

in the news

Senior Housing and Long-Term Care



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Proceed with Caution: Contracts Between Senior Communities and Placement Agencies May Not Violate the Anti-Kickback Statute

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In the first OIG Advisory Opinion of 2014, the OIG addressed whether a referral contract between senior communities and a placement agency violates the Anti-Kickback Statute (“AKS”). The OIG concluded that, even though payments made under the contract implicate the AKS, it would not impose any administrative sanctions due to a number of unique factors. According to the OIG, the unique facts of the arrangement reduced any risk that the senior communities improperly paid the placement agency to induce referrals of or generate federal health care program business.

Background of the Arrangement

The Advisory Opinion was requested by a nonprofit corporation that owns several senior communities and two skilled nursing facilities (“SNFs”). In the senior communities, staff helped with daily living activities, administer medications, and provide skilled nursing services to residents. A small portion of residents receiving services paid for them through a state Medicaid waiver. Further, some staff from the corporation’s SNFs provided federally reimbursable speech, occupational, and physical therapy to community residents.

A few of the corporation’s communities (“contracting communities”) contracted with an independent placement agency to promote available housing and place new residents. For every new resident the agency referred, the contracting communities paid the agency a fee based on a percentage of the resident’s charges for his or her initial month or two at the



community. The fee did not relate to any charges billed to Medicare or Medicaid. Furthermore, the contracts prohibited the placement agency from referring residents, and the contracting communities from accepting referrals of residents, who are known to rely on Medicaid, Medicare, or other government sources for reimbursement.

The corporation did not provide any federally reimbursable services to residents referred by the placement agency, because none of the contracting communities provide services reimbursed by Medicare, none of their residents receive therapy from the corporation's SNF staff, and no residents participate in the Medicaid waiver program. However, it was possible that after the referral, residents could become qualified to receive Medicaid waivers or move to one of the corporation's SNFs or non-contracting communities and receive federally reimbursable care.

The OIG's Analysis: How the Senior Communities Reduced Their Risk

Under the AKS, payments purposefully made to induce or reward referrals of services payable by Medicare or Medicaid are prohibited and can result in administrative sanctions such as exclusion from federal health care programs or civil monetary penalties. Even though the contracting communities paid the placement agencies for patient referrals, the OIG outlined several specific factors that reduced the parties' risk of violating the AKS. These factors include:

- The placement fee does not take into account any charges to Federal health care programs.
- The contract prohibits both the placement agency from referring and the contracting communities from accepting new residents known to rely on funding from state or federal health care programs.
- The placement agency does not refer new residents for housing and services reimbursed by federal health

care programs. While the OIG recognized that these residents could later receive such services, the OIG discounted this recognition, because it is speculative and outside the control of the placement agency.

- The corporation certified that it neither tracks which residents in a non-contracting community later receive services provided by the corporation's other communities or SNFs nor limits the residents' choice of providers. The OIG found that this reduces the risk that the corporation is directing referred residents to services reimbursed by federal health care program dollars.

Based on these factors, the OIG favorably concluded that it would not impose any administrative sanctions. However, the OIG included the warning that: (1) the fees paid to the placement agency implicated the AKS, because referred residents could later receive federally reimbursable care; and, (2) the percentage based compensation structure used to calculate such fees is inherently problematic under the AKS, because it relates to the volume and value of business generated between parties.

What Providers Should Know

- As the OIG generally warned, fees paid to placement agencies that refer new residents to facilities implicate the AKS. [Such arrangements must be structured carefully](#) to avoid AKS liability, exclusion from federal health care programs, and civil monetary penalties.





- **The OIG's decision not to impose sanctions is quite narrow—be wary.** Many long-term care providers cannot meet some of the factors that led to the favorable decision. In particular, most providers offer services reimbursed by Medicare and do not have a resident population that exclusively pays for services through private pay or third party payors.
- **The OIG's decision only applies to the Federal AKS.** Some states have statutes similar to the AKS that prohibit payment for referrals of health care services payable by any payor, not just Medicare or Medicaid. As a result, even though arrangements similar to those in the Advisory Opinion likely do not violate federal law, the arrangements can still violate state law.

For More Information

The Advisory Opinion (No. 14-01) can be found [here](#).

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