



Policy Brief

October 18, 2019



Consumers Reward Companies Taking Social and Political Stances

Last week, Dick's Sporting Goods Store destroyed [\\$5 million worth of military-style, semiautomatic rifles](#) they pulled from shelves to ensure that they would not end up on the streets. Moves like this are adding to the trend of [companies taking action](#) on social and political issues. Gen Z and Millennials have [growing expectations](#) that companies should take a stance on social and political issues and are more willing to put their dollars behind their beliefs. Companies who are pushing for social changes and standing for what they believe in are being rewarded by these consumers. Below is more about evolving consumer expectations, successful social campaigns and how this trend is gaining steam.

Evolving Consumer Expectations

Market research has shown that [consumers from all generations](#) believe that companies should use their influence to impact political and social issues. While some will boycott companies they disagree with, the consumers that do agree will be more likely to [purchase more and express brand loyalty](#). Companies without any stance on an issue also face risk. Think of [Uber, who faced harsh criticism](#) when they continued to operate after New York taxi workers struck to protest President Trump's 2017 travel ban for immigrants of certain nationalities. Additionally, employees increasingly care about what their company stands for, making it a growing opportunity to [attract talent](#).

Successful Social Campaigns Authenticity and taking action to address social issues has proven to be [key in having successful](#) social campaigns. According to a [survey conducted](#) by Sprout Social, consumers believe a company is most authentic when [they address an issue](#) that affect their consumers (47%) or their employees (40%). Air BnB and Patagonia built more credibility with consumers by putting action behind

their campaign, like [pledging resources](#) to their cause and [taking legal action](#). Additionally, the use of social media has become significantly important as consumers [increasingly believe](#) that companies should communicate their positions on social media.



Proposed Changes to Stark and Anti-Kickback Rules

CMS and the Office of Inspector General (OIG) recently released long-awaited proposed rules to revise the regulations pertaining to Stark and the Anti-Kickback statute. The rules seek to loosen current restrictions and remove barriers preventing hospitals from engaging in value-based payment models. They represent the agencies' response to comments submitted through different Requests for Information (RFI) and are part of the Department of Health and Human Services' (HHS) [Regulatory Sprint to Coordinated Care](#). Below are key proposals included in the rules.

CMS' Proposed Rule on the Stark Statute

- Revise several definitions, including “fair market value”, “commercial reasonableness”, and “volume/value” requirements.
- Make the Electronic Health Record (EHR) donation exception permanent.
- Adopt a new exception to protect compensation not exceeding an aggregate of \$3,500 per calendar year if certain conditions are met, for remuneration to a physician.
- Expand the 90-day grace period for certain writing requirements.
- Eliminate the rules pertaining the period of disallowance.
- Seeks comments about the role of price transparency in the context of the Stark law and whether to require the provision of cost information at the point of a referral for an item or service.

OIG's Proposed Rule on the Anti-Kickback Statute

- Establish [three new safe harbors](#) to address various care coordination and value-based payment arrangements.
- Adopt a new safe harbor to protect arrangements involving the donation of certain cybersecurity technology.

- Protect certain remuneration provided in connection with models sponsored by CMS, reducing the need to have individualized fraud and abuse waivers for each model.
- For the safe harbor on local transportation, increase the mileage limit for transporting residents of rural communities from 50 miles to 75 miles.
- Eliminate any distance limit for the transportation of patients discharged from a facility after admission as an inpatient, regardless of whether the patient resides in an urban or rural area.
- Seeks comments on which Social Determinants of Health (SDOH) are most important to improve care coordination. Interested in examples and data demonstrating the efficacy of “tools and related supports” addressing SDOH.
- Seeks comments on extending the definition of “CMS-sponsored model” to include patients beyond those under a CMS-sponsored model.



Colorado Announces New State Insurance Option

While presidential candidates continue to debate a national public insurance option, states such as Washington and Colorado are already exploring it. Colorado’s Department of Health Care Policy (DHCP) and its Division of Insurance (DOI) unveiled their [new program](#), which will sell [State Option Plans](#) on the Health Insurance Exchanges beginning January 1, 2022. Currently, 90% of uninsured Coloradans [cite cost](#) as the reason they go without coverage—something Colorado [Governor Polis](#) aims to change.

Will it replace private insurance?

Colorado State Option Plans will *not* replace private insurance. Unlike national public-option proposals, the state will use private insurance to offer more affordable plans on the Health Insurance Exchanges. These insurers will have to reimburse for an expanded list of primary care and preventative services, regardless of whether the enrollee has met their deductible. Insurers also must spend 85% of premium costs on patient care. Although enrollment is anticipated to increase by over 9,000 individuals, this increase is projected to come from the previously-uninsured population—not those currently with employer-sponsored coverage.

