There's a Coupon for That: How Coupons for Medical Services on Daily Deal Websites Violate the Federal anti-Kickback Statute

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I. INTRODUCTION

" Flaunt your beaming beauty with today's Groupon: for $150, you get an in-office Zoom! teeth-whitening treatment (an $800 value), x-rays (a $187 value), and a new-patient exam (a $99 value) . . . (a $1,086 total value)." Groupon, a portmanteau derived from group and coupon, is a daily deal website where customers can purchase coupons for goods and services at local businesses. The Groupon business model is relatively simple: a local business displays a coupon on its website with a pre-determined amount of coupons that must sell before the deal is applicable to any buyer. Groupon gets a share of all coupons sold and the local business gains new customers, greater exposure, and increased market share. The success of Groupon has led to the proliferation of daily deal websites on the Internet, targeting customers in specific cities or demographic groups. Moreover, these sites are attracting providers of medical services, like general practitioners and health testing centers, hoping to reap such benefits. Many coupons for medical services advertised on daily deal websites do not raise anti-kickback concerns since the advertised services are not covered by Federal health care programs. However, not all medical coupons advertised on daily deal websites are lawful under the anti-kickback statute. The Department of Health and Human Services, Office of Inspector General ("OIG") — a government agency charged with combating fraud, waste and abuse in Federal health care programs — approved a proposed business arrangement akin to the daily deal website model. In advisory opinion 12-02, the OIG favorably opined on a website that displayed coupons and advertisements from health care providers and suppliers, exclusively, for items and services billable to Federal health care programs. However, the OIG was careful to distinguish the proposed arrangement from arrangements currently in effect that do raise kickback concerns. The proposed arrangement stated, among other things, that customers would be able to print coupons that are only redeemable after services are rendered. Customers would not pre-pay for the services they seek and the website would fully comply with the discount regulatory safe harbor, which excludes certain transactions from being considered "prohibited remuneration" under the anti-kickback statute. The OIG found this arrangement posed a low risk of fraud and abuse under the anti-kickback statute because the marketer is not a health care provider, payments to the marketer did not depend on the volume or value of business, advertising on the site would be comparable to advertising in print media, and providers would not be unduly influenced to provide medically unnecessary services since customers would not pre-pay for coupons. Under a similar analysis, the current arrangement between daily deal websites and providers of services billable to Federal health care programs presents an unacceptable risk of fraud and abuse because several important factors intrinsic in advisory opinion 12-02 do not exist.

This article argues business arrangements between daily deal websites and providers of medical services nonetheless violate the anti-kickback statute because they arrange for the use of services billable to Federal health care programs through targeted advertising activity. Furthermore, parties to this arrangement, as currently structured, are unlikely

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to evade prosecution under the criminal and civil penalties of the statute since these arrangements follow a percentage compensation structure and do not fall within applicable regulatory safe harbors. Part II examines the federal anti-kickback statute jurisprudence and rules applicable to arrangements between daily deal websites and health care providers. Part III argues that while daily deal websites do not actively market to beneficiaries of Federal health care programs, the peculiarities of this arrangement, such as the financial incentive to increase the number of customers purchasing coupons, support an inference of illegality under the anti-kickback statute. Part III also posits that regulatory safe harbors for personal services and management contracts and for discounts do not shield parties under this arrangement from criminal prosecution because compensation under this arrangement takes into account the volume of generated business. Part IV argues the discount regulatory safe harbor should be amended to encompass these arrangements because Congress intended the safe harbors to evolve to reflect current business practices. Lastly, this article concludes that unless the regulatory safe harbors are amended to encompass the daily deal website structure, participants in these arrangements are at an increased risk of liability under the anti-kickback statute.

II. BACKGROUND

A. Judicial Enforcement of the Anti-kickback Statute and the Government’s Burden of Proof

Congress enacted the anti-kickback statute to deter the practice of providing remuneration as an inducement to refer services reimbursable by Federal health care programs. The anti-kickback provision of the Social Security Act of 1972 prohibits kickbacks, bribes, or rebates offered directly or indirectly, overtly or covertly, in return for referring individuals for items or services payable by Federal health care programs. Furthermore, referrals under the statute include arranging for or recommending purchasing, leasing, or ordering goods and services for which payment may be made, in whole or in part, by the federal government. Such broad language implicates even mundane business transactions in the healthcare industry, and it applies to all federally funded healthcare programs. The impetus behind the enactment of the anti-kickback statute is the prevention of program abuse and fraudulent claims and the protection of program beneficiaries.

In 1985, the Third Circuit held in United States v. Greber that the federal anti-kickback statute is violated so long as one purpose of a business arrangement is to induce future referrals. The “one-purpose” doctrine judiciously broadened the scope of the anti-kickback provision and is the standard by which courts and the OIG analyze possible violations. In addition, for a successful criminal conviction under the statute the federal government must prove that the defendant knowingly and willfully intended to transfer prohibited remuneration. Unlike the “one-purpose” doctrine - the majority rule - courts were split on how the government must prove the requisite intent. However, the Patient Protection and Affordable Care Act in 2010 clarified the mens rea requirement by expressly stating that the defendant need not have actual knowledge or specific intent to violate the statute.

In the same way, anti-kickback statute violations ultimately depend on the totality of the circumstances. The government need not find specific instances of fraud and abuse of Federal health care programs to prosecute under the statute. The potential for abuse, coupled with inadequate safeguards, makes practitioners and daily deal websites vulnerable to prosecution. Entities involved in arrangements that do not adequately satisfy the requirements of a regulatory safe harbor are especially vulnerable.

B. Regulatory Safe Harbor Exceptions to the Anti-kickback Statute

The practice of discounting is statutorily exempt from the anti-kickback statute only if discounts are properly disclosed and reflected in reimbursement claims submitted to Federal health care programs. In addition, Congress authorized the OIG to issue regulations specifying payment practices that are protected from criminal and civil liability. Accordingly, several legally sanctioned activities, written in the Code of Federal Regulations, shield an entity from both civil and criminal prosecution. However, failure to fall within one of the regulatory
safe harbor exceptions does not automatically make an arrangement unlawful; rather, the arrangement is assessed under the statute for legality. The OIG often issues advisory opinions on the applicability of a particular safe harbor provision to a hypothetical arrangement in cases where the legality of an arrangement may be unclear.

