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Headlines in Long-Term Care Facilities, Assisted Living and Senior Housing Law
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Long-Term Care Facilities, Assisted Living and Senior Housing Lawyers

Robert J. Heath, Chair
Debra S. Bursinger
Mary T. McCormack
Meg S.L. Pekarske
Katherine A. Proctor
A. John Richter
Burton A. Wagner

Suite 1700
1000 North Water Street
Milwaukee, WI 53202-8650
414-298-1000
800-553-6215

Suite 600
22 East Mifflin Street
Madison, WI 53703-4225
608-229-2200
800-728-6239

Suite One
N16W23250 Stone Ridge Drive
Waukesha, WI 53188-1194
262-951-4500
800-928-5529

2215 Perrygreen Way
Rockford, IL 61107
815-633-5300
800-840-5420

Suite 280
8800 East Raintree Drive
Scottsdale, AZ 86260-3963
480-860-0414

Penthouse
8400 East Prentice Avenue
Greenwood Village, CO 80111
303-843-6042

www.reinhartlaw.com

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OIG ISSUES ADVISORY OPINION 10-26

On December 20, 2010, the Department of Health and Human Services Office of Inspector General (OIG) issued Advisory Opinion 10-26, which discussed an ambulance provider's proposed payment methodologies for Medicaid-covered residents of Skilled Nursing Facilities (SNFs) (Proposed Arrangement). In Advisory Opinion 10-26, the OIG decided against the Requestor's Proposed Arrangement, noting that it could potentially generate prohibited remuneration under the anti-kickback statute and that the OIG could potentially impose administrative sanctions on the Requestor if it enacted the Proposed Arrangement.

The Requestor operates in a state where the Medicaid program pays nursing facilities a per resident per day rate for ancillary and support costs, which, under that state's law, include Medicaid Transport Services. SNFs must pay the Medicaid Transport Services directly to ambulance providers. Further, for residents of SNFs who are eligible for Medicare and Medicaid (Dually Covered Residents), the SNF is responsible for paying the Medicare-allowable amount that would ordinarily be paid by Medicaid as a secondary payor. The Requestor proposed to provide SNFs with two payment plans for providing Medicaid Transport Services to their residents:

- Plan One: The Requestor would offer the SNFs a capitated rate per resident per day for its services based on the number of Medicaid resident days, with no regard for whether the Requestor's services were actually utilized for a resident. For Dually Covered Residents, the SNFs would bill Medicare as the primary payor, and the Requestor's capitated rate would cover the Medicaid portion. In the case of Medicaid-only residents, the Requestor's capitated rate would not fully cover the Requestor's costs. The Requestor would make up the difference with its charges for Dually Covered Residents.

- Plan Two: The Requestor would enter into a contract with the SNFs, by the terms of which the Requestor would charge SNFs on a fee-for-service basis for Medicaid-only residents. These rates would be below the Requestor's costs, but would not apply to Dually Covered Residents, for whom the Requestor would bill Medicare as the primary payor and the SNF would pay for the co-payment and deductible as determined by the Medicare-allowable amount.

Typically, the SNFs with which the Requestor works would have residents for whom the Requestor would receive reimbursements from Medicare Part B or other payors. The Requestor noted that, especially in Plan One, SNFs would be likely to refer those residents' business to the Requestor.

The OIG reviewed the Proposed Arrangement under the anti-kickback statute and its 2003 Compliance Program Guidance for Ambulance Suppliers, noting that any "link or connection, whether explicit or implicit, between the price offered for business paid out of the purchaser's pocket and referrals of federal program business billable by the ambulance supplier will implicate the anti-kickback statute." The OIG highlighted the below-cost nature of payments for Medicaid-only residents, and stated that such payment plans would "suggest that a nexus may exist between the below-cost payment rates offered to the SNFs" and referrals of other federal health care program business. The OIG noted that SNFs were in the position to direct business to the Requestor that would be outside of the

payment plans, such as the Medicare Part B business. Further, both parties have clear motives to trade cut-rate payments for Medicaid-only resident business for other federal health care program business.

As part of its inquiry, the OIG sought indicia that the rates offered would not be commercially reasonable absent other, nondiscounted business. According to the OIG, the fact that the payments for Medicaid-only business were below the Requestor's costs was evidence that the Requestor and the SNFs may propose to swap below-cost rates on business for which the SNFs retain the business risk, for more profitable nondiscounted federal business. Such an arrangement would allow the Requestor to recover its losses on the discounted business, "potentially through overutilization or abusive billing practices." Accordingly, the OIG found that the Proposed Arrangement posed a substantial risk of "swapping" of business that would be violative of the anti-kickback statute.

If you have any questions about Advisory Opinion 10-26, please contact your Reinhart attorney or any of our health care attorneys.

This *Headlines in Long-Term Care Facilities, Assisted Living and Senior Hoursing Law E-Alert* provides general information and should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them.

Reinhart
Boerner Van Deuren s.c. Attorneys at Law

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