

# Summary of The Medicare and Medicaid Patient Protection Act of 1987 (42 U.S.C. 1320a-7b)

Copyright 1996 William L. Manning except as otherwise noted. All rights reserved. [wmanning@netreach.net](mailto:wmanning@netreach.net)

The Medicare and Medicaid Patient Protection Act of 1987, as amended, 42 U.S.C. §1320a-7b (the "Antikickback Statute"), provides for criminal penalties for certain acts impacting Medicare and state health care (e.g., Medicaid) reimbursable services. Enforcement actions have resulted in principals being liable for the acts of their agents. Of primary concern is the section of the statute which prohibits the offer or receipt of certain remuneration in return for referrals for or recommending purchase of supplies and services reimbursable under government health care programs. Section 1320a-7b(b) provides:

(1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe or rebate (directly or indirectly, overtly or covertly, in cash or in kind - (A) in return for 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 in whole or in part under [Medicare] or a State health care program, or (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under [Medicare] or a State health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

Furthermore, this subsection provides:

(2) whoever knowingly and willfully offers and pays any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person - (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under [Medicare] or a State health care program, or (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under [Medicare] or a State health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

Thus, the Antikickback Statute prohibits certain solicitations or receipt of remuneration and the offer or payment of certain remuneration. Section 1320a-7b(b)(2) has generally been applied to broker-style arrangements, whereby an individual offers remuneration to another individual for the purpose of recommending or referring an individual for the furnishing or arranging for an item or service. In an Antikickback Statute analysis, it is immaterial whether remuneration induces one in a position to refer or recommend. It is sufficient that the remuneration may induce one to refer or recommend. *United States v. Greber*, 760 F.2d 68, 71 (3rd Cir.), cert. denied, 474 U.S. 988 (1985). Under *Greber*, it is also irrelevant that there are other legitimate reasons for the remuneration. If one purpose is to induce referrals, then the Antikickback Statute is violated. *Id.* at 71.

The Antikickback Statute contains certain exceptions, which allow conduct that would otherwise violate the statute, such as certain discounts given by suppliers to cost-reporting providers. Finally, the statute permits the Secretary of DHHS to promulgate regulations which identify

other practices which do not violate the Antikickback Statute. In this latter case, the Secretary of DHHS has promulgated approximately numerous "safe harbors", found at 42 C.F.R. §1001.952, which, if the requirements are met, insulate individuals and entities from prosecution under the Antikickback Statute for conduct which would otherwise violate the Antikickback Statute. Although compliance with a regulatory safe harbor is not required if the written agreements or arrangements between parties under consideration do not fall within the Antikickback Statute in the first instance, the safer course is to evaluate "gray area" agreements in the context of the regulatory safe harbors. The safe harbor regulations, however, are rather narrowly drafted and therefore make compliance with them difficult.