Of the twenty-five safe harbor exceptions, one of the most important provisions to the daily deal business arrangement is the discounts safe harbor provision. For daily deal websites to fall within the discount safe harbor, a claim submitted by a seller on behalf of a buyer must show the discount was provided at the time of service. Furthermore, the seller must be able to show, upon request, that the offeror, which is an entity that promotes the purchase of an item or service, notified the seller of its obligations to report such a discount. A medical provider who submits a claim on behalf of a patient who bought a coupon from a daily deal website must show that the discount was made at the time of service and that the daily deal website notified the seller of its obligation to report the discount; otherwise, the safe harbor provision does not apply.

Furthermore, the safe harbor for personal services and management contracts is relevant to daily deal website arrangements. This safe harbor exempts service contracts from anti-kickback scrutiny if they fully comply with the seven requirements outlined in the provision. These requirements include that a business arrangement must serve a reasonable commercial purpose and it must not be based on the volume of business generated by the principal and the agent. An agent for purposes of the safe harbor is any person other than a bona fide employee of the principal.

Like other provisions of the statute, the intent behind a payment arrangement is controlling in the determination of compliance with the discount safe harbor. Thus, a profit motive alone may be insufficient to prove intent to transfer illegal remuneration. Yet there may be cases where a jury can infer intent to induce referrals of beneficiaries of Federal health care programs where the profit motive is overwhelming.

C. Business Arrangements that are Highly Disfavored by the OIG Because of Their Susceptibility to Abuse

The parties in Zimmer, Inc. v. Nu Tech Medical, Inc. agreed to a percentage-based compensation agreement where a manufacturer of orthopedic products, Zimmer, consigned products to a supplier of medical items, Nu Tech. Nu Tech would then distribute to physician offices and bill Medicare. Nu Tech would retain a percentage of all reimbursements depending on the volume of billable products. Zimmer sought an advisory opinion when the parties began to differ on the proper execution of the contract. Zimmer also filed suit seeking a declaratory judgment that the contract was unenforceable since it violated the anti-kickback statute. This advisory opinion was fully considered and incorporated by the District Court for the Northern District of Indiana in its opinion. It is not unusual for a court to defer to the conclusions of an advisory opinion in judicial proceedings when analyzing possible violations of the anti-kickback statute. Advisory opinion 98-01 was an analysis of the proposed arrangement between Zimmer and Nu Tech. The Zimmer court adopted this opinion to conclude that the proposed arrangement presented significant financial incentives to increase marketing and billing practices, that Nu Tech would unduly influence referral sources and patients, and that the arrangement contained insufficient safeguards against fraud and abuse.

Nursing Home Consultants v. Quantum Health Services exemplifies another case where percentage compensation agreements have been found illegal under the anti-kickback statute. In Quantum Health Services, Quantum, a medical equipment supplier, and NHC, a marketer of medical supplies, entered into a contract that obligated NHC to identify Medicare recipients who needed medical supplies and arrange for the recipients to purchase supplies from Quantum. NHC's compensation was tied to the number of units of medical supplies Quantum sold, so the more Medicare business NHC sent to Quantum, the greater NHC's compensation. The United States District Court for the Eastern District of Arkansas found the underlying marketing agreement illegal and unenforceable under the anti-
kickback statute when NHC filed a breach of contract claim. The court further held that the marketing agreement was not shielded by the safe harbor for personal services since compensation was based on the number of sales NHC generated.

Lastly, the anti-kickback statute does not distinguish between physicians and lay persons because either party can refer, arrange for, or recommend federal health care business. The court in United States v. Polin, for instance, found this distinction a distortion of the Act. In Polin, the medical director and registered nurse of a cardiac monitoring facility were charged with violating the anti-kickback statute when they paid a pacemaker salesman to recommend their services to beneficiaries of Medicare. The court found this to be a classic kickback scheme explicitly prohibited by the statute.

III. ANALYSIS

A. Arrangements Between Daily Deal Websites and Providers of Medical Services Violates the Anti-Kickback Statute Because They Present an Increased Risk of Fraud and Abuse.

The potential for business arrangements between daily deal websites and health care providers to encourage overutilization of Federal health care programs, and provision of medically unnecessary care, poses an unacceptable risk of program abuse. Moreover, certain aspects of the current arrangement between these parties are not only potentially abusive, but also violative of the anti-kickback statute according to judicial and administrative interpretations.

1. Percentage Compensation Arrangements Have Been Disfavored by the Courts and the OIG Because of the Potential for Overutilization and the Financial Incentive to Increase Federal Health Care Business.

Business arrangements that encourage overutilization of services covered under Federal health care programs, or that otherwise increase program costs, pose an unacceptable risk of fraud and abuse. In particular, the OIG has found percentage compensation arrangements potentially abusive because of the financial incentive to increase services billable to Federal health care programs. Percentage compensation arrangements are susceptible to abusive practices because of the lack of safeguards against fraud and abuse, the financial incentives to increase abusive marketing practices, and the opportunity to unduly influence referral sources and patients. Through specialized marketing, the hallmark of daily deal websites, these sites ensure a minimum threshold of customers for the practitioner utilizing its services. In addition, daily deal websites necessarily have an incentive to exceed this threshold of customers to increase their financial gain. This business arrangement encourages overutilization of Federal health care programs by incentivizing procurement of the maximum number of customers, of which the federal government is certain to pay for services rendered to beneficiaries of the programs.

A pre-determined fee arrangement between these parties would help refute the notion that daily deal websites function as referral organizations or arrange for the purchase of reimbursable services because the underlying financial incentive to increase the supply of patients would be mitigated. The OIG reached a favorable decision in advisory opinion 12-02 partly because the proposed arrangement established a set fee that would be paid in advance, irrespective of the volume of referrals. The requestor would charge a flat monthly fee based on the level of a provider's membership. In contrast, since compensation is tied to the volume of business in the case of daily deal websites, these arrangements pose an increased risk of fraud and abuse. The OIG has maintained, in discussions of other proposed arrangements, that "per click," "per patient," and similar compensation arrangements are highly disfavored under the anti-kickback statute.

