

# OIG Issues Favorable Opinion of Arrangement Containing Percentage-Based Compensation Structure

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Last week, the OIG issued an [advisory opinion](#) indicating that it would not impose sanctions on an arrangement pursuant to which a placement agency receives a percentage-based fee for referring new residents to senior communities.

The Requestor, a nonprofit corporation, is a parent company that owns and controls eleven senior residential communities ("Communities"), two skilled nursing facilities ("SNFs"), and a management company that negotiates and administers contracts for the Requestor's subsidiaries and provides other management services. The Communities offer a range of services, including medication administration and skilled nursing services, and non-medical staff assists with daily living activities, housekeeping, and transportation.

Almost all new residents of the Communities finance the cost of the services through private payors or self-pay. A State Medicaid program pays for services provided to a small percentage of residents in three of the Communities. Other than this State Medicaid program, the SNFs are the only subsidiaries of the Requestor that provide federally reimbursed health care services to residents of the Communities.

Two of the Communities (the "Participating Communities") contract with a placement agency, which promotes, and places individuals into, the Participating Communities' facilities. Under this arrangement (the "Arrangement"), the placement agency receives a fee, calculated based on a percentage of a new resident's charges for his/her initial one- to two-months at the Participating Community. The contracts prohibit the placement agency from referring new residents who are known to rely on federal funding sources for payments to the Participating Communities. The fees the Participating Communities pay to the placement agency do not include charges billed to federal health care programs, and none of the Participating Communities provide services reimbursed by Medicare. Although residents that the placement agency refers to the Participating Communities do not receive services that are payable by federal health care programs at the time of the referral, the OIG notes it is possible that residents originally referred by the placement agency may receive federally payable services in the future either by the State Medicaid program offered in three of the Communities or by the SNFs that are subsidiaries of the Requestor.

The OIG identifies several elements that "sufficiently reduce" the risk that remuneration provided under the Arrangement could be an improper payment for referrals or the generation of federal health care program business:

- The placement fee takes into account only the initial rent and services provided by the Participating Community and paid for by the new resident and the calculation of the placement fee does not include any charges to federal health care programs.
- The contracts between the Participating Communities and the placement agency prohibit both placement and acceptance of potential residents who are known to rely on state or federal funding sources (e.g., Medicare, Medicaid) for payment of amounts owed to the Participating Communities.
- The placement agency refers potential residents for housing and services that are not payable by federal health care programs.
- The Requestor certified that its subsidiaries do not track referrals or common residents or patients among the Requestor's subsidiaries, nor do they limit their residents' choice of providers, practitioners, or suppliers of services in order to steer them to affiliated providers.

OIG's advisory opinions are binding only on requestors, but this opinion offers providers and suppliers valuable guidance nonetheless. Though the opinion is favorable, the OIG reiterates that "[p]ercentage compensation arrangements are inherently problematic under the anti-kickback statute, because they relate to the volume and value of business generated between the parties." If providers or suppliers intend to employ percentage-based compensation models and the payments could potentially be viewed as payments for referrals or for the generation of federal health care business, they should consider requesting an advisory opinion or attempting to structure the arrangement to meet the elements the OIG cites as those that sufficiently reduce the risk of remuneration being viewed as payment for referrals or the generation of federal health care business. By issuing a favorable opinion, the OIG leaves open the possibility that, under certain circumstances, organizations may establish percentage-based compensation models so long as applicable safeguards are met.

## Authors



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