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OIG Takes Another Look at Swapping Arrangements: State-Run Veterans' Homes Therapy Arrangements

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The Office of Inspector General (OIG) recently issued Advisory Opinion 12-09, concluding that reduced-rate arrangements for therapy care at state-run veterans' homes would not be subject to administrative sanctions from the OIG's civil monetary penalty authority of 42 U.S.C. § 1320a-7a or the OIG's administrative enforcement of the anti-kickback statute, 42 U.S.C. § 1320a-7b. The arrangements included a provision that therapy service providers would charge Medicare beneficiaries for therapy in accordance with the Medicare Physician Fee Schedule (PFS) and charge the state for the same therapy services at a rate less than the Medicare PFS. Although the OIG expressed concern that "swapping" arrangements of discounted fees for non-Medicare services to capture federal health care program referrals could result in administrative sanctions, the OIG concluded that the payment rates were greater than the providers' costs and that the state-run nature of the veterans' homes were sufficient in this case for the OIG to conclude that the arrangements had a low risk of implicating the anti-kickback statute.

The Arrangements

The four veterans' homes in this arrangement were managed by a state board (the Board) that sought therapy providers for the veterans' homes. The veterans' homes are long term care facilities that provide medical, clinical and nursing services to resident veterans.

The Board sought sealed bids in a public request for proposal (RFP) for physical therapy, occupational therapy, and speech language pathology services to the following patient populations: (i) residents with a disability rating of 70% or rated with a need for nursing home care by the Department of Veterans Affairs (70% Service Connected Veterans) and where the provider would bill the Board for the therapy services; and (ii) residents who were not 70% Service Connected Veterans

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and either had Medicare, Medicaid, private-pay insurance or no insurance and where the therapy provider would bill the appropriate health care program, insurance or individual for the therapy service and any applicable copay or deductible.

The Board awarded contracts to two bidders (the Therapy Providers) who each proposed to charge one rate for the non-70% Service Connected Veterans and another rate for the 70% Service Connected Veterans. The Therapy Providers charged the Board a rate less than the Medicare PFS but greater than the cost of providing the therapy service for the 70% Service Connected Veterans. For non-70% Service Connected Veterans, the Therapy Providers charged the Medicare PFS rate to any health care program, insurer and applicable copays and deductibles to the resident. This billing arrangement was consistent with the veterans' homes operations, where the Board is responsible for all of the expenses and costs incurred for 70% Service Connected Veterans and the expenses and costs for non-70% Service Connected Veterans were billed to the resident or the resident's third-party payor.

The Board explained that there were several favorable characteristics of these arrangements. The Board certified that the amounts paid under the arrangements were fair market value for the services and greater than the Therapy Providers' cost to provide the services. The veterans' homes allowed for individual residents to choose a therapy provider outside of the selected Therapy Providers, although the Board noted that many did not. Only the veterans' homes physicians could order therapy (and not the Therapy Providers' employees or contractors) and the Board certified that to the best of its knowledge none of the physicians had any financial relationship with the Therapy Providers.

OIG Analysis

The OIG began its analysis by explaining that the discounted price offered to the Board for the 70% Service Connected Veterans could be viewed as an improper swapping arrangement that implicated the anti-kickback statute. It explained that the OIG's 2008 Supplemental Compliance Program Guidance for Nursing Homes explained that any nexus between the price offered to a nursing facility for its out of

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pocket costs and the referrals of federal health care beneficiaries may implicate the anti-kickback statute.

However, the OIG concluded that there was an insufficient nexus between the discounted rate offered to the Board for the 70% Service Connected Veterans and the referrals of the federal health care program business. The OIG noted that the rate charged to the Board was certified by the Board as fair market value and exceeded the Therapy Providers' cost of services. Accordingly, the risk that the discounts were tied to referrals of the federal health care program was reduced.

The OIG then explained that the arrangements otherwise held a low risk of violating the anti-kickback statute in the following five ways:

1. The RFP process provided an open, transparent and competitive manner for competing therapy providers to bid for the therapy services. The OIG noted that the state-run Board was permitted under its statutory authority to have discretion to solicit and select contractors that were advantageous to the state and its veterans.
2. The veterans' homes physicians did not have a financial relationship with the Therapy Providers and the risk of inappropriate referrals or overutilization was low. The OIG also explained that having the federal beneficiaries pay copays and deductibles helped because the beneficiaries had a financial incentive to monitor the utilization of therapy services.
3. The arrangements would not likely have a negative affect on patient care because the Therapy Providers would provide reliable therapy services to the residents.
4. The open RFP process would not have an adverse effect on competition. The OIG acknowledged that the Board could act on behalf of the state and select a provider that was the most responsive and responsible bidder. The OIG also acknowledged that the Board had the discretion to make an independent decision to select a therapy provider that benefited the state treasury.
5. The state received the financial benefit from the 70% Service Connected Veterans discount. In a nod to state sovereignty the OIG noted that the Board could make a decision to conserve state fiscal resources and that the state

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alone received the benefit of the Board's decision. The OIG carefully distinguished this state benefit from the "core evil" of a similar financial benefit that a private or public business might receive in similar circumstances.

Hospital Inpatients

Advisory Opinion 12-09 takes another look at a swapping arrangement. This opinion is probably best viewed as acknowledging the difference between financial benefits to a state from a *state* health care provider on one hand and a benefit to a *for-profit or nonprofit health care provider* on the other hand. The OIG was careful to note that if the Board acted in a manner where the financial benefits flowed to the Board members or that the RFP was awarded in an untoward manner, then the OIG could have reached a negative conclusion.

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