PUBLICATION

Dodging the AKS: Marketplace Plans Are Not 'Federal Health Care Programs' [Ober|Kaler]

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In an October 30th letter addressed to Congressman Jim McDermott, the Department of Health and Human Services (HHS) Secretary, Kathleen Sebelius, left little to interpretation: Qualified health plans (QHPs) purchased through the Marketplace do not constitute “federal health care programs” under the federal antikickback statute (AKS). The Secretary stated that this determination was made in consultation with the Department of Justice.

The Secretary provided a specific list of programs that would not be considered federal health care programs: state-based and federally facilitated marketplaces; the cost-sharing reductions and advance payments of the premium tax credit; Navigators for the federally facilitated Marketplaces and other federally funded consumer assistance programs; consumer-oriented and -operated health insurance plans; and the risk adjustment, reinsurance and risk corridors programs. In doing so, the Secretary was careful to note that the government is not without alternative oversight and investigative tools for the Marketplace. The Secretary provided a laundry list of potential investigative and prosecutorial tools for the Marketplace, including: (1) the Office of Inspector General's (OIG's) jurisdiction to audit, investigate, and evaluate Affordable Care Act (ACA) programs; (2) HHS's and OIG's authorization under section 1313 of the ACA to investigate the “affairs of an Exchange”; (3) the False Claims Act, where federal funds are at issue; and (4) “additional federal and state criminal or civil authorities.”

While neither Congressman McDermott's letter nor the Secretary's response specifically mentioned pharmacy coupons or premium support payments offered to patients enrolling in QHPs, many concluded that if the Marketplace was not encumbered by the AKS then coupons and premium support payments would be permitted. The Centers for Medicaid and Medicare Services (CMS), however, moved quickly to throw cold water on hospitals and other providers who might seek to provide premium support payments.

On November 4th, a mere five days after the Secretary's letter to Congressman McDermott, the CMS Center for Consumer Information and Insurance Oversight (CCIO) released a Q&A[PDF] titled, “Third Party Payments of Premiums for Qualified Health Plans in the Marketplaces.” The FAQ notes HHS's “significant concerns” with the possibility of third party payors—such as hospitals, other health care providers, and other commercial entities—making premium and cost-sharing support payments on behalf of patients enrolled in the Marketplace.

CMS said its unease with the practice stems from a concern that premium support payments will “skew the insurance risk pool and create an unlevel field in the Marketplaces.” While not stating that premium support payments are banned, CMS stated that it “discourages” the practice and further “encourages issuers to reject such third party payments.” CMS further noted its intent to monitor the practice and to take “appropriate action,” if necessary, pursuant to its authority to regulate the Marketplaces under section 1321(a) of the ACA.

Ober|Kaler's Comments

The Secretary's letter and CCIO's Q&A seem to suggest somewhat of a disconnect within HHS. While the new CCIO guidance is not directly contradictory to the Secretary's letter, the CCIO Q&A indicates an uneasiness with premium support payments—a policy the Secretary's letter had appeared to condone.

Notably, the CCIO Q&A did not go so far as to state that premium support payments are illegal; indeed, it is not clear what authority CMS would rely upon were it to seek to regulate this practice in the Marketplace. The CCIO guidance referenced only CMS's broad authority to regulate the Marketplaces under section 1321(a) of the ACA.

Irrespective of this apparent conflict over premium support payments, the Secretary's letter to Congressman McDermott nonetheless has broad implications. As noted in Congressman McDermott's original letter to the Secretary, the fact that the AKS does not apply to QHPs gives them greater flexibility to offer rewards to their beneficiaries, such as rewards for participating in preventive care screenings. The Secretary's statement that the AKS does not apply to the Marketplace was not contradicted in the subsequent Q&A, so it appear that there is no obstacle to pharmaceutical manufacturers extending their coupon programs to individuals who obtained coverage through the Marketplace.

As suggested above, the Secretary's statement eliminates the AKS as an obstacle to a number of different programs aimed at individuals in connection with QHPs and other plans purchased through the Marketplace. Nevertheless, state laws must be evaluated before moving forward with such programs. For example, state fraud and abuse and insurance laws may have implications on premium support programs.

Finally, while the False Claims Act is applicable to all payments made through, or in connection with, an Exchange where federal funds are at issue, the Secretary's decision that the AKS is inapplicable to QHPs and other coverage obtained through the Marketplace raises unanswered question about what acts may serve as a predicate for an action under the federal False Claims Act.