Nevertheless, whether a profitable business arrangement was entered into with the intent to induce referrals of federally funded business is usually a question for a jury. So long as the benefits of a profitable business scheme passes to the federal government, incentives to generate business may not be particularly troublesome. Yet, in daily deal arrangements it is not always the case that the federal government reaps the benefits of a profitable business scheme. For example, where a customer buys a coupon for year-long membership in a
medical group, not every service billable to Federal health care programs will be discounted because the discount applies to membership fees and not health services.\textsuperscript{82} 

2. Daily Deal Websites Violate the Anti-Kickback Statute by Referring Patients to Practitioners and Arranging for or Recommending Services Reimbursable by Federal Health Care Programs. Although it is left to a jury to decide whether the parties to an arrangement had the requisite intent to commit fraud, the substantive agreement between daily deal websites and providers of medical services alone is indicative of an intent to induce referrals of federally funded business.\textsuperscript{83} As the court held in Zimmer, the four corners of the contract, when unambiguous, are an expression of the intent of the parties to the contract.\textsuperscript{84} Since providers enter arrangements with daily deal websites to promote their business and to ultimately retain customers for the long term, a provider's retention of new customers using daily deal websites supports an inference of illegal conduct.\textsuperscript{85} The anti-kickback statute prohibits knowingly and willfully paying, offering, soliciting or receiving remuneration in return for referring an individual or arranging for any service for which payment may be made in part under a Federal health care program.\textsuperscript{86} Daily deal websites receive as compensation a percentage of all medical service coupons customers purchase, and in turn practitioners gain new patients.\textsuperscript{87} Alternatively, practitioners are also offering remuneration for arranging for service for which payment may be made in whole or in part under a Federal health care program.\textsuperscript{88} This qualifies as illegal remuneration as defined in the anti-kickback statute because where a practitioner shares profits amassed from advertising discounted medical services in exchange for new patients who will likely stay long term, a valuable exchange takes place. Daily deal websites essentially operate as referral organizations under such arrangements; thus, a reasonable interpretation of the agreement between these parties will support an inference of illegal conduct or the potential for an exchange of prohibited remuneration.\textsuperscript{89} As in Quantum, daily deal websites arrange for or recommend the purchase of services reimbursable by Federal health care programs.\textsuperscript{90} For example, in a deal for discounted membership in a medical group offering primary care and lab services covered by Medicare, one could easily conclude that the daily deal website is arranging for or recommending the purchase of services billable to Federal health care programs.\textsuperscript{91} The court in Quantum found that a marketing company violated the anti-kickback statute by recommending to Medicare recipients that they purchase their supplies from a supplier that paid the marketing company a percentage of all products sold.\textsuperscript{92} In the aforementioned example, the daily deal website essentially recommended the purchase of services from a medical group when it marketed the discounted membership to thousands of its members in exchange for a percentage of all coupons sold.\textsuperscript{93} 

3. Daily Deal Websites Do Not Actively Market to Beneficiaries of Federal Health Care Programs; However, These Sites Exert Influence over Referral Sources by Way of Their Popularity in the Market. The opportunity for a marketer to unduly influence referral sources and patients is a significant factor in evaluating whether a particular arrangement is in violation of the anti-kickback statute.\textsuperscript{94} While daily deal websites do receive remuneration and practitioners offer remuneration for services billable to Federal health care programs, daily deal websites arguably influence beneficiaries and practitioners to purchase and post coupons for medical services.\textsuperscript{95} In Polin, the unfettered recommendations of a pacemaker sales representative to use the appellees' cardiac monitoring service were held sufficient to substantiate a kickback charge against the appellee.\textsuperscript{96} Unlike the sales representative in Polin, however, daily deal websites do not market directly or solely to beneficiaries of Federal health care programs.\textsuperscript{97} Active marketing and direct contact with beneficiaries present opportunities to improperly influence referral sources.\textsuperscript{98} Daily deal websites do not engage in what the OIG refers to as "white coat marketing."\textsuperscript{99} White coat marketing, or marketing activities engaged in by health care professionals, is subject to closer scrutiny because health care professionals are in a special
position of trust. Like the requestor of advisory opinion 12-02, daily deal websites are non-health care entities that market coupons. Moreover, in this case it is more favorable that daily deal websites offer coupons for a variety of goods and services, not just those from health care entities. This further shows that daily deal websites are not health care entities or affiliated solely with the health care industry. Additionally, daily deal websites market coupons to the general population irrespective of whether or not a customer has a particular health insurance. Their marketing practices do not raise the usual red flags found in marketing schemes discussed in OIG advisory opinions.

However, this arrangement steers patients to particular providers because advertising on daily deal websites is not akin to advertising on other public websites or print media. While customers are the ultimate decision makers on whether or not to purchase coupons for a medical service, daily deal websites control the prominence of the deal on its website and the frequency of targeted emails it sends to thousands on its listserv. As discussed in advisory opinion 12-02, advertising activity that is simply displayed on a website and not targeted to the customer using the site presents a low risk of fraud and abuse because it is not meant to induce the purchase of a practitioner’s coupon. In that opinion, the OIG noted that patients would not perceive coupons to be an endorsement of any particular health care provider other than the provider advertising its business. However, in the case of daily deal websites, targeted advertising activity to frequent users of its website presents an increased risk of program abuse.

The risk of program abuse when daily deal websites influence beneficiaries’ choice in medical services is further compounded when beneficiaries receive unnecessary medical service. Pre-paid coupons for medical services may improperly influence a provider’s medical judgment to render medically unnecessary or inappropriate services. The proposed arrangement in advisory opinion 12-02 presented a decreased risk of abuse because customers would not pre-pay for coupons, thus alleviating the pressure on practitioners to provide medically unnecessary services. This is not the case in current arrangements with daily deal websites because customers pay up front for the coupon, and consequently have an expectation to receive applicable services, regardless of the necessity of such services. Practitioners, well aware of this expectation, will likely feel pressured to provide a service even when it is not appropriate to do so. To the extent this is directed toward Federal health care program beneficiaries, this may be an abusive practice, encouraging overutilization of these programs.

B. Regulatory Safe Harbors Are Inapplicable to Daily Deal Websites as Currently Structured Because These Arrangements Do Not Meet All the Requirements of Relevant Safe Harbors.

