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Carving Out Federal Programs Does Not Preclude Anti-Kickback Liability

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The federal Anti-Kickback Statute ("AKS") prohibits offering, paying, soliciting or receiving remuneration to induce referrals for items or services payable by federal health care programs unless the transaction fits within a regulatory safe harbor. 42 U.S.C. § 1320a-7b. AKS violations are felonies, resulting in penalties of \$25,000 per violation and up to 5 years in prison in addition to civil penalties. AKS violations are now also False Claims Act violations, resulting in additional civil penalties.

To avoid AKS concerns, some transactions have been structured to carve out federal health care programs, e.g., remuneration is paid for non-Medicare or Medicaid business, but the remunerative arrangement does not apply to items or services payable by Medicare or Medicaid. The theory is that because the remuneration does not apply to federal healthcare programs, the AKS does not apply.

The Office of Inspector General ("OIG") recently reaffirmed that such "carve out" arrangements do not necessarily protect the participants from AKS liability:

The OIG has a long-standing concern about arrangements under which parties "carve out" Federal health care program beneficiaries or business generated by Federal health care programs from otherwise questionable financial arrangements. Such arrangements implicate, and may violate, the anti-kickback statute by disguising remuneration for Federal health care program business through the payment of amounts purportedly related to non-Federal health care program business.

OIG Advisory Opinion No. 12-06 at p.6-7. Accordingly, the OIG declined to render a favorable opinion as to an arrangement that would have allowed certain payments for only those patients referred for non-federal program business.

Unless the transaction can fit within one of the AKS regulatory safe harbors in 42 C.F.R. § 1001.952, the test for an AKS violation remains whether "one purpose" of a transaction is to induce referrals for items or services payable by Medicare, Medicaid or other federal health care programs. *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985), *cert. denied*, 474 U.S. 988 (1985). While carving out federal programs may

help, it does not insulate participants from AKS violations. Healthcare providers and other potential referral sources or recipients may want to review any "carve out" arrangements to ensure that they truly satisfy the AKS.

For questions regarding this update, please contact

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