How will payments be set?

The state option [sets reimbursement rates](#) for hospitals between 175% and 225% of Medicare rates. Currently, [hospitals average](#) 269% of Medicare rates from other private plans' reimbursement. As a result, actuarial analyses anticipate savings between \$69.7 and \$133.6 million in 2022. Colorado plans to request a 1332 waiver from CMS to use these funds to offer new benefits or further reduce premiums in the future.

How are hospitals responding?

While providers support more affordable, robust insurance offerings, [hospitals caution](#) that basing rates on Medicare often results in insufficient reimbursement. Colorado's Insurance Commissioner Michael Conway stated his aim to collaborate on this and other concerns moving forward. "We're committed to making sure that we don't negatively impact any of our rural hospitals." Health care stakeholders in Colorado have until October 25th to submit written feedback on the proposal.



Federal Judge Vacates Section 1557 Gender Identity Protections

On Tuesday, October 15th, Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas [ruled that Section 1557](#) of the Affordable Care Act (ACA), which has been interpreted as protecting gender identity in health care settings, was in violation of the Administrative Procedures Act (APA) and the Religious Freedom Restoration Act (RFRA). While the judgment is limited in scope, leaving much of Section 1557 intact, it does expose patients seeking gender affirmation services or abortions to the possibility of discrimination, including denial of care. Below is more about the ruling.

[The ruling](#) was in response to a civil claim from faith-based health care providers arguing that Section 1557 "placed substantial pressure on Plaintiffs to perform and cover [gender] transition and abortion procedures." The Court agreed that the Plaintiffs' refusal to perform or cover those services was a "sincere religious exercise."

In his reasoning, Judge O'Connor cites that Section 1557 "conflicts with its incorporated statute ([Title IX](#))" and that the government failed to demonstrate a compelling interest for burdening the free exercise

of religion under RFRA. The Court’s remedy — called “vacatur”— effectively strips the 2016 anti-discrimination final rule of its authority as it relates to gender identity protections.

Judge O’Connor’s decision comes while CMS is reviewing comments—including one [submitted by AHPA](#)—on a [Proposed Rule](#) to revise [Section 1557](#). Meanwhile, the Supreme Court recently [heard arguments](#) on Title VII to determine whether “sex” includes sexual orientation and gender identity for employment discrimination purposes, which could have implications for Title IX. Currently, the future of anti-discrimination protections for women and transgender individuals remains unclear.



A Look at the Federal Register

Modernizing and Clarifying the Physician Self-Referral Regulations

CMS released a proposed rule ([84 FR 55766](#)) to revise the Physician Self-Referral or Stark regulations. The rule seeks to make it easier for physicians to participate in innovative value-based arrangements, accept cybersecurity donations, and improve care quality. Comments are due December 31st. **A CMS summary of the rule can be found [here](#).**

Revisions to Safe Harbors Under the Anti-Kickback Statute (AKS)

The OIG proposed changes ([84 FR 55694](#)) to regulations implementing the Federal Anti-Kickback Statute. The rule adds new safe harbors incentivizing value-based arrangements and care coordination, as well as protecting physicians who take on downside financial risk. Comments are due December 31st. **An OIG summary of the rule can be found [here](#).**

Interim Final Rule on Public Charge

The Department of State issued an interim final rule ([84 FR 54996](#)) that amends the standard of “likely at any time to become a public charge” to “[more likely than not] at any time to become primarily dependent on the government.” Comments close November 12th.

Promoting Telehealth in Rural America

The Federal Communications Commission issued a final rule ([84 FR 54952](#)) on its Promoting Telehealth in Rural America Program, including a summary of the Commission's report and order on regulating telecommunications rates and services in rural areas.

IN OTHER NEWS

[HHS' Guide for Clinicians: Appropriate Dosage Reduction or Discontinuation of Long-Term Opioid Analgesics](#) – HHS

[HHS Proposes New Wellness Demonstration Projects](#) – Health Affairs

[California Bill Would Level the Playing Field for Telehealth](#) – GovTech

[Doctors, Once GOP Stalwarts, Now More Likely to Be Democrats](#) – WSJ

[Nobel Prize in Medicine Awarded to U.S. and British Scientists](#) – STAT

[As Medicare Enrollment Nears, Popular Price Comparison Tool Is Missing](#) – KFF

[One Dad's \\$200,000 Crusade to Save His Daughters from Addiction](#) – Vox

[Congressional Budget Office Says Pelosi Drug Pricing Bill Could Save \\$345 Billion](#) – STAT