

OIG Greenlights Referral Program for Independent Living Facility

On May 19, 2010, the U.S. Department of Health and Human Services Office of the Inspector General (OIG) set forth [Advisory Opinion 10-05](#) concerning a health care provider's proposed rewards program for residents and employees who refer prospective residents to its continuing care retirement communities (CCRCs) (the Proposed Arrangement). CCRCs provide housing and other services, including as-needed care, to the elderly.

POSTED:

Jul 12, 2010

RELATED PRACTICES:

[Health Care](#)

<https://www.reinhartlaw.com/practices/health-care>

Factual Background

The provider requesting the OIG's opinion (the Provider) offers several strata of care: independent living, assisted living, and skilled nursing. When a person enters a CCRC, they contract for the right to progress to higher levels of care as their needs increase. For the services that they receive, residents pay an entrance fee and a monthly fee. In the case of this particular provider, the monthly fee itself does not increase as residents move from one level of care to the next.

In the CCRCs at issue, independent living residences make up the majority of the facilities, and independent care residents outnumbered skilled nursing residents ten to one. Further, a 2005 actuarial study commissioned by the Provider found that two-thirds of the independent living residents are not expected to ever become residents of the CCRC's skilled nursing facilities. At the independent living level, the Provider does not offer health care services, nor does it participate in any federal health care programs. If an independent living resident needs health care services, he or she seeks these services from outside providers or transfers to a higher level of care within the CCRC.

The Proposed Arrangement

The Proposed Arrangement is comprised of two parts:

1. **Gift Cards for CCRC Tours:** Current residents and employees of the Provider's CCRC would receive a gift card for supplying the Provider with the name and contact information of an eligible prospective resident if the prospective resident toured the facility within 90 days.
2. **Credits/Rewards for Independent Living Referrals:** The resident or



employee would receive a credit toward his or her monthly fee (residents), or a check (employees) if their referral would result in a prospective resident moving into the CCRC.

The Proposed Arrangement is directed at attracting residents to its independent living units. The referring employees are not physicians or other medical professionals who would directly influence a prospective resident's medical decision making. Instead, the employees are nonmedical staff members who are typically friends of the prospective resident; to the extent that they hold sway over a prospective resident's decision about whether to move into a CCRC, it would generally be on issues related to location, convenience, and social opportunities.

Legal Analysis

Advisory Opinion 10-05 addressed the question of whether the Proposed Arrangement ran afoul of the Federal Anti-Kickback statute or regulations. Specifically, the Advisory Opinion addressed whether the residents and employees who receive incentives by "arranging for" or "recommending" the purchase or order of items or services payable by a federal health care program. The OIG determined that, under the given facts, the residents and employees would not. As such, there was no anti-kickback violation.

In making this determination, the OIG noted that the incentive payments would not be made for referrals to the assisted living or skilled nursing facilities, only the independent living portion of the CCRC. Importantly, federal health care programs do not reimburse residents for the cost of their independent living arrangements. While some independent living residents do move into the CCRC's assisted living and skilled nursing units, given the relatively small percentage that do and the significant amount of time that generally elapses before they do, the OIG noted that whether a particular prospective resident would ever enter into a higher level of care is "substantially speculative and outside the control of" the individual making the referral. The OIG further noted that the decision to enter a particular independent living facility is one made for myriad reasons, many of which are completely unrelated to ones future medical needs.

The OIG distinguished the Proposed Arrangement from less benign incentive systems, because the residents and employees to be compensated under the Proposed Arrangement would be friends or acquaintances of the prospective resident, not individuals likely to exert undue influence on the prospective



resident's medical decision making. Accordingly, the OIG deemed the Proposed Arrangement to "have no impact on any health care professional's decision to order a health care item or service or to refer a patient to a particular practitioner, provider, or supplier."

While Advisory Opinions are not legal precedent, they do provide helpful insight into how the OIG is likely to act with regard to a given set of facts. Therefore, a CCRC operator who enacts a referral-incentive program in line with Advisory Opinion 10-05 should avoid OIG inquiry into the program, provided that no health care professionals are compensated for referrals, and no state or federal health care programs would fund the prospective resident's living arrangement.

A number of our clients are currently enjoying the benefits of successful referral programs. If you are interested in exploring the opportunities presented by this Advisory Opinion, or if you have any other health care law questions, please contact an attorney with Reinhart's Health Care Practice Group.

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.