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Nursing Facility Discounts Approved in OIG Advisory Opinion 17-08

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February 2018

The OIG created an opening for nursing facility discounts to private payors when it approved a startup company's proposal to create a network of nursing facilities willing to offer discounts on the daily rates charged to private long term care insurers and their policy holders in OIG Advisory Opinion 17-08. Because the nursing facilities involved also provide items and services that are reimbursed under federal health care programs, the OIG analyzed the arrangement under the beneficiary inducement prohibitions of the civil monetary penalty statute (beneficiary inducement CMP) and the Anti-Kickback Statute (AKS). The OIG ultimately concluded that neither AKS sanctions nor a CMP would be imposed due to the sufficiently low risk of fraud, abuse or beneficiary inducement under the facts at hand.

Under the proposed arrangement, the startup company would allow any nursing facility within the state to join the network as a Network Facility so long as the facility (1) maintained a CMS quality rating of three stars or higher and (2) agreed to provide up to a specified discount on the daily rate charged for a semi-private room covered by a private, long term care insurer that had contracted with the startup company to be a Participating Payor. Under a limited exception to these requirements, a Network Facility could add a related facility that did not have at least a three-star quality rating if the related facility was under common ownership and located in a zip code that had no nursing facilities with at least a three-star rating.

While all of the Network Facilities would be entities that provide items and services reimbursable under federal health care programs, the discounts would not apply to federally reimbursable stays. Only private, long term care insurers could be Participating Payors and the discount would apply only to stays paid under private insurance policies. In addition, policyholders would not be required to receive federally reimbursable items or services from a Network Facility in order to receive the discount. The discount would be divided between the Participating Payor and its policyholder, with two-thirds going towards the Participating Payor's liability and one-third allocated to the policyholder's cost-sharing obligation.

The only remuneration paid to the startup company would be a fee for administrative services that would be paid by a Participating Payor to the startup company each time that a discount was received.

Policyholders would be made aware of the network and discount, but would also be notified that they did not have to use a Network Facility to receive their full benefits and that they remained free to choose any facility meeting the terms of their insurance coverage. Policyholders would not be penalized, such as through increased cost-sharing, for choosing not to use a Network Facility.

The OIG weighed several risk factors before concluding that it would not impose CMPs or sanctions under the AKS in connection with the arrangement. First the OIG determined there was a low risk of beneficiary inducement, despite the fact that patients who benefit from the discounts may be federal health care program beneficiaries who may later need a federally reimbursable stay in a nursing facility. The OIG reasoned that though beneficiaries who chose a Network Facility as a result of the discount might be more likely to choose that same facility for subsequent federally reimbursable care, the Network Facility had no ability to predict or influence a beneficiary's future need for federally reimbursable items or services. Similarly, the OIG reasoned that beneficiaries needing federally reimbursable care *during* a Participating Payor-covered stay would be likely to choose to receive those services at the same Network Facility out of convenience, regardless of the discount offered through the private-pay stay.

The OIG also concluded that the arrangement would not lead to an unfair competitive advantage for Network Facilities. The OIG found that the requirements for nursing facility participation were objective and open, allowing any nursing facility meeting quality standards to choose to participate. Further, nothing in the arrangement precluded a beneficiary from choosing to use their insurance coverage at a nursing facility that was not part of the network. Finally, the OIG stated that a beneficiary's choice of nursing facility is often impacted by numerous factors, including lifestyle preference, making it unlikely that the discount alone would influence a beneficiary's choice of facility.

The OIG's AKS analysis referenced the same factors it had considered favorable in its CMP discussion, adding that because the physicians and other practitioners who make decisions about the need for long term care received no remuneration under the arrangement, there was sufficiently low risk of fraud and abuse to allow the arrangement.