

OIG Opinion Signals Approval of Narrow Placement Agency Referrals to Senior Residential Communities

In January 2014, the U.S. Department of Health and Human Services (HHS) Office of Inspector General (the OIG) released an advisory opinion (the Opinion) regarding the enforcement of the federal Anti-Kickback Statute (the AKS) as it relates to referrals from a placement agency to senior residential communities. Specifically, the Opinion addresses contracts under which a placement agency is compensated for referring new residents to senior communities where they may eventually receive services paid for by federal health care programs (the Arrangement).

After detailing the precautionary steps the parties in the Opinion took to prevent and avoid unlawful kickbacks, the OIG explained that it will not impose sanctions in connection with the Arrangement. The OIG reasoned that although the Arrangement could potentially generate prohibited remuneration under the AKS if the requisite intent to induce or reward referrals of federal health care program business were present, the facts and circumstances of the Arrangement, in combination, adequately reduce the risk of prohibited conduct.

Anti-Kickback Statute

The AKS makes it a criminal offense to knowingly and willfully offer, pay, solicit or receive any remuneration to induce or reward referrals of items or services reimbursable by a federal health care program. The AKS has been interpreted to even cover an arrangement where just one purpose of the remuneration was to obtain money for the referral of services or to induce further referrals.

Opinion Facts

- The organization requesting the opinion (the Requestor) is a non-profit that provides senior housing and geriatric care through 11 senior residential communities, 2 skilled nursing facilities (SNF) and a management company.
- Nearly all new residents of the Requestor's residential communities cover the costs of the services and housing out of their own resources or via private payors. A state Medicaid waiver program pays for about 2% of residents; however, those residents were not referred through the Arrangement.
- Aside from the waiver program, the SNFs are the only portion of the Requestor

POSTED:

Mar 12, 2014

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that provide federally reimbursed health care services. The SNFs provide services to their residents and therapy services to the residents of some of the residential communities. SNF services are not available to the communities participating in the Arrangement.

- The Requestor contracts with an independent placement agency (the Agency) to promote two of the residential communities and place new residents with those communities.
- The Agency receives a fee for every new resident placed at one of the participating communities. The fee is calculated based on a percentage of the new resident's charge for his or her first (or first and second) month. The fee does not include any charges billed to federal health care programs.
- The Arrangement prohibits the Agency from referring any new residents who are known to rely, in whole or in part, on Medicaid, Medicare or other state or federal funding sources for the residential communities' charges.

Analysis

Of central concern to the OIG regarding the Arrangement was the possibility that residents originally referred by the Agency could eventually receive federally payable services provided by one of the Requestor's other communities or SNFs after a change in circumstances, such as becoming qualified for the waiver program or moving to an SNF or one of the other communities offering SNF services. The OIG concluded that under that possibility, there is remuneration that implicates the AKS.

However, the OIG explained that the real issue goes beyond this and looks at whether the remuneration is likely to be an improper payment to generate federal health care program business for the Requestor. In examining that issue, the OIG concluded that the facts and circumstances of the Arrangement, in combination, adequately reduce the risk that the remuneration provided under the Arrangement could be an improper payment for referrals or the generation of federal health care program business. Thus, the OIG explained, it will not impose sanctions in connection with the Arrangement. The facts and circumstances the OIG cited as most significant include:

- The Arrangement's placement fee takes into account only the initial rent and services provided by the residential community and paid for by the resident; the fee does not include any charges to federal health care programs;
- The Arrangement prohibits, and the parties certify to their adherence to such prohibitions, both the placement and acceptance of potential residents who are

known to rely, in whole or in part, on state or federal funding sources for community charges;

- The Agency has been retained only to provide referrals to communities that do not offer housing or services that are payable by federal health care programs; and
- The Requestor does not track referrals or common residents or patients among the communities and SNFs, nor does it limit their residents' choice of providers, practitioners or suppliers of services.

OIG explained that while none of the factors completely eliminates the risk of fraud and abuse, the absence of direct remuneration links and the remaining speculative nature of potential remuneration was enough to reduce the risk to a tolerable level.

Application of Opinion

Facilities considering entering into referral arrangements should use the Opinion as a guide on how to structure potential arrangements to reduce the risk of AKS violations. Specifically, facilities should aim to address:

- Division of Services. Facilities should enter into referral arrangements only where the services involved can be segregated from services payable by federal health care programs;
- Prohibited Participants. Facilities should ensure both the facility and the referral agency understand and agree not to refer or pay any referral fee for a resident who will rely on state or federal assistance to pay for health care services provided by the facility;
- Fee Calculation. Facilities should weigh the various referral fee calculation options. Fee calculations based on a percentage of gross collections from a new resident are inherently problematic under the AKS because they relate to the volume and value of business generated. Under no circumstances can the fee take into account services paid for by a federal health care program.

Reinhart's Health Care team is available to assist your long-term care, assisted living or senior housing facility in the development and adoption of referral policies and procedures, or to consult with you regarding any other legal or regulatory issues. Please feel free to contact Robert Heath or your Reinhart attorney to discuss any questions or concerns related to your long-term care, assisted living or senior housing facility. The assistance of Brad Dennis in the preparation of this e-alert is gratefully acknowledged.



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