

# Client Alert



Contact Attorneys Regarding  
This Matter:

R. Michael Barry  
404.873.8698 - direct  
404.873.8697 - fax  
[michael.barry@agg.com](mailto:michael.barry@agg.com)

## OIG Issues Advisory Opinion Addressing "Swapping" Arrangements

The Department of Health and Human Services Office of Inspector General (OIG) recently issued Advisory Opinion 11-11 (issued July 28, 2011, posted August 4, 2011) in response to a request by a supplier (the Supplier) to skilled nursing facilities (SNFs) of medical supplies, equipment and related services. The OIG ultimately determined that the arrangement exhibited a link between Medicare covered services and non-covered services that would pose a substantial risk of violating the Anti-kickback Statute.

Under the facts presented, a particular SNF issued a request for proposal for bids by suppliers to be the exclusive provider of Medicare-covered items and services to the SNF. The request for proposal also required that suppliers provide pricing for both Medicare-covered items and services *and* non-covered items and services, which the SNF may elect to purchase outside of the exclusive arrangement.

In response to the SNF's request for proposal, the Supplier proposed two arrangements. Under either arrangement, the Supplier would bill Medicare Part B for items that are provided to the SNF that are covered by Medicare and would bill the SNF for items that are not covered by Medicare.

The first arrangement was structured such that the pricing for the non-covered items and services was below the Supplier's costs for such items and related services. The Supplier stated that the reimbursement that it would receive for the Medicare-covered items would more than cover losses incurred in the provision of the non-covered items, too. The Supplier also noted that it would likely not offer the same pricing on the non-covered items and services if it was not selected by the SNF as the exclusive Supplier for Medicare-covered items.

The Supplier's second arrangement was identical to the first, except that the Medicare-covered items would be provided by the Supplier and the non-covered items and services would be provided by a Newco, a separate but commonly owned entity. Under this arrangement, the pricing on the non-covered items and services (provided by the Newco) would also be provided below the Newco's cost.

The OIG concluded that each proposed arrangement would pose a substantial risk of violating the Anti-kickback Statute. In particular, the OIG determined that there was a nexus between the low cost rates offered to the SNF

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Arnall Golden Gregory LLP  
Attorneys at Law

171 17th Street NW  
Suite 2100  
Atlanta, GA 30363-1031  
404.873.8500

2001 Pennsylvania Avenue NW  
Suite 250  
Washington DC 20006  
202.677.4030

[www.agg.com](http://www.agg.com)

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for non-covered items and the exclusive agreement with the SNF for Medicare covered items. As set forth in the OIG's *Supplemental Compliance Program Guidance for Nursing Facilities*, "if any direct or indirect link exists between a price offered by a Supplier or provider to a nursing facility for items or services that the nursing facility pays for out of pocket and referrals of Federal business for which the Supplier or provider can bill a Federal health care program, the anti-kickback statute is implicated."<sup>1</sup>

The OIG was not convinced that the second arrangement would provide any insulation from the improper swapping arrangements—noting in particular that its analysis was focused on the substance, not the form, of an arrangement.

While the Advisory Opinion has limited application only to the requesting party, it nonetheless provides important insight to the aspects of improper "swapping" arrangements and further clarification that parties may not mitigate the risk inherent to such arrangements merely by changing the form of the arrangement. When drafting arrangements that may be implicated by the Anti-kickback Statute, it is important to understand that merely adding a "strawman" entity will not cause an otherwise prohibited arrangement to satisfy regulatory concerns.

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<sup>1</sup> 73 Fed. Reg. 56,832, 56,844 (Sept. 30, 2008)