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INSPECTOR GENERAL RULES CCRC REFERRAL FEES DO NOT VIOLATE ANTI-KICKBACK LAWS

An Advisory Opinion released May 27, 2010 by the Office of Inspector General of the Department of Health and Human Services (the "OIG") concludes that payment of referral fees to residents and employees for new admissions to CCRCs where federally-reimbursed nursing services are provided does not violate the federal anti-kickback law.

The anti-kickback statute prohibits payment or receipt of incentives to arrange for or recommend the purchase or order of items or services payable by a federal health care program. Violation of the law is a felony punishable by a fine of up to \$25,000, imprisonment up to five years, or both, plus automatic exclusion from federal health care programs, including Medicare and Medicaid.

The referral reward program at issue proposed to give current CCRC residents and employees a gift card if an eligible individual tours the community within 90 days of referral, and grants a cash payment or fee credit if the prospective resident moves into independent living at the CCRC within 12 months after the tour.

Although no payment is made for referrals directly into any Medicare- or Medicaid-reimbursed nursing or assisted living program, the OIG previously had expressed concern about other arrangements that involved "offering or paying remuneration for non-Federal referrals to 'pull through' the Federal business," so the potential for a referred resident to use federally-reimbursed services was an issue.

In determining that the arrangement did not constitute an illegal kickback, the OIG focused on the following factors:

- No payments are made for residents who move directly into the assisted living or skilled nursing areas of the CCRC.
- The approximate ratio of independent living residents to nursing unit residents is 10:1.
- Only one-third of residents entering independent living are expected to need nursing services eventually, and if they do need them, it is predicted to be an average of 8 years in the future.
- The employees and residents making the referrals generally are not physicians or other health care professionals in a position to make direct recommendations about health services or to influence medical decision-making.

This opinion is limited to its facts and can be relied upon only by the requestor, but such published opinions are indicative of OIG policy.

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