

OIG ISSUES GUIDANCE ON REAL ESTATE PURCHASE FROM ENTITY OWNED IN PART BY EXCLUDED INDIVIDUAL

On September 6, 2019, OIG issued Advisory Opinion No. 19-05 ("the Opinion") regarding the proposed purchase of real estate from an entity owned and managed, in part, by an excluded individual. The facts that gave rise to the Opinion involved a community health center receiving federal grant funding and Medicare reimbursement which was looking to purchase real estate owned in part by an excluded individual.

BACKGROUND

Under section 1128A(a)(6) of the Social Security Act, any person who arranges or contracts with an individual or entity that the person knows or should know is excluded from participation in a federal health care program, for the provision of items or services for which payment may be made under such a program, is subject to civil monetary penalties. Under section 1128A, a claim for items or services includes (among other things), an application for payment involving items or services listed in an itemized claim for reimbursement or entered in a cost report.

In requesting the Opinion, the community health center affirmed that the purchase of the real estate would not be listed in any claim or request for federal health care program payment, would not be included in any federal or state health program reimbursement method nor would it be included in any cost report. Additionally, the provider certified that there would be no ongoing relationship between the parties following the purchase.

OIG'S ANALYSIS AND CONCLUSION

In its analysis, OIG ruled that the purchase would not trigger civil monetary penalties because the purchase of the real estate would not involve the provision of items or services for which payment may be made under any federal health care program. In reaching its conclusion, OIG also looked favorably upon the fact that the excluded person would not have the opportunity to provide any items or services to the provider after the closing of the real estate purchase since there would be no ongoing relationship between the parties after closing.

This conclusion is consistent with OIG's prior guidance, including its 2013 Special Advisory Bulletin on Exclusion, which provides in part: "[I]f Federal health care programs do not pay, directly or indirectly, for the items or services being provided by the excluded individual, then a provider that participates in Federal health care programs may employ or contract with an excluded person to provide such items or services." In the Special Advisory Bulletin, OIG indicates that one essential element in determining potential civil monetary penalties liability for contracting with an excluded person is whether the excluded person participates in the furnishing of items or services that are payable by a federal health care program, including administrative and management services. Although this is a fact-sensitive analysis, OIG's logic would seem to indicate that a *passive investment* by a real estate investor who is an excluded person is likely too attenuated to rise to the level of issuance of civil monetary penalties if a provider contracted with the excluded person on such a limited basis, provided that the arrangement would not involve the provision of an item or service for which payment may be made under any federal health care program. However, the more active the role of the real estate investor (or the investor's entity) in administration and management of the real estate, the riskier the proposition becomes.

It is also important to note that OIG's permissive exclusion authority under 42 U.S.C. §1320a-7(b)(8), which pertains to entities controlled by excluded individuals, is triggered when an excluded individual owns at least five percent of an entity (or serves as an officer, director, agent or managing employee of such entity).

PRACTICAL TAKEAWAYS

When entering into a contract (such as a real estate lease or purchase agreement) with an entity that has some level of ownership by an excluded person, providers should undertake a careful analysis of the ownership interest of the excluded person as well as that person's engagement in the business and management of the entity. From a contractual perspective, providers should consider including strong representations and warranties from the non-provider entity, as well as robust indemnification language, to minimize potential issues. Finally, it is crucial for health care providers to be sensitive to and stay aware of the flow of federal health care funds on both a direct and

indirect basis in order to avoid potential civil monetary penalties liability.

If you have questions or would like additional information about this topic, please contact:

- **Joel Swider** at (317) 429-3638 or jswider@hallrender.com;
- **Patrick Garcia** at (443) 951-7043 or pgarcia@hallrender.com; or
- Your regular Hall Render attorney.

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