Business arrangements between daily deal websites and practitioners have the potential to violate the anti-kickback statute; however, participants in this arrangement can shield themselves from liability by structuring the arrangement to fully comply with a regulatory safe harbor. Of course, since non-compliance with a safe harbor is not a requisite element of establishing an AKS violation, it is important to note that the inquiry into whether a defendant’s conduct falls within a regulatory safe harbor is reserved for trial. Instead, the government must also prove that the defendant knowingly and willfully intended wrongful conduct. The safe harbor for personal services and management contracts and the safe harbor for discounts are the most applicable to this arrangement. Yet the parties in these arrangements, as currently structured, will not be shielded from criminal penalties and civil sanctions under the anti-kickback statute.

1. The Safe Harbor for Personal Services and Management Contracts Is Inapplicable to the Daily Deal Website Arrangement Since This Arrangement Takes into Account the Volume of Business Generated.

Under the personal services and management contract safe harbor, a practitioner functions as the principle within the meaning of the regulation. Accordingly, daily deal websites function as the agent of the principle since it is not a bona fide employee of the health organization. Five of the seven requirements set out in this safe harbor
are dispositive upon a cursory assessment of the arrangement. Presumably, the arrangement between daily deal websites and practitioners are set out in writing and signed by the parties. The written instrument likely details the specific services daily deal websites will provide to practitioners, and the agreement also specifies the duration of the arrangement. Lastly, services under the contract can be deemed reasonably necessary to accomplish commercially reasonable business purposes.

However, the arrangement fails to meet two of the seven standards outlined in the regulation. The first failure concerns part five of the regulation; daily deal websites do not receive compensation in advance of the launch of the coupon. As the Zimmer court held, it is unreasonable to interpret a percentage compensation agreement as payment for services rendered. Here, daily deal websites are paid a percentage of all coupons sold; therefore, the aggregate compensation is not set out in advance as required by the regulation. In advisory opinion 99-12, where company A would print and distribute coupons from retailers involved in the delivery of health care items or services, the OIG found it central to its analysis that compensation was not conditioned on the actual use of the coupon on a reimbursable item or service. Also, in the case of daily deal websites, compensation is not dependent on customers actually obtaining services billable to the federal government. But unlike the proposed arrangement in advisory opinion 99-12, daily deal websites are not paid a set fee prior to displaying the coupons, a favorable factor contributing to the sanction of the proposed arrangement.

This arrangement also fails to meet another prong of part five of the safe harbor, which requires that compensation should not take into account the volume of business generated between the parties. Compensation of daily deal websites is tied to the volume of business generated by coupons displayed on behalf of practitioners, and Federal health care programs pay (in whole or in part) for a portion of business generated from these coupons. Zimmer held that by virtue of including a percentage compensation scheme in the contract, the court was justified in concluding that the parties intended to increase the sale of products billable to Medicare. The agreement between the parties in this instance can similarly be held illegal and unenforceable because it could evince intention to increase services billable to Federal health care programs.

2. The Discount Safe Harbor Provision Is Inapplicable to the Daily Deal Website Arrangement Because Proper Disclosures and Notifications Are Not Made.

Practitioners and daily deal websites must meet the requirements for “seller” and “offeror,” as outlined in the discount safe harbor in order to shield themselves from criminal and civil sanctions. Under the discount safe harbor, practitioners that submit a claim on behalf of a customer must provide, upon request, information that shows that the daily deal website gave notice, “in manner reasonably calculated to give notice,” to the practitioner of its duty to report the discount. For daily deal websites to meet the requirements of the discount safe harbor, it must simply give notice to practitioners, “in a manner reasonably calculated to give notice,” of its obligation to report discounts. Although these requirements are straightforward, it is unclear whether they are included in the current practices of daily deal websites. The requestor of advisory opinion 12-02 received a favorable opinion because the requestor certified that it would satisfy its obligation to notify sellers and buyers of their duty to report discounts through the Terms of Use on its website. Daily deal websites must notify customers purchasing coupons for medical services as well as practitioners using its service of this duty to report; otherwise, a discount safe harbor defense is precluded.

Daily deal websites do not have sufficient safeguards to ensure that discounts pass to the federal government since. For example, a patient enrolled in a medical group under discounted membership fees from a daily deal website promotion will not receive perpetually discounted health care services. Rather, the discount will only apply to the patient’s cost-sharing obligations, not the entire service. Sufficient safeguards to mitigate the risk of overutilization of Federal health care programs are partly why the proposed arrangement reached a favorable result in advisory opinion 12-02. In this
proposed arrangement, the requestor also certified that through its Terms of Use it would inform practitioners and customers utilizing its services that discounts must apply to the entire item or service, not just the customer’s cost-sharing obligation. In other words, the requestor certified it would comply with the discount safe harbor, which daily deal websites fail to do since discounts apply to the customer’s cost-sharing obligation.

Moreover, there is potential for providers to engage in abusive billing practices because there are inadequate safeguards in place to prevent these practices. Although customers first have to purchase coupons for medical services and then redeem those coupons before any potentially fraudulent or abusive billing practices can take place, it is irrelevant to the anti-kickback inquiry whether increased cost to the federal government is actually realized.

IV. POLICY RECOMMENDATION

Although the business arrangement between practitioners and daily deal websites is illegal under the anti-kickback statute and unprotected by a statutory or regulatory safe harbor, the discount safe harbor should be amended to offer protection to this kind of arrangement. As is, the safe harbor for discounts is not intended to protect arrangements between practitioners and daily deal websites because daily deal websites are not an offeror within the meaning of the safe harbor. An offeror must be the entity that provides a discount on an item or service to a buyer. Since daily deal websites do not provide the discounts but instead market them to their customers, they are technically not within the purview of the safe harbor.

However, Congress intended the regulatory safe harbors to evolve to reflect current business practices. Evolving safe harbors ensure that the health care industry can take advantage of innovative discount practices so that savings may be passed on to the federal government. Certain deals currently on the market fail to have the necessary safeguards in place to ensure discounts pass to the federal government. Specifically, deals only applying to the customer’s cost sharing obligation under Federal health care programs and not to the entire item or service billable to the federal government raise significant concern. Amending the discount safe harbor can provide some guidance to practitioners and daily deal websites on how to structure a deal to meet this end.

