



STOP! GO! CAUTION!

A practical guide to federal remuneration laws

By **STEPHEN SAMBOL**

On May 18, 2006, the Supreme Court of Florida held that the 2000 Florida anti-kickback statute was preempted by federal law and thus unconstitutional under the Supremacy Clause of the United States Constitution. As a

result, referral relationships between Florida health-care providers are now governed exclusively by the federal Anti-kickback and Stark laws.

The federal Anti-kickback statute was enacted as part of the Social Security Amendments of 1972. The statute prohibits anyone from knowingly and

willfully offering or paying any remuneration with the purpose to induce or reward the referral or generation of federal health-care-program related business. Those convicted of violating the statute may be subject to criminal and civil penalties as well as exclusion from participation in both state and federal health-care programs.

The statute has been amended three times in an effort to clarify and restrict its application. Most notably, Congress amended the statute in 1977 to exclude certain business practices. These statutory exemptions, referred to as "safe harbors," have since been expanded to include 22 practices. Protection under a safe harbor requires that the business practice at issue must fall squarely into one of the enumerated provisions. However, failure to comply with a safe harbor provision does not necessarily mean that the business practice is illegal. Compliance with safe harbor provisions is voluntary, and any non-compliant arrangement must be analyzed independently. Providers uncertain as to whether a specific arrangement qualifies as a "safe harbor" may request an advisory opinion.



GREEN LIGHTS

There are a number of well-established safe harbor provisions exempting business practices used by healthcare providers. Guidance is available with respect to these categories, as a consensus exists among the

judiciary. The safest of the safe harbor provisions include those regulating:

- Investment interests
- Equipment rental
- Personal services and management contracts
- Sale of practice
- Warranties
- Employee arrangements
- Group purchasing organizations
- Price reductions offered to health plans
- Investments in group practices
- Cooperative hospital service organizations
- Ambulatory surgical centers
- Price reductions offered to eligible managed care organizations

- Ambulance replenishing



YELLOW LIGHTS

However, there are a number of categories which the courts have been unable to establish a consensus of opinion. As a result, potential risks exist with respect to several categories of common relationships. Healthcare providers should exercise caution when entering into business relationships involving:

- Joint ventures
- Space rental
- Compensation arrangements with physicians
- Relationships with other healthcare entities/referral services
- Recruitment arrangements
- Discounts
- Medical staff credentialing
- Malpractice insurance subsidies
- Gainsharing arrangements
- Referral arrangements for specialty services



RED LIGHTS

Finally, there are a number of business practices that the courts have deemed inherently illegal under the anti-kickback statute. Business practices that pose a significant risk of fraud and abuse to federal health-care programs are clearly prohibited. The courts have refused to extend any safe harbor protection to the following types of arrangements:

- Compensation to independent sales representatives.
- Compensation to non-bona-fide employees.
- Compensation based upon percentages of medical equipment sales.
- Space rental when a referral relationship exists between parties.
- Compensation in exchange for referrals to testing laboratories.

Stephen Sambol is a founding shareholder at the law firm of Alvarez, Sambol, Withrop & Madson, PA, who concentrates his commercial practice in the representation of individual physicians, groups and other health-care businesses; 1-800-877-7488; sbs@aswmpa.com.