

Toward a Health System Where Self-Referral Laws Are Obsolete

Jared Rhoads

For many years, physicians who see Medicare and Medicaid patients have been required to comply with the suite of rules known as the Stark Law and Anti-Kickback Statute. The Stark Law was passed in 1989, and its intent was to prevent physicians from referring Medicare patients to labs or other services where they or their family members have a financial relationship. The Anti-Kickback Statute dates back to 1972, when it was passed to prevent the offering or receiving of kickbacks for referrals of patients, services, or items covered by Medicare or Medicaid. In essence, the laws govern physician self-referral, and are intended to stamp out the alleged conflict of interest that arises when, for example, a physician refers a patient to a hospital or facility in which the physician has an ownership interest.

The latest expansion to the Stark laws is tucked away on page 1,534 of the health reform legislation signed into law by President Obama.¹ It specifically targets physicians who order MRIs, CT scans, PET scans, or “any other designated health services that the Secretary determines appropriate” for their Medicare and Medicaid patients.

As Kaiser Health News summarizes it, “Under the new health care overhaul law, doctors who refer Medicare and Medicaid patients to in-house imaging machines must disclose in writing that they own the equipment. They’ll also have to tell their patients they can get the services elsewhere, and provide a list of 10 alternative sites within 25 miles.”²

So if you are a physician working in group practice, and you determine that you can better serve your patients through faster turnaround or more consistent quality by having your own advanced diagnostic machines onsite, you might want to think twice before making that purchase. For starters, you will be forced to advertise on behalf of your competitors. But worse, you will be placing yourself in the crosshairs of yet another set of compliance auditors. And don’t think that Congress would not someday pass a law to reduce reimbursement rates for services delivered in-house, in the name of equalizing “excess” profits. If that happens, it would come after you’ve committed to your million-dollar investment.

Regulations such as these often have at least a shred of justifiability to them. In this case, the best argument for some sort of check on self-referral is that it is needed in order to protect taxpayers against waste, fraud, and abuse. After all, when the federal government is the payer—as it is in

Medicare and Medicaid—taxpayers are forced participants in a non-market arrangement. In such a context, one can say that it is reasonable to impose guardrails against rent-seeking and self-dealing that would otherwise drain public funds. There is a place for that point, but as a long-term position it is too accepting of our current unfree system. Having a government program with “watchdog” laws layered on top should be seen as a second-best option behind having a freer system that does not require such “fixes.”

Self-referral is not an inherently pernicious business practice. It’s the medical equivalent of vertical integration in the business world. Are consumers’ rights violated when an automobile dealership opens up its own on-site service garage, or when Amazon.com recommends a book to a visitor and then provides the link to the Amazon page from which the book can be purchased? Of course not.

The rules against self-referral are not just offensive to physicians; they are complex and arbitrary. They create non-trivial compliance costs and they chill innovation in how medical practices might be organized and run more efficiently. The real conflict here is not between patients and their physicians, whose interests are aligned. Conflict arises when the government steps in to pay for what should be private transactions between patients and their doctors.

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Declaration of Conflicting Interests

The author has declared no potential conflicts of interest with respect to the research, authorship, or publication of this article.

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1. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).
2. “Physicians must disclose if they own CT, MRI, or PET scanners” *Kaiser Health News*, August 23 2010.