V. CONCLUSION

Medical services coupons advertised on daily deal websites violate the anti-kickback statute because practitioners essentially offer remuneration for referrals from these websites. The favorable opinion issued by the OIG on a similar arrangement presented a low risk of fraud and abuse because it did not encompass a percentage compensation structure and did not create financial incentives to over-utilize Federal health care programs. In contrast, through targeted advertising activity, daily deal websites may arrange for the purchase of services billable to Federal health care programs. Furthermore, this business arrangement encourages overutilization of Federal health care programs because daily deal websites have an incentive to increase the amount of customers purchasing coupons for medical services, since it will receive a percentage of all coupons sold. Because the safe harbor provisions for personal services and management contracts and for discounts do not apply to these arrangements, practitioners and these websites are vulnerable to prosecution under the anti-kickback statute. To enable compliance with the statute by practitioners and daily deal proprietors, the discount safe harbor should be amended to reflect current business practices so discounted health care items and services may be passed to the federal government. Amending the statute is consistent with what Congress intended when it enacted the discount exception to the anti-kickback statute.

2 See FAQ, Groupon, http://www.groupon.com/faq#3 (last visited Feb. 27, 2013) (stating if not enough persons purchase a deal, it is cancelled and customer will not be charged).
3 See id. (claiming the customers are not required to sign up groups of people for the deal to take effect since Groupon consists of millions of members).
percent of customers have returned or plan to return to the merchant).


9 See id. at 2 (stating the proprietor of the website would contract with physicians and other health care providers who wish to participate in one of five membership levels offering varying degrees of promotion and coupon display).

10 See id. at 5 (stating customers would not be required to create an account to access the coupons).

11 See id. (proposing that customers submitting their own claims to federal health care programs will be advised to report any discounts from use of a coupon).

12 See id. at 10-11 (concluding the proposed arrangement could potentially generate prohibited remuneration if the parties had the requisite intent to induce or reward federal health care business; however, the OIG would not impose administrative sanctions because of the low risk of abuse).

13 See generally Social Security Act of 1972 §§ 1128A(a) (7), 1128B(b), 42 U.S.C. §§ 1320a-7a(a)(7), 1320a-7b(b) (2006) (enacting criminal and civil monetary penalties for prohibited acts involving federal health care programs).

14 Contra Advisory Opinion 12-02, supra note 9 at 8 (finding proposed arrangement low risk under the anti-kickback statute because coupons are equivalent to print advertisements and are not targeted to particular customers).


16 See infra Part II (discussing the nuances of anti-kickback case law and interpretation of regulatory safe harbors).

17 See infra Part III(A) (arguing percentage compensation agreements inherently incentivize overutilization of federal health care programs).

18 See infra Part III(B) (analyzing the arrangement between daily deal websites and practitioners under the personal services and management contracts safe harbor, and the discount safe harbor).

19 See infra Part IV (proposing safe harbors should be amended so the health care industry can take advantage of innovative discount practices which would pass saving to the federal government).


21 See 42 U.S.C. §§ 1320a-7(b) (2006) (prohibiting acts that increase the likelihood of fraud and abuse of federal health care programs).


23 See DAVID E. MATYAS & CARRIE VALIANT, LEGAL ISSUES IN HEALTHCARE FRAUD AND ABUSE: NAVIGATING THE UNCERTAINTIES 17 (3d ed. 2006) (opining that the Anti-kickback statute will remain a focus of the health care industry because its reach is expanding).

24 See United States v. Bay State Ambulance Serv., Inc., 874 F.2d 20, 29 (1st Cir. 1989) (stating inducement of Medicare business is the essence of the Medicare fraud); see also United States v. Greber, 760 F.2d 68, 71 (3d Cir. 1985) (recognizing the purpose of the Anti-kickback statute is to combat financial incentives for physicians to order medically unnecessary services).

25 See Greber, 760 F.2d at 69 (affirming jury instructions stating defendant is guilty if a purpose of the arrangement was to induce further orders of services).

26 E.g., United States v. McClatchey, 217 F.3d 823, 835 (10th Cir. 2000) (adopting the “one-purpose” test as the correct interpretation of the statute); United States v. Kats, 871 F.2d 105, 108 (9th Cir. 1989) (finding Greber court’s interpretation of the Anti-kickback statute consistent with legislative history).

27 See 42 U.S.C. § 1320a-7b(b) (2006) (prohibiting remunerations to induce referrals of beneficiaries of Federal health care programs); Hanlester Network v. Shalala, 51 F.3d 1390, 1398 (9th Cir. 1995) (outlining standard of proof as an intent to exert undue influence over the reason or judgment of another to produce referrals).

28 Compare United States v. Neufeld, 908 F. Supp. 491, 495-96 (S.D. Ohio 1995) (finding the knowingly and willfully standard does not require knowledge of illegality of defendant’s conduct), with Hanlester Network, 51 F.3d at 1400 (reasoning violation of the anti-kickback statute requires specific intent to violate the statute).

29 See 42 U.S.C. § 1320a-7b(b) (2011) (imposing a maximum fine of $25,000, imprisonment up to five years, or both, and automatic exclusion from Federal health care programs under a general intent standard).

