

Publications

Health Care Alert: OIG Advisory Opinion 14-01 – No Sanctions for Arrangement Where Placement Agency Receive Fees for Referral of New Residents to Senior Communities

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The Office of Inspector General posted OIG Advisory Opinion No. 14-01 on January 21, 2014 in response to a nonprofit senior housing and geriatric care provider's question of whether it may pay an independent placement agency a fee for referring new residents to certain of its facilities. Despite concerns that the arrangement could potentially generate prohibited remuneration under the Anti-Kickback Statute (AKS), the OIG found that the facts and circumstances of the arrangement sufficiently mitigated any fraud and abuse risks.

The opinion was requested by a nonprofit entity that owns and controls subsidiaries involved in senior housing and geriatric care, including 11 senior residential communities, two skilled nursing facilities (SNFs), and a management company. Other than a state Medicaid waiver program that pays for services for a small percentage of residents in three of the residential communities, the SNFs are the only entities that provide federally reimbursed health care services. Two of the 11 residential communities contract with an independent placement agency that receives a fee for every new resident placed at the two communities. The fee is based on a percentage of the new resident's charges for his initial month or initial two months, and the fee does not include any charges billed to federal health care programs. The agreement between the placement agency and communities prohibits the placement agency from referring, and the communities from accepting, new residents who are known to rely, in whole or in part, on Medicaid, Medicare, or other state or federal funding sources. Neither of the two residential communities provide services reimbursed by Medicare, and residents do not have access to such services provided by the SNFs.

In its analysis, the OIG acknowledged that the placement fee paid by the communities arguably constitutes remuneration in return for referrals of federal program business because such residents referred by the placement agency could eventually receive services for which the communities or affiliated entities would receive federal health care program reimbursement. In addition, the OIG pointed out that the

placement fee is calculated based on specified percentages of the recipient community's initial gross collections from the new resident, and that percentage compensation arrangements "are inherently problematic" under the AKS because they relate to the volume and value of business generated between the parties.

Nonetheless, the OIG determined that the facts and circumstances of the arrangement, in combination, adequately reduce the risk that the remuneration to the placement agency could be an improper payment for referrals or the generation of federal health care program business. The OIG looked specifically to the following factors in making this decision:

- The placement fee only includes initial rent and does not include or otherwise take into account charges to any federal health care program.
- The contracts underlying the arrangement prohibit both placement and acceptance of potential residents who are known to rely on government funding for their health care.
- The placement agency referrals are for housing and services that are not covered by a federal health care program. Neither of the communities using the referral arrangement provide services reimbursed by Medicare. Further, if a resident referred by the placement agency were to later receive services covered by a federal health care program, the OIG determined that such an occurrence would be both too speculative at the point the placement fee is actually paid and otherwise out of the control of the placement agency.
- The senior care provider made various certifications to the OIG, including a certification that it does not track referrals or common residents or patients, nor do they limit the residents' choice of providers.

Together, these factors served as the basis for the OIG's conclusion that the risk is minimal that one purpose of the arrangement is to generate referrals of federal health care program business.

As with all OIG Advisory Opinions, this Opinion is limited in scope to the specific arrangement described in the Opinion. Each situation is fact specific, and providers should review their current contracts and arrangements with placement and referral agencies to ensure they are not in violation of the AKS. In addition to federal law, providers should also consider the legal implications of such arrangements under any applicable state "mini-AKS" laws applicable to Medicaid and/or private payor arrangements.

If you have any questions, please contact your Vorys health care attorney.