



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



[We redact certain identifying information and certain potentially privileged, confidential, or proprietary information associated with the individual or entity, unless otherwise approved by the requestor.]

Issued: December 8, 2017

Posted: December 15, 2017

[Name and address redacted]

Re: OIG Advisory Opinion No. 17-08

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding your proposal to develop a state-wide network of nursing facilities that would provide discounts on the daily rates they charge to private long-term care insurers and the insurers' policyholders (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for the imposition of sanctions under the civil monetary penalty provision prohibiting inducements to beneficiaries, section 1128A(a)(5) of the Social Security Act (the "Act"), or under the exclusion authority at section 1128(b)(7) of the Act, or the civil monetary penalty provision at section 1128A(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act, the Federal anti-kickback statute.

You have certified that all of the information provided in your request, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties.

In issuing this opinion, we have relied solely on the facts and information presented to us. We have not undertaken an independent investigation of such information. This opinion is limited to the facts presented. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Proposed Arrangement could potentially

generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce or reward referrals of Federal health care program business were present, the Office of Inspector General (“OIG”) would not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement. In addition, the OIG would not impose administrative sanctions on [name redacted] under section 1128A(a)(5) of the Act in connection with the Proposed Arrangement. This opinion is limited to the Proposed Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

This opinion may not be relied on by any persons other than [name redacted], the requestor of this opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

[Name redacted] (“Requestor”) is a startup company that proposes to develop a network (the “Network”) of nursing facilities throughout the state of [state redacted] (the “State”). Nursing facilities in the Network (each, a “Network Nursing Facility”) would provide discounts on the daily rates they charge to private long-term care insurers that contract with Requestor (the “Participating Payors”), as well as to the Participating Payors’ policyholders (the “Policyholders”).

Any nursing facility located in the State that meets both of the following criteria would be eligible to join Requestor’s Network: (1) the nursing facility maintains an overall quality rating of 3-stars or higher on the Centers for Medicare & Medicaid Services (“CMS”) Nursing Home Compare website;^{1,2} and (2) the nursing facility agrees to provide a discount of up to [amount redacted] off its daily private payor rate for a semi-private room (the “Discount”) covered by a Participating Payor. Requestor certified that it relies upon the Nursing Home Compare website to provide an independent measure of nursing facilities’ quality ratings. To be listed on the Nursing Home Compare website, a

¹ Centers for Medicare & Medicaid Services, *Nursing Home Compare*, <https://www.medicare.gov/nursinghomecompare/search.html>. Accessed on November 3, 2017.

² Requestor would permit one limited exception to this criterion: a Network Nursing Facility may request to add a related facility (*i.e.*, a facility under common ownership) with an overall quality rating of only 1-star or 2-stars to the Network, if that related facility is located in a zip code with no nursing facilities that are rated 3-stars or higher.

nursing facility must be Medicare- or Medicaid-certified.³ Thus, all of the Network Nursing Facilities would offer items or services payable by one or more Federal health care programs.⁴

Only private long-term care insurers may be Participating Payors. Any Policyholder, including a Policyholder who also is a Federal health care program beneficiary (a “Beneficiary”), could receive the Discount under the Proposed Arrangement. No Discount would be offered for days of stay covered by a Federal health care program, because such days are not covered by the Participating Payors’ policies. Thus, Medicare, Medicaid, and other Federal health care program payment rates would not be discounted under the Proposed Arrangement. Requestor certified that Beneficiaries would not be required to choose to receive any federally reimbursable stay, item, or service from a Network Nursing Facility to receive a Discount.

The Discount would apply to amounts both the Participating Payor and the Policyholder owe for Participating Payor-covered stays. Two-thirds of the Discount would be allocated to the Participating Payor’s liability, and one-third would be allocated to any cost-sharing amount the Policyholder would owe to the Network Nursing Facility.⁵ The Network Nursing Facilities would provide no benefit other than the Discount to Participating Payors and Policyholders under the Proposed Arrangement. Neither the Network Nursing Facilities nor the Policyholders would pay Requestor for its services; however, each time a Participating Payor receives a Discount from a Network Nursing

³ Requestor certified that 705 State-licensed nursing facilities currently operate in the State; only three are not Medicare- or Medicaid-certified.