30 See United States v. Shaw, 106 F. Supp. 2d 103, 115 (D. Mass. 2000) (explaining the statute penalizes conduct that crosses the line from permitted price competition to...
impermissible discounting especially where savings do not pass to Federal health care programs).
31 See United States v. Ruttenberg, 625 F.2d 173, 177 (7th Cir. 1980) (holding a determination of direct and immediate costs to the Medicare-Medicaid system irrelevant to conviction under the statute because the government punishes the potential for increased costs).
34 See Shaw, 106 F. Supp. 2d at 111 (explaining discount provision of anti-kickback statute was Congress's way of ensuring normal discounting in business would remain legal).
35 See id. at 112 (discussing the enactment of paragraph (e) of the anti-kickback statute, which authorizes the Secretary of the Department of Health and Human Services to promulgate regulations exempting payment practices from prosecution).
39 See 42 C.F.R § 1001.952(b) (2011) (dividing parties to a discount arrangement into buyers, sellers, and offerors of discounts). See generally Michael K. Loucks & Carol C. Lam, PROSECUTING AND DEFENDING HEALTH CARE FRAUD CASES 269 (2d ed. 2010) (explaining proper interpretation of the regulatory safe harbors should be informed by the statutory safe harbor).
41 See id. at 63,527 (stating that the offeror is protected irrespective of the buyer or seller's failure to report the discount if the offeror has done everything that it reasonably could under the circumstances).
42 See United States v. Shaw, 106 F. Supp. 2d 103, 119 (D. Mass. 2000) (holding that the jury must determine whether disclosures are proper and appropriate to satisfy the discount provision).
43 See 42 C.F.R § 1001.952(d) (2011) (exempting from the illegal remuneration provision of the anti-kickback statute payments made as compensation for services).
44 See id. (requiring a written agreement for not less than one year, signed by the parties to the agreement).
45 See 64 Fed. Reg. at 63,525 (clarifying that the test is not lawfulness under the statute but rather whether the arrangement is reasonably calculated to further the business of the purchaser).
46 See OIG Anti-Kickback Provisions Response to Comments and Summary of Revisions, 56 Fed. Reg. 35,952, 35,974 (Jul. 29, 1991) (agreeing that advertising activities fall under the safe harbor when such activities do not involve direct contact with program beneficiaries or the entities are not involved in health care delivery).
47 See Shaw, 106 F. Supp. 2d at 114 (declaring that a trier of fact must determine an intent to commit a violation from the substance of the transaction rather than the form or label attached to the transaction).
48 See id. at 119 (stating that providers are encouraged to seek discounts as good business practices so long as federal or state health care programs share in the benefit of the discount).
49 See id. at 121 (cautioning that while a jury can infer that the purpose behind a particular business arrangement was to induce federally funded business, the jury should also understand that good business practices that increase profits should not preclude immunity under the discount exception); see also Zimmer v. Nu Tech Med., 54 F. Supp. 2d 850, 862 (N.D. Ind. 1999) (holding that a percentage-based compensation scheme was sufficient to conclude the parties were motivated to increase the sale of products reimbursable by federal or state health care programs).
50 See Zimmer, 54 F. Supp. 2d at 851–52 (noting that the parties intended their business relationship to be that of a supplier and an independent contractor responsible for distribution and billing).
51 Id.
52 See id. at 852 (explaining that Nu Tech would retain twenty to twenty-five percent of the dollar volume receivable per year).
53 See id. (seeking an advisory opinion pursuant to 42 U.S.C. § 1320a-7d(b)).
54 See id. at 853 (arguing that the agreement was void and unenforceable under Indiana law since it was illegal under federal law).
55 See id. at 856 (stating that although an advisory opinion is not mandatory authority, considerable weight should be given to its conclusions).
56 See, e.g., United States v. Shaw, 106 F. Supp. 2d 103, 113 (D. Mass. 2000) (rejecting the notion that OIG statements regarding its regulations are controlling but also expressing the wisdom in considering the OIG's interpretation
of key terms since it is the agency charged with its implementation).

57 Advisory Opinion 98-01, supra note 22.

58 See Zimmer, 54 F. Supp. 2d at 861 (finding that the parties intended to enter into a percentage compensation agreement, thereby violating the anti-kickback statute); see also United States v. Miles, 360 F.3d 472, 480 (5th Cir. 2004) (finding a PR agency did not violate the anti-kickback statute because the agency had no influence on a physician’s decision to use a particular home health care service).


60 See id. at 839 (noting that NHC was not involved in the actual sale of medical supplies).

61 See id. (stating that the marketing agreement was for one year and would automatically renew for an additional one-year period unless either party was notified of cancellation).

62 See id. at 842 (reasoning that by virtue of its compensation scheme, the marketing agreement is the sort of business arrangement prohibited by the anti-kickback statute).

63 See id. at 844 (declining to extend protection to the marketing agreement since the safe harbor specifically prohibits compensation schemes which take into account the volume of referrals or business).

64 See, e.g., United States v. Polin, 194 F.3d 863, 866-67 (7th Cir. 1999) (ruling that providing payment in return for directing Medicare patients to a cardiac monitoring service violates the anti-kickback statute regardless of whether or not payments were paid to a physician).

65 See id. at 867 (rejecting the assertion that the different subsections of the anti-kickback statute address different and non-overlapping schemes).

66 See id. at 865 (explaining that the defendants offered a cardiac salesman $50 for each Medicare patient he referred).

67 See id. at 866 (rejecting defendants’ argument that they did not violate the anti-kickback statute since their agent was not a physician and only physicians could refer a patient under the statute).

68 See Advisory Opinion 98-01, supra note 22 (discussing the potential for abuse leading to increased program costs where compensation incentivizes overutilization of services).

69 Id.

70 See id. (analyzing an arrangement where, under contract, Company B would market services and goods to physicians, submit claims of purchases to insurance carriers distributing Medicare and Medicaid funds, and forward reimbursements (less Company B’s fee of twenty to twenty-five percent of collected revenues) to Company A).

71 Id. at 6.


73 See, e.g., Zimmer v. Nu Tech Med., 54 F. Supp. 2d 850, 857-58 (N.D. Ind. 1999) (discussing examples of percentage compensation schemes struck down by courts because one party was in a position to control the supply of persons or services to its benefit).

74 See id. at 862 (holding that the parties’ agreement involved prohibited remuneration because products might be paid for in full or in part by Federal health care programs).

75 See Nursing Home Consultants v. Quantum Health Servs., 926 F. Supp. 835, 841 (E.D. Ark. 1996) (finding that a marketing agreement where compensation is tied to a pre-determined annual fee would be legal and distinct from the agreement in question, which tied compensation to the number of sales made by the defendant).

76 See Advisory Opinion 12-02, supra note 8, at 4.

77 See id.

78 See Advisory Opinion 99-12, supra note 38.

79 Id.

80 See United States v. Shaw, 106 F. Supp. 2d 103, 121 (D. Mass. 2000) (stating that whether the discount or other reduction in price was passed to the federal government can suggest the requisite intent of the parties).

81 See id. at 111 (discussing Congress’s intention to encourage good business practices which may result in savings to Federal health care programs).

82 See LIVING SOCIAL, supra note 6 (limiting a coupon for discounted membership in a medical group to one per person per visit).

83 See id. (establishing that the reason behind a transaction and the requisite state of mind are more substantial than the form of the transaction).


85 See Shaw, 106 F. Supp. 2d at 121 (permitting a jury to use a strong profit motive to infer willfully and knowingly acting to induce referrals of federal health care business). But see United States v. McClatchy, 217 F.3d 823, 834 (10th Cir. 2000) (explaining that an expectation or hope that referrals may ensue from legitimate services is not a violation of the AKS).

