

Summary Chart of Anti-Kickback Statute - Investment Interest Safe Harbor 42 C.F.R. § 1001.952(a)(2)

The federal Anti-Kickback Statute (“AKS”) is a criminal statute that prohibits the exchange, or offer to exchange, of anything of value in an effort to induce or reward the referral of federal health care program business. The Office of Inspector General (“OIG”) has adopted safe harbors to protect certain business and financial practices and relationships from criminal and civil prosecution. Failure to qualify for a safe harbor does not necessarily make any conduct or practice illegal. Instead, the conduct or practice will be subject to review on a case-by-case basis. The below chart synthesizes the eight requirements of the investment interest safe harbor. For ease, the chart separates affirmative obligations and practices that must be avoided. This chart is provided to help the hospice track its qualification for this safe harbor.

Must	Is Element Satisfied?
1. Offer on Equal Terms: The terms offered to a passive investor, if any, who is in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity must be no different from the terms offered to other passive investors.	
2. Treat Non-Investors Equally: The entity or investor must not market or furnish the entity's items or services (or those of another entity as part of a cross referral agreement) to passive investors differently than to non-investors.	
3. Pay Equal Returns: The amount of payment to an investor in return for the investment interest must be directly proportional to the amount of the capital investment (including the fair market value of any pre-operational services rendered) of that investor.	
Must NOT	
1. Exceed 40% Investment Interest: Investors who are in a position to make or influence referrals to, otherwise furnish items or services to, or otherwise generate business for the entity must not hold more than 40% of value of investment interest of each class of investment interests during the previous fiscal year or 12 months. ¹	
2. Offer Terms Related to Referral Volume: The terms on which an investment interest is offered to an investor who is in a position to make or influence referrals, to, furnish items or services to, or otherwise generate business for the entity must not be related to the previous or expected volume of referrals, items or services furnished, or the amount of business otherwise generated from that investor to that entity.	
3. Condition Upon Referral: Must not require a passive investor to make referrals to, be in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity as a condition for remaining as an investor.	
4. Exceed 40% of Gross Revenue: No more than 40% of entity's gross revenue related to the furnishing of health care items and services in the previous fiscal year or previous 12-month period may come from referrals or business otherwise generated from investors. ²	
5. Loan Funds to Obtain Investment Interest: The entity or any investor (or other individual or entity acting on behalf of the entity or any investor in the entity) must not loan funds to or guarantee a loan for an investor who is in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity if the investor uses any part of such loan to obtain the investment interest.	

¹ The OIG has noted that this standard will require monitoring data, and that entities may use any internal accounting principles so long as such principles are consistently used over time so that there is no manipulating of data to obscure noncompliance. Equivalent classes of equity investments may be combined, and equivalent classes of debt instruments may be combined.

² As with the first condition, entities are permitted to use any internal accounting principles so long as such principles are used consistently over time so that data is not manipulated.

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