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Show me the money, and I'll show you whom the government is watching

By Bart Daniel and Elle Klein

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Notorious bank robber Willie Sutton's advice was, "Go where the money is...and go there often."^[1] And right now, especially in light of the ongoing pandemic, the money is in healthcare. In response to this unprecedented public health crisis, the federal government is spending millions of dollars in support of COVID-19 testing, research, and treatment. As such, it is no surprise that both federal and state authorities are turning their efforts toward combatting fraud related to COVID-19 and those seeking to exploit and profit from the pandemic.

Additional government spending naturally leads to additional government enforcement and oversight.^[2] Both federal and state regulators, such as the Department of Justice and state attorneys general, have begun increasing their focus on and even creating multiagency task forces to combat healthcare fraud schemes tied to COVID-19.^[3]

In light of this increased oversight, as a result of additional government spending and increasing virus testing and serology testing clinical laboratories, it is a matter of when, not if, the government decides to enforce the legal weapons at their disposal—namely, the federal Anti-Kickback Statute (AKS). However, a more recent act, the Eliminating Kickbacks in Recovery Act (EKRA),^[4] may provide government enforcement agencies an additional, more robust and customized means of enforcement. Knowing that they will soon be under a microscope, healthcare professionals should evaluate their marketing and compensation arrangements to ensure compliance with these laws.

Anti-Kickback Statute

Those in the healthcare industry are likely already aware of the AKS. The federal AKS is a healthcare fraud and abuse statute that prohibits the exchange of remuneration—which the statute defines broadly as anything of value—for referrals/kickbacks for services that are payable by a federal program, mainly Medicare or Medicaid. The AKS provides for both criminal and civil penalties. The criminal penalties include fines of up to \$25,000 and five years of imprisonment. In addition, the enforcement agencies can pursue civil penalties of up to \$50,000 per violation plus three times the amount of any government overpayment. Compliance professionals should acquaint themselves with the nuances of this law and make sure their current practices are compliant.

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