86 See 42 U.S.C. § 1320a-7b(b) (2006) (stating that prohibited remuneration includes kickbacks, bribes, or rebates).

87 See Weiss, supra note 71 (explaining that Groupon obtains roughly fifty percent of the coupon revenue).

88 See 42 U.S.C. § 1320a-7b(b) (2006) (including remuneration offered directly or indirectly, overtly or covertly).

89 See Zimmer, 54 F. Supp. 2d at 853-54 (N.D. Ind. 1999) (rejecting defendant’s alternate interpretation of a percentage-based supplier-distributor agreement as an unreasonable interpretation); see also United States v. Ruttenberg, 625 F.2d 173, 177 (7th Cir. 1980) (concluding that the potential for increased costs is the evil Congress sought to avoid).

90 See Nursing Home Consultants v. Quantum Health Servs., 926 F. Supp. 835, 843 (E.D. Ark. 1996) (finding the arrangement in violation of subparagraph B of the anti-kickback statute because the medical equipment supplier
was paid for recommending to Medicare recipients that they purchase supplies from its business partner).

91 See LIVING SOCIAL, supra note 6 (advertising One Medical Group, a medical office offering primary care services and on-site lab services in the District of Columbia).

92 See Quantum Health Servs., 926 F. Supp. at 839 (noting that the compensation scheme in the marketing agreement fell within the class of transactional relationships prohibited by the anti-kickback statute).

93 See LIVING SOCIAL, supra note 6 (advertising annual membership for $99, a fifty percent savings).

94 See Zimmer, 54 F. Supp. 2d at 835 (deferring to OIG advisory opinion 98-01 which found that the percentage compensation arrangement between the parties presented opportunities for both parties to unduly influence referral sources by marketing actively, and directly to Medicare patients).

95 See United States v. Miles, 360 F.3d 472, 480 (5th Cir. 2004) (finding that the company, by engaging in promotional activities on behalf of the appellants, did not unduly influence physicians who were the subject of the promotional activities).

96 See United States v. Polin, 194 F.3d 863, 866 (7th Cir. 1999) (rebutting appellee’s argument that because physician approval was ultimately needed before a patient could use its services, only a physician was capable of making a referral).


98 See Advisory Opinion 98-01, supra note 22 (analyzing proposed arrangement to find Company B would have opportunities to influence referral sources because Company B markets, consults and bills in connection with home medical equipment).

99 See Advisory Opinion 08-19, supra note 38.

100 Id.

101 Id.

102 See Advisory Opinion 99-12, supra note 38 (evaluating the totality of the circumstances, including distribution to all patients regardless of health insurance coverage, to conclude proposed arrangement does not implicate the anti-kickback statute).

103 See, e.g., id. (sanctioning a proposed arrangement because, among other things, coupons were distributed to all patients, irrespective of their insurance coverage); Advisory Opinion 08-19, supra note 38 (finding significant that all potential customers will receive the same automated service in an arrangement where advertising activity would extend to the chiropractic industry).

104 See Advisory Opinion 12-02, supra note 8 at 8 (stating that accurate and non-deceptive print advertising does not raise anti-kickback concerns).


106 See Advisory Opinion 12-02, supra note at 9.

107 Id.


109 See Advisory Opinion 12-02, supra note 8, at 8.

110 Id.

111 See id. (likening coupons in the proposed arrangement to those mailed to consumers since there is no up-front investment by consumers).

112 See Terms and Condition, LIVING SOCIAL, http://livingsocial.com/terms#certain_conditions_placed_on_your_use_of_the_site_and_services (last visited Aug. 07, 2012) (requiring customers to redeem coupons in its entirety in one visit since promotional value of the deal is time sensitive).

113 See Advisory Opinion 98-01, supra note 22, at 6 (finding that the potential for overutilization of items and services poses an unacceptable risk of fraud and abuse).

114 See, e.g., 42 C.F.R. § 1001.952(h) (2011) (outlining requisite elements in an arrangement to shield entities from criminal and civil prosecution under the anti-kickback statute).

115 See United States v. Shaw, 106 F. Supp. 2d 103, 122 (D. Mass. 2000) (rejecting defendant's argument that his motion to dismiss should prevail because the alleged wrongdoing is protected under the discount exception).

116 See Hanlester Network v. Shalala, 51 F.3d 1390, 1400 (9th Cir. 1995) (holding specific intent is not the requisite mens rea under the anti-kickback statute).

117 See generally 42 C.F.R. § 1001.952 (promulgating permissive exclusions based on anti-kickback statute violations).


119 See 42 C.F.R. § 1001.952(d) (defining the principle as the individual making payments as compensation for services performed).

120 See id. (explaining that the agent is shielded from liability so long as all the seven standards are met).

121 See 42 C.F.R. § 1001.952(d)(1) (requiring a written instrument signed by both parties).

122 See 42 C.F.R. § 1001.952(d)(2)-(4) (declaring that the agreement must specify an exact schedule of intervals, precise length, and exact charge for periodic or sporadic services provided by the agent but that the term of the agreement must not be less than a year).

123 See 42 C.F.R. § 1001.952(d)(7) (requiring that the aggregate services be commercially reasonable).

124 See Nursing Home Consultants v. Quantum Health Servs., 926 F. Supp. 835, 842 (E.D. Ark. 1996) (declaring a marketing agreement unenforceable because the parties failed to set payment in a manner that did not take into account the volume of business).

125 See Partner with Living Social, LIVING SOCIAL, https://getfeatured.livingsocial.com/getfeatured/us (last visited...
potential parties involved in the proposed management since

to satisfy this provision of the safe harbor makes the

finding it significant that the coupons themselves applied to

discount can only pass to the federal government if it is

defining discount as a "reduction in the amount charged for

entity from criminal or civil prosecution for technical or

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deal websites; however, arrangements can be tailored to

that the term "offeror" was not intended to encompass daily

state disclosures in fine print or terms of use).

137

be reflected in the claims customers submit on their own

products).

131

contract).

132

violations of the regulatory safe harbors).

127

running a promotion).