⁴ In addition to items and services that a Network Nursing Facility might provide to residents during stays covered by a Federal health care program, a Network Nursing Facility might also be in a position to provide other federally reimbursable items and services (*e.g.*, items and services covered by Medicare Part B) to residents during stays that are covered by a Participating Payor.

⁵ If the Policyholder’s share of the Discount equals or exceeds the Policyholder’s cost-sharing obligation, the Policyholder would owe \$0 in out-of-pocket cost-sharing expenses; the Policyholder would not receive a disbursement of cash or credit if the Policyholder’s share of the Discount exceeds his or her cost-sharing obligation.

Facility, the Participating Payor would pay Requestor a fee for administrative services.⁶ Requestor certified that physicians, discharge planners, and others participating in site-of-care decisions regarding Policyholders' long-term care needs would not receive any remuneration under the Proposed Arrangement.

Policyholders would remain free to choose any nursing facility permitted by the terms of their Participating Payors' plans, but the Discount would be available only for Participating Payor-covered stays provided by Network Nursing Facilities. Requestor certified that, although Policyholders could decrease their out-of-pocket expenses by up to one-third of the amount of the Discount by choosing a Network Nursing Facility, no penalty or change in standard benefits (e.g., an increase in a Policyholder's out-of-pocket expenses) would apply if the Policyholder chooses a non-Network Nursing Facility. The Participating Payors would provide clear written notice to Policyholders informing them that: (1) a Network exists that is comprised of nursing facilities with a Nursing Home Compare website overall quality rating of 3-stars or higher, unless special circumstances apply (as described in footnote 2); (2) Discounts are available from Network Nursing Facilities for days of stay covered by the Participating Payor; (3) the choice to receive care from nursing facilities outside Requestor's Network would not otherwise change any contracted-for benefits under their policies or otherwise result in any penalty; and (4) Requestor is the Network manager and may be contacted about issues regarding the Discount program.

II. LEGAL ANALYSIS

A. Law

The anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program. See section 1128B(b) of the Act. Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-kickback statute is violated. By its terms, the statute ascribes criminal liability to parties on both sides of an impermissible "kickback" transaction. For purposes of the anti-kickback statute, "remuneration" includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

⁶ This administrative fee would be Requestor's sole source of remuneration under the Proposed Arrangement. Requestor certified that one of its owners has ownership interests in nursing facilities that participate in Federal health care programs located outside of the State; however, none of Requestor's owners have an interest in any other lines of business related to items and services payable by Federal health care programs. Requestor would implement the Proposed Arrangement only with respect to nursing facilities located in the State.

The statute has been interpreted to cover any arrangement where one purpose of the remuneration was to obtain money for the referral of services or to induce further referrals. See, e.g., United States v. Nagelvoort, 856 F.3d 1117 (7th Cir. 2017); United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000); United States v. Davis, 132 F.3d 1092 (5th Cir. 1998); United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir. 1985), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. Conviction will also lead to automatic exclusion from Federal health care programs, including Medicare and Medicaid. Where a party commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such party under section 1128A(a)(7) of the Act. The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs under section 1128(b)(7) of the Act.

Section 1128A(a)(5) of the Act (the “CMP”) provides for the imposition of civil monetary penalties against any person who offers or transfers remuneration to a Medicare or State health care program (including Medicaid) beneficiary that the benefactor knows or should know is likely to influence the beneficiary’s selection of a particular provider, practitioner, or supplier of any item or service for which payment may be made, in whole or in part, by Medicare or a State health care program (including Medicaid). The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs. Section 1128A(i)(6) of the Act defines “remuneration” for purposes of section 1128A(a)(5) as including “transfers of items or services for free or for other than fair market value.”

B. Analysis

Under the Proposed Arrangement, Network Nursing Facilