

Health Headlines

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IRS Issues Request for Comments Delaying Enforcement of Nondiscrimination Rules for Insured Health Plans –

The Internal Revenue Service (IRS) has issued IRS Notice 2011-1 delaying the enforcement of the nondiscrimination provisions of the Patient Protection and Affordable Care Act (PPACA) against insured group health plans until the IRS, Department of Labor (DOL), and Department of Health and Human Services (HHS) are able to publish guidance regarding the new rules. Section 10101(d) of PPACA applies the nondiscrimination provisions found at Section 105 of the Internal Revenue Code, which already are applicable to self-insured plans, to group health plans. These provisions prevent plans from discriminating with regard to either eligibility or benefits in favor of “highly compensated individuals” (generally defined to include the five highest paid officers, shareholders who own more than 10% in value of the stock of the employer, and the highest paid 25% of all employees, with some exceptions). Once the rules go into effect, insured group health plans that do not comply with the nondiscrimination provisions may be subject to an excise tax, a civil action to enjoin non-compliant practices, or, in the case of non-federal governmental group health plans, civil monetary penalties.

The IRS has delayed enforcement of the nondiscrimination rules because of concerns over the lack of guidance regarding how the rules will apply to group health plans. The statutory provision provides only that rules “similar to” those rules that apply to self-insured plans will apply to group health plans. The IRS, in conjunction with the DOL and HHS, determined that compliance would not be required until additional guidance was issued. As part of the delay, the IRS has solicited comments regarding several issues, including:

- The definition of “benefits;”
- Application of the nondiscrimination rules to group health plans following establishment of the state health insurance exchanges in 2014 along with other provisions of PPACA;
- Whether the guidance should provide for “safe harbor” plan designs;
- Potential transition rules following a merger, acquisition or other corporate transaction; and
- Application of sanctions for noncompliance.

Comments must be submitted to the IRS by March 11, 2011 and will be shared with the DOL and HHS. IRS Notice 2011-1 is available by clicking [here](#).

Reporter, *Adam Laughton*, Houston, +1 713 276 7400, alaughton@kslaw.com.

Representatives Pete Stark and Wally Herger Reintroduce a House Bill that Would Bolster the OIG’s Authority to Exclude Individuals and Entities – Representative Pete Stark (D-Calif.), author of what is colloquially referred to as the “Stark Law,” continues to focus on perceived fraud and abuse within the healthcare industry. On February 11, 2011, Rep. Stark along with Rep. Wally Herger (R-Calif.) reintroduced the bill titled Strengthening Medicare Anti-Fraud Measures Act of 2011 (the Bill) in the House of Representatives. The Bill would bolster the Department of Health and Human

Services Office of Inspector General's (OIG) permissive exclusion authority with respect to individuals and entities affiliated with sanctioned entities. Although it had been previously introduced in the 111th Congress and was passed in the House last year, the Bill had not yet been taken up by the Senate.

Currently 42 U.S.C. § 1320a-7(b)(15) grants the OIG permissive authority to exclude individuals controlling a sanctioned entity. A "sanctioned entity" refers to an entity that has been excluded from participation under Medicare or a State health care program or that has been convicted of any offense that constitutes grounds for a mandatory exclusion or certain permissive exclusions. Individuals with "control" are those individuals either with a direct or indirect ownership or control interest in a sanctioned entity who know or should know of the action constituting the basis for the conviction or exclusion or who are officers or managing employees of a sanctioned entity. The OIG issued guidance for the industry in October of 2010 explaining how the agency interprets this section of the Social Security Act. A copy of the *Health Headlines* article discussing and providing a link to the OIG guidance is available by clicking [here](#).

The reintroduced Bill would amend this same provision, 42 U.S.C. § 1320a-7(b)(15), to allow exclusion of individuals and entities "affiliated" with a sanctioned entity. First, the proposed amendments in the Bill would permit the OIG to exclude any "affiliated entity" of a sanctioned entity. An "affiliated entity" is defined to mean an entity affiliated with a sanctioned entity as well as an entity that *was* affiliated with the sanctioned entity at the time of the conduct that formed the basis for the conviction or exclusion. As an example, the Bill would permit the OIG to exclude a parent company of a sham or shell entity that was convicted of Medicare fraud or excluded.

Second, the Bill would extend to exclusion of individuals having certain relationships with a sanctioned entity or an affiliated entity. The Bill would permit exclusion of individuals having an ownership or control interest in a sanctioned entity or affiliated entity and who knew (or should have known) of the problematic conduct, as well as individuals serving as officers or managing employees of a sanctioned entity or affiliated entity. Third, the Bill would also extend to permissive exclusion of individuals who *formerly* held such ownership or control interests, or officer or managing employee positions, with a sanctioned entity or affiliated entity at the time of the conduct that forms the basis for conviction or exclusion.

The Bill has been referred to the House Ways and Means Committee, Budget Committee and Energy and Commerce Committee. A copy of the Bill is available by clicking [here](#).

Reporter, *Kate Stern*, Atlanta, +1 404 572 4661, ksstern@kslaw.com.

Office of Inspector General Publishes Additional Fraud & Abuse Training Materials for New Physicians – In November 2010, the Office of Inspector General (OIG) released a guide entitled "Roadmap for New Physicians: Avoiding Medicare and Medicaid Fraud and Abuse" (the Roadmap). The Roadmap "assists physicians in understanding how to comply with [Medicare and Medicaid fraud and abuse laws] by identifying 'red flags' that could lead to potential liability in law enforcement and administrative actions." OIG has now issued additional training materials to assist in delivering the key points of the Roadmap. The new resources include a PowerPoint presentation that may be used to teach the material outlined in the Roadmap, a prepared set of speaker notes to simplify delivering the presentation, and a video that includes the slide presentation with narration for individuals who cannot attend a live presentation.

As described by OIG, "These materials summarize the five main Federal fraud and abuse laws (the False Claims Act, the Anti-Kickback Statute, the Stark Law, the Exclusion Statute, and the Civil Monetary Penalties Law) and provide tips on how physicians should comply with these laws in their relationships with payers (*e.g.*, the Medicare and Medicaid programs), vendors (*e.g.*, drug, biologic, and medical device companies), and fellow providers (*e.g.*, hospitals, nursing homes, and physician colleagues)."

The Roadmap for New Physicians is available by clicking [here](#). For more detail concerning the background of the Roadmap, see our November 15, 2010 *Health Headlines* edition, available by clicking [here](#). The companion PowerPoint presentation and speaker notes are available by clicking [here](#) and [here](#). Finally, the slide presentation with accompanying narration is available by clicking [here](#).

Reporter, *Mike Paulhus*, Atlanta, +1 404 572 2860, mpaulhus@kslaw.com.

King & Spalding Upcoming Roundtable to Discuss Medicare and Medicaid Program Contractors – On February 23, 2011, King & Spalding will be hosting a Roundtable in its Atlanta office entitled “Taking Charge of Contractor Chaos.” The Roundtable will offer a discussion of the various Medicare and Medicaid program contractors (including RACs, MACs, MICs, PSCs and ZPICs) and how they operate, overlap and differ, as well as how providers can prepare themselves for contractor audits. Please be on the lookout for additional communications regarding further program details and registration information.

King & Spalding 20th Annual Health Law and Policy Forum – King & Spalding’s 20th annual Health Law and Policy Forum will be held this year on March 14 at the Four Seasons Hotel in Atlanta. Please be on the lookout for additional communications soon that will provide details on the specific content of the program.

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