Aug. 20, 2012) (noting no upfront cost to practitioners when

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at

10

106 F. Supp. 2d 850, 861 (N.D. Ind. 1999) (using defendant’s fee schedule, which

outlined the percentage of billable services due per year, to

conclude that the defendant’s fee was not for goods sold).

126

See Advisory Opinion 99-12, supra note 38 (indicating

it may have reached a different conclusion had coupons tied
directly or indirectly to a service reimbursable by Federal

health care programs).

147

See id. (specifying that the clinics in the proposed

arrangement would be compensated before coupon

distribution).

133

See 42 C.F.R. § 1001.952(d)(5) (2011) (requiring

aggregate compensation to be consistent with fair market

value in arms-length transactions).

131

See Advisory Opinion 98-01, supra note 22 (discussing

the potential for abuse leading to increased program

costs where compensation incentivizes overutilization of

services).

126

See Zimmer, 54 F. Supp. at 861 (N.D. Ind. 1999)

(finding irrelevant to the analysis of legality whether a

particular party was responsible for the actual marketing

of products).

133

See id. at 863 (declining to sever Federal health care

programs from the agreement because it would re-write the

contract).

134

See generally 42 C.F.R. § 1001.952(h)(5) (2011)

(defining discount as a “reduction in the amount charged for

an item or service based on an arms-length transaction”).

135

See id. at § 1001.952(h)(2) (stating that discounts must

be reflected in the claims customers submit on their own

behalf).

136

See id. at § 1001.952(h) (outlining standards to shield

entities from criminal and civil prosecution under the anti-

kickback statute).

137

See, e.g., LIVING SOCIAL, supra note 6 (neglecting to

state disclosures in fine print or terms of use).

138

See Advisory Opinion 12-02, supra note 8, at 9 (stating

that the term “offeror” was not intended to encompass daily

deal websites; however, arrangements can be tailored to

comply with the safe harbor).

139

See OIG Anti-Kickback Provisions Response to


35,952, 35,956 (July 29, 1991) (declining to shield an

entity from criminal or civil prosecution for technical or de

minimis violations of the regulatory safe harbors).

140

See Shaw, 106 F. Supp. 2d at 115 (stating that

discounting must be based on the understanding that the
discount can only pass to the federal government if it is

made aware of the discounts).

141

See Advisory Opinion 12-02, supra note 8 at 3, 9-10

(finding it significant that the coupons themselves applied to

the entire item or service, not just the customer's cost).

142

See id. at 10 (declining to offer safe harbor protection to

potential parties involved in the proposed management since

parties were not joined in the request of the opinion and did

not provide certifications of compliance with the discount

safe harbor).

143

See Shaw, 106 F. Supp. 2d at 119 (concluding that the

question of whether disclosures are proper and appropriate

depends on the details of the transaction and other evidence

proffered at trial under the scrutiny of a jury).

144

See, e.g., Terms and Conditions, LIVING SOCIAL, http://
livingsocial.com/terms#certain_conditions_placed_on_your_use_of_the_site_and_services (last visited Aug. 20,

2012) (failing to make the proper disclosures to comply with

the discount safe harbor in its terms of use).

145

See United States v. Ruttenberg, 625 F.2d 173, 177

(7th Cir. 1980) (finding that paying for the opportunity to

provide services billable to Federal health care programs

constitutes an illegal use of federal funds).

146

See id. at 177 (stating that the potential for increased

costs to the federal government is evident where payments

are made to influence the judgment of the relevant decision

maker); cf. United States v. Miles, 360 F.3d 472, 480

(5th Cir. 2004) (finding it significant that alleged illegal

remuneration occurred after a physician already decided to

use defendant's home health care services for which the
defendant would pay a fee to a PR agency who advertised to

physicians on its behalf).

147

See Clarification of Safe Harbor Provisions and


Reg. 63,518, 63,528 (Nov. 19, 1999) (codified at 42 C.F.R.

Part 1001) (noting that Congress intended the regulatory

safe harbors to both incorporate and enlarge upon the

statutory discount exception found in the anti-kickback

statute).

148

See id. (explaining that an offeror is not the seller of the

item or the service but provides a discount on an item or

service to a buyer).

149

See id.

150

See, e.g., Advisory Opinion 12-02, supra note 8, at 9

(permitting the requestor to structure its daily deal website
to fall within the discount safe harbor although the daily

deal website was not an offeror within the meaning of the

safe harbor).

151

See United States v. Shaw, 106 F. Supp. 2d 103, 112 (D.

Mass. 2000) (stating that it was Congress's intent to have

the regulations updated periodically when it granted the

OIG authority to protect certain arrangements).

152

See id. at 115 (explaining that the discount exception
to the anti-kickback statute was passed to encourage a free

health care market system so that the federal government
could reap cost-saving benefits).

153

See, e.g., LIVING SOCIAL, supra note 6 (failing to specify

whether discounted membership in a medical group will

translate to discounted services billable to Federal health

care programs).

154

See Advisory Opinion 12-02, supra note 8 (blessing a

proposed daily deal website partly because third party

payors, including the federal government, would benefit

from the reduction in cost of the item or service).

155

See Clarification of Safe Harbor Provisions and

Establishment of Additional Safe Harbor Provisions,

64 Fed. Reg. 63,518, 63,528 (Nov. 19, 1999) (codified at

42 C.F.R. Part 1001) (allowing certain coupons and
discounts to qualify for safe harbor protection as long as the
arrangement meets the requirements of the discount safe harbor provision).

156 See 42 U.S.C § 1320a-7b(h) (2006) (prohibiting remuneration offered directly, indirectly, overtly or covertly).

157 See Advisory Opinion 12-02, supra note 8, at 11 (narrowly tailoring a favorable opinion to the proposed arrangement and explicitly disclaiming reliance on the opinion by any other individual or entity).

158 See id. at 8-9 (stating that advertising which is only displayed on a website and not targeted toward customers using the website does not raise significant anti-kickback concerns).

159 See Zimmer v. Nu Tech Med., 54 F. Supp. 2d 850, 855 (N.D. Ind. 1999) (rendering a percentage compensation agreement unenforceable under the anti-kickback statute because both parties had significant financial incentives to engage in abusive marketing and billing practices).


161 See 64 Fed. Reg. at 63,528 (explaining that the safe harbor provisions protect all discounts protected by Congress in the statutory discount exception found in the anti-kickback statute).