



Thompson Coburn LLP | One US Bank Plaza | St. Louis, MO 63101

Marketplace Plans Not Subject to Anti-Kickback Statute

On October 30, 2013, the Secretary of the Department of Health and Human Services ("DHHS"), Kathleen Sebelius ("Secretary"), released a **letter** to Congressman Jim McDermott (D-WA) answering the question of whether qualified health plans ("QHPs") purchased through the Affordable Care Act's ("ACA") marketplaces are subject to the Anti-Kickback Statute.

For the Anti-Kickback Statute to apply, the QHPs must be considered a "federal health care program" as defined by the Anti-Kickback Statute. "Federal health care program" is defined as "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government...or any State health care program...."

The Secretary stated that DHHS, in consultation with the Department of Justice, does not consider "QHPs, other programs related to the Federally-facilitated Marketplace, and other programs under Title I of the Affordable Care Act to be federal health care programs." The Secretary explained that the programs which are not considered "federal health care programs" include: (1) the State-based and Federally-facilitated marketplaces; (2) the cost-sharing reductions and advance payments of the premium tax credit; (3) Navigators for the Federally-facilitated Marketplaces and other Federally funded consumer-assistance programs; (4) consumer-oriented and operated health insurance plans; and (5) the risk adjustment, reinsurance and risk corridors programs.

The Secretary noted that DHHS is "taking strong measures to protect consumers and to ensure robust oversight of these critical Affordable Care Act programs." On August 30, 2013, DHHS published the **first set of compliance standards in a final rule** that includes requirements for decertification of QHPs and "the imposition of civil money penalties against non-compliant issuers who have plans in the Federally-facilitated Marketplace."

In addition, the Secretary's letter emphasized that:

- The Office of Inspector General ("OIG") has jurisdiction to audit, investigate and evaluate the HHS-administered programs in Title I of the ACA;
- The ACA authorizes DHHS and the OIG to investigate the "affairs of an Exchange";
- The False Claims Act applies to any "payments made by[,] through, or in connection with an Exchange if the payments include Federal funds"; and
- Depending on the specific conduct in question, additional federal and state criminal or civil authority may apply.

Please contact your Thompson Coburn attorney or any of the attorneys in our Health Care Practice Group if you have questions regarding the Affordable Care Act or compliance with health care fraud and abuse laws.

Allen D. Allred	314-552-6001	aallred@thompsoncoburn.com
Don L. Daniel	314-552-6379	ddaniel@thompsoncoburn.com
James L. Fogle	314-552-6035	jfogle@thompsoncoburn.com
Evan Raskas Goldfarb	314-552-6198	egoldfarb@thompsoncoburn.com
A. Jay Goldstein	312-580-2207	agoldstein@thompsoncoburn.com
Milada R. Goturi	202-585-6951	mgoturi@thompsoncoburn.com
James F. Gunn	314-552-6189	jgunn@thompsoncoburn.com
Joyce Harris Hennessy	314-552-6165	jhennessy@thompsoncoburn.com
Garrett T. Jackson	314-552-6586	gjackson@thompsoncoburn.com
Nicole K. Jobe	314-552-6592	njobe@thompsoncoburn.com
Robert N. Kamensky	312-580-2247	rkamensky@thompsoncoburn.com
Richard J. Lang	312-580-2220	rlang@thompsoncoburn.com
Joan M. Lebow	312-580-2212	jlebow@thompsoncoburn.com
Suzanne E. Ritzler	312-580-2227	sritzler@thompsoncoburn.com

Thompson Coburn LLP
Chicago | Los Angeles | St. Louis | Southern Illinois | Washington, D.C.
www.thompsoncoburn.com

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