Barley Snyder

New Anti-Kickback Safe Harbors May Stimulate Senior Living Investment

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Senior living organizations are not wasting time in responding to the federal government's invitation for proposals to add new safe harbors that would reduce the risk of Anti-Kickback Statute liability.

On October 26, the American Health Care Association and National Center for Assisted Living (AHCA/NCAL) publicly applauded the federal government's recent efforts to modify the Anti-Kickback Statute regulations. The statute imposes criminal penalties on health care entities that pay or receive financial rewards for referring patients to Medicare and Medicaid providers. While the regulations are intended to reduce fraud, waste and abuse, they often have the unintended consequence of discouraging providers from forming joint ventures or other financial arrangements that can improve efficiency and coordination of care.

In August, the Office of Inspector General (OIG) requested industry comments on how best to expand anti-kickback safe harbors to allow for more clinical integration among providers. The agency is interested specifically in new safe harbors that would allow providers to jointly participate in alternative payment models that promote better care coordination and value. The federal government already helps in this area by granting regulatory waivers to certain providers participating in the Medicare Shared Savings Program. However, by proposing to expand the anti-kickback safe harbors themselves, rather than the waiver program, the OIG acknowledges that waivers are not enough to stimulate the private investment needed to bring health care costs down. The federal government currently spends over $1 trillion per year on public health care programs, while 30 percent of this spending is classified as "wasteful." Medicare spending on post-acute care alone exceeds $60 billion, and much of this care is provided in settings that cost significantly more than services by skilled nursing facilities or home health agencies.

In its public comments, the AHCA/NCAL notes that many skilled nursing facilities want to expand their post-acute services, but they need to collaborate with other health care providers to create an effective, clinically integrated network. Short of seeking a government waiver, the opportunities for collaboration are constrained by the limitations of existing anti-kickback safe harbors. The AHCA/NCAL therefore has proposed a new "ancillary services joint venture" safe harbor that would relax the regulations and encourage more investment.

The move toward relaxing anti-kickback regulations may be good news for continuing care retirement communities (CCRCs) that want to invest in joint ventures and other clinically integrated networks, without unwanted regulatory concerns. The proposal to expand existing anti-kickback safe harbors, rather than simply increasing the number of waivers, signals the government's acknowledgment that private stakeholders can move faster and farther in implementing innovative care coordination strategies. The goal for everyone is to bring health care costs down, without creating an undue risk of fraud. The government's invitation for industry comments appears to be a positive first step.

If you have any questions concerning these new safe harbor proposals, please contact me or anyone in the Barley Snyder Senior Living Group.

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