken substantial steps in terms of relaying information and providing physicians with the basics of fraud and abuse, and how to comply with the Federal laws that have the potential of leading to liability.

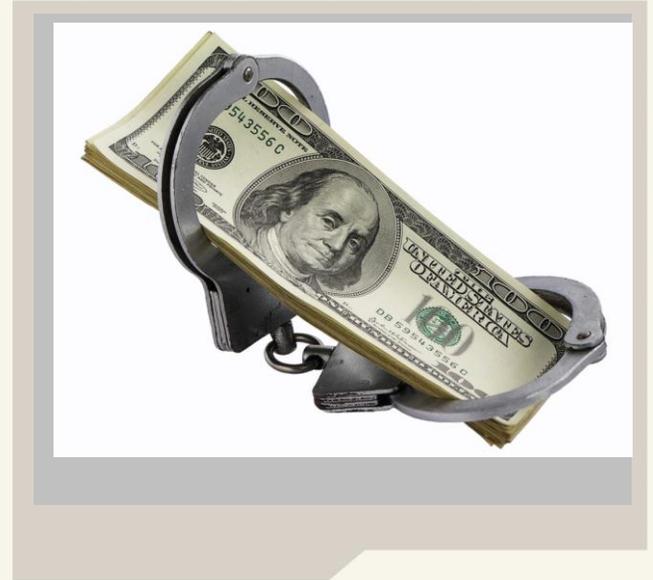
Fraud and Abuse Laws:

The most important Federal fraud and abuse laws that apply to physicians are the False Claims Act (FCS), the Physician Self-Referral Law (Stark Law), and the Anti-Kickback Statute (AKS).

False Claims Act [31 USC §§ 3729-3733]

The law is simple: under the FCA, it is illegal for one to submit claims for payment to Medicare or Medicaid that they know, or should know, is false or fraudulent. Common examples of this act relates to physicians billing for services to Medicaid/Medicare that never occurred; billing for premium services, when in fact inferior services were rendered; double billing; or up-coding.

Under the FCA, the law does not require a specific intent to commit the act, as the Act defines “knowing” to include instances where the physician acted recklessly or in deliberate ignorance of the truth or falsity of the information. In addition, the Federal government has provided an incentive to whistleblowers, allowing individuals to come forward and file a lawsuit on behalf of the United States and receive a percentage of any recovery obtained from the suit.



Falling prey to this act could result in fines up to three times the loss, plus \$11,000.00 per claim filed, under the civil penalties.

Physician Self-Referral Law [42 USC § 1395nn]

The Self-Referral Law, commonly referred to as the Stark Law, is considered one of the most violated acts within the health care industry. Stark Law prohibits physicians from referring patients to receive “designated health services” that are payable by Medicare/Medicaid to entities with which the physician, or an immediate family member, has a financial relationship, unless it falls under an exception. The law defines “financial relationship” to include both ownership/investment interests and compensation arrangements between the physician and entity.

With numerous changes over the years on what “designated health services” entails, the government has finally settled on them to include:

- clinical laboratory services;
- physical therapy, occupational therapy, and

JKY's Physician Newsletter

APRIL 2012

- speech language pathology services
- clinical laboratory services;
- physical therapy, occupational therapy, and speech language pathology services
- radiology and certain other imaging services
- radiation therapy services and supplies
- durable medical equipment and supplies
- parenteral and enteral nutrients, equipment, and supplies
- prosthetics, orthotics, and prosthetic devices and supplies
- home health services
- outpatient prescription drugs
- inpatient and outpatient hospital services

Currently there are thirty-five (35) exceptions under Stark Law that allow for acceptable financial relationships for physicians to refer to entities for DHS. Some of the common exceptions utilized in the industry are: personal service agreements, lease agreements, and bona-fide employment agreements. Similar to FCA, Stark law is also a strict liability statute, meaning proving specific intent is not required.

Anti-Kickback Statute [42 USC § 1320a-7b(b)]

Under the AKS, a physician is prohibited from knowingly and willfully paying an individual or entity to induce or reward patient referrals or the generation of business involving any item or service payable by the Federal health care programs (e.g. drugs, supplies, or health care services for Medicare/Medicaid patients).

The Statute uses the term “remuneration” and defines it to include anything of value, as it can take many forms besides cash; for example: free rent, expensive hotel stays, gifts, meals, etc. Very simply – paying for referrals in the health care industry is a criminal act. Under this Statute, each party's intent is a crucial element of their liability.

The Statute does provide certain safe harbors that provide physicians protection from certain payment and





“An ounce of prevention is worth a pound of cure.”

Adil Daudi is an Attorney at Joseph, Kroll & Yagalla, P.C., focusing primarily in Health Care Law, Fraud and Abuse, Regulatory Compliance, Asset Protection, Physician Contracts and Employment Agreements, Medical/Corporate Formations, Estate Planning, Shariah Estate Planning, and Non-Profit Organizations. He can be contacted for any questions related to this article or other areas of law at adil@josephlaw.net or (517) 381-2663.



business practices that would otherwise implicate the AKS. Certain AKS safe harbors include personal service agreements, rental agreements, investments in ambulatory surgical centers, and payments to bona-fide employees.

Compliance Programs

It is strongly encouraged and advised for physicians to implement and follow a compliance program that will serve to assist physicians to avoid fraudulent activities and ensure they are providing true and accurate claims.

Many medical practices have taken advantage of using the services of a health law attorney to help establish a compliance program. The following components, directly from the OIG website, provide physicians with a solid groundwork of establishing a compliance program:

1. Conduct internal monitoring and auditing;
2. Implement compliance and practice standards;
3. Designate a compliance officer or contact;
4. Conduct appropriate training and education;
5. Respond appropriately to detected offenses and develop corrective action;
6. Develop open lines of communication with employees;
7. Enforce disciplinary standards through well-publicized guidelines.

According to the OIG, with the passage of the Patient Protection and Affordable Care Act of 2010, it won't be long before physicians will be required to establish a compliance program if they are treating Medicare/Medicaid.

DEDICATED. DETERMINED. DEPENDABLE.