



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



[We redact certain identifying information and certain potentially privileged, confidential, or proprietary information associated with the individual or entity, unless otherwise approved by the requestor.]

Issued: January 13, 2014

Posted: January 21, 2014

[Name and address redacted]

Re: OIG Advisory Opinion No. 14-01

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding 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”). Specifically, you have inquired whether the Arrangement constitutes grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (the “Act”), or the civil monetary penalty provision at section 1128A(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act, the Federal anti-kickback statute.

You have certified that all of the information provided in your request, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties.

In issuing this opinion, we have relied solely on the facts and information presented to us. We have not undertaken an independent investigation of such information. This opinion is limited to the facts presented. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce or

reward referrals of Federal health care program business were present, the Office of Inspector General (“OIG”) will not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

This opinion may not be relied on by any persons other than [name redacted], the requestor of this opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

A. The Parent Company and Affiliated Entities

The requestor, [name redacted] (the “Parent Company”), is a nonprofit corporation based in [state name redacted] (“State”). The Parent Company owns and controls subsidiaries involved in senior housing and geriatric care, including: (1) eleven senior residential communities (the “Communities”), (2) two skilled nursing facilities (the “SNFs”), and (3) a management company (the “Management Company”) that negotiates and administers contracts for the subsidiaries and provides them other management services. The Parent Company’s subsidiaries (including the Communities) are collectively referred to herein as the “Affiliated Entities.”

The Communities offer to their residents various services. Licensed nurses set up or administer medications and provide other skilled nursing services (e.g., wound care) for residents. Non-medical staff provides residents with medication reminders and other medication assistance and helps with daily living activities, housekeeping and laundry services, and transportation. Nearly all new residents of the Communities cover the costs of any such services they use and their housing rental out of their own resources or via private payors. A State Medicaid program (the “Elderly Waiver Program”), covered under the waiver for Medicaid beneficiaries at section 1915(c) of the Act, pays for services provided to a small percentage of residents in three of the Communities.¹

Outside the context of the Elderly Waiver Program, the SNFs are the only Affiliated Entities that provide Federally reimbursed health care services to residents of the Communities. In addition to the services that SNF staff provide to patients residing in the SNFs’ facilities, SNF staff also provide Federally payable speech, occupational and

¹ About two percent of all of the Communities’ residents participate in the Elderly Waiver Program. Services provided through the Elderly Waiver Program are paid for by Federal and State health care program funds.

physical therapy to residents of some of the Communities, either in-home or at an on-site facility. The Parent Company certified that although it is possible to extract information regarding common residents or patients among the Affiliated Entities from existing records, such information is not regularly tracked. The Parent Company certified that its Affiliated Entities do not limit their residents' choice of providers, practitioners, or suppliers of services in order to direct them to health care services offered by the Affiliated Entities.

B. Placement at the Participating Communities

[Name redacted] (“the Placement Agency”) is an independent placement agency for senior housing that provides information and advice about housing and care options to seniors and their families and caregivers. The Placement Agency contracts with two of the Communities (the “Participating Communities”) to promote their available housing² and place new residents with them.

Under the Arrangement,³ the Placement Agency receives a fee for every new resident at one of the Participating Communities who arrived there through the Placement Agency. The fee is calculated based on a percentage of a new resident's charges for his or her initial month (or initial two months).⁴ The fee calculation does not include any charges billed to Federal health care programs.

The contracts between the Placement Agency and the Participating Communities prohibit the Placement Agency from referring to the Participating Communities new residents who are known to rely, in whole or in part, on Medicaid, Medicare, or other state or Federal funding sources for payment of amounts owed to the Participating Communities. These contracts also state that the Participating Communities will not accept the referral

² The Placement Agency operates an online information clearinghouse which, among other things, posts promotional listings about the Participating Communities.

³ The contracts underlying the Arrangement were originally entered into in 2003 but were amended by the parties in 2009. This advisory opinion is limited to the terms of the amended contracts.

⁴ Specifically, the Arrangement directs a Participating Community to pay the Placement Agency a fee equal to the sum of [percentage redacted] of a new resident's charges for the first full month and [percentage redacted] of the new resident's charges for the second full month. The Arrangement also permits the Participating Community to choose instead to pay the Placement Agency a fee equal to [percentage redacted] of the new resident's first full month's charges.

of such new residents from the Placement Agency.⁵ The Parent Company certified that, since the parties entered into the contracts, the Participating Communities have adhered to the restrictions on acceptance of new potential residents and will continue do so. To the best of the Parent Company's knowledge, the Placement Agency has adhered to the restrictions with regard to referral of potential residents and will continue to do so.

None of the Participating Communities provide services reimbursed by Medicare. Although one of the Participating Communities provides services under the Elderly Waiver Program, no residents who were referred to that Participating Community by the Placement Agency receive care paid for by the Elderly Waiver Program. The SNF staffs do not provide services at either of the Participating Communities. As a result, residents who are referred by the Placement Agency to the Participating Communities do not, at the time of the referral, receive Federally payable services provided by any Affiliated Entity.⁶ It is possible, however, that residents originally referred by the Placement Agency could eventually receive Federally payable services provided by an Affiliated Entity after a change in circumstances, such as becoming qualified for the Elderly Waiver Program, or moving to an affiliated SNF or to a different Community where Federally payable services provided by affiliated SNF staff are available to Community residents.

II. LEGAL ANALYSIS

A. Law

The anti-kickback statute 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. See section 1128B(b) of the Act. Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-kickback statute is violated. By its terms, the statute ascribes criminal liability to parties on both sides of an impermissible

⁵ The contracts between the Placement Agency and the Participating Communities specifically provide that the former "will not refer potential residents whose source of payment [is known by the Placement Agency to be], in whole or in part, provided by state or federal funding sources...." The contracts further indicate that the Participating Community "agrees that they will not accept such a referral of such potential residents from the [Placement Agency]."

⁶ At one time, the Participating Communities included one Community whose residents had access to Federally payable on-site therapy services provided by staff from one of the SNFs. That Community no longer has a contract to receive referrals from the Placement Agency, however. We do not opine upon the past arrangement that included referrals to this Community by the Placement Agency.

“kickback” transaction. For purposes of the anti-kickback statute, “remuneration” includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

The statute has been interpreted to cover any arrangement where one purpose of the remuneration was to obtain money for the referral of services or to induce further referrals. See, e.g., United States v. Borrasi, 639 F.3d 774 (7th Cir. 2011); United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000); United States v. Davis, 132 F.3d 1092 (5th Cir. 1998); United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir. 1985), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. Conviction will also lead to automatic exclusion from Federal health care programs, including Medicare and Medicaid. Where a party commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such party under section 1128A(a)(7) of the Act. The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs under section 1128(b)(7) of the Act.

B. Analysis

By paying the placement fee, the Participating Communities pay remuneration to the Placement Agency, which is a source of referrals of residents who may in the future receive Federally reimbursed services from one of the Affiliated Entities.⁷ A resident may eventually receive Federally reimbursed services if he or she enters the Elderly Waiver Program while residing at a Participating Community, or if he or she moves to an affiliated SNF or a Community where Federally payable services provided by SNF staff are available to residents. In short, there is remuneration that implicates the anti-kickback statute. For purposes of this advisory opinion, the core issue is whether the remuneration is likely to be an improper payment to generate Federal health care program business for the Parent Company or its Affiliated Entities.

The Placement Agency is paid for every new resident it places at one of the Participating Communities. The placement fee is calculated based on specified percentages of the recipient Participating Community’s initial gross collections from the new resident. Percentage compensation arrangements are inherently problematic under the anti-kickback statute, because they relate to the volume and value of business generated between the parties. Although the Parent Company certified that the placement fee is not

⁷ The Department of Health and Human Services has promulgated a safe harbor for referral services at 42 C.F.R. § 1001.952(f). The safe harbor for referral services would not apply to the Arrangement, however, because, among other reasons, the placement fee is not assessed equally against and collected equally from all participants, and it is not based on the cost of operating the referral service.

calculated on the basis of items or services paid for by Federal health care programs, we nevertheless must consider whether the placement fee is remuneration intended to generate Federal health care program business, because some of the residents placed by the Placement Agency eventually may receive services from an Affiliated Entity paid for by one or more Federal health care programs.

For the reasons set forth below, we conclude 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.

First, the placement fee takes into account only the initial rent and services provided by the Participating Community and paid for by the new resident. The calculation of the placement fee does not include any charges to Federal health care programs. We recognize that a placement fee not calculated on the basis of charges to Federal health care programs might nevertheless be intended to generate Federal health care program business. However, the absence of a link between the placement fee calculation and such charges, in combination with other factors, serves to reduce the risk of fraud and abuse posed by the Arrangement.

Second, the contracts that underlie the Arrangement prohibit both placement and acceptance of potential residents who are known to rely, in whole or in part, on state or Federal funding sources, such as Medicare or Medicaid, for payment of amounts owed to the Participating Communities. While such contractual prohibitions do not eliminate the possibility of such referrals taking place, in the context of the Parent Company's certifications that these terms of the contracts have been, and continue to be, honored, they constitute a factor on which we rely, in combination with others.

Third, the Placement Agency refers potential residents for housing and services that are not payable by Federal health care programs. None of the Participating Communities provide services reimbursed by Medicare. Residents of the Participating Communities do not have access to services provided by the SNF staffs,⁸ and no participants in the Elderly Waiver Program were referred to a Participating Community by the Placement Agency. Whether an individual resident originally placed by the Placement Agency will receive Federally payable services provided by an Affiliated Entity at some point in the future, due to a change in circumstances, is substantially speculative and outside the control of the Placement Agency.

⁸ As noted above at footnote 3, we do not opine upon the past arrangement that included referrals by the Placement Agency to a Community whose residents had access to Federally payable therapy services provided by employees of a SNF.

Finally, the Parent Company certified that the Affiliated Entities do not track referrals or common residents or patients among the Affiliated Entities, nor do they limit their residents' choice of providers, practitioners, or suppliers of services in order to steer them to affiliated providers. These factors reduce the risk that the Affiliated Entities are generating Federal health care program business by directing or influencing referrals among themselves of residents placed by the Placement Agency.

On the basis of all these factors, in combination, we conclude that the risk is minimal that one purpose of the Arrangement is to generate Federal health care program business.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce or reward referrals of Federal health care program business were present, the OIG will not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name redacted], the requestor of this opinion. This advisory opinion has no application to, and cannot be relied upon by, any other individual or entity.
- This advisory opinion may not be introduced into evidence by a person or entity other than [name redacted] to prove that the person or entity did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is expressed or implied herein with respect to the application of any other Federal, state, or local statute, rule, regulation, ordinance, or other law that may be applicable to the Arrangement, including, without limitation, the physician self-referral law, section 1877 of the Act (or that provision's application to the Medicaid program at section 1903(s) of the Act).

- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.
- This advisory opinion is limited in scope to the specific arrangement described in this letter and has no applicability to other arrangements, even those which appear similar in nature or scope.
- No opinion is expressed herein regarding the liability of any party under the False Claims Act or other legal authorities for any improper billing, claims submission, cost reporting, or related conduct.

This opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008.

The OIG will not proceed against [name redacted] with respect to any action that is part of the Arrangement taken in good faith reliance upon this advisory opinion, as long as all of the material facts have been fully, completely, and accurately presented, and the Arrangement in practice comports with the information provided. The OIG reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, to rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against [name redacted] with respect to any action that is part of the Arrangement taken in good faith reliance upon this advisory opinion, where all of the relevant facts were fully, completely, and accurately presented and where such action was promptly discontinued upon notification of the modification or termination of this advisory opinion.

An advisory opinion may be rescinded only if the relevant and material facts have not been fully, completely, and accurately disclosed to the OIG.

Sincerely,

/Gregory E. Demske/

Gregory E. Demske
Chief Counsel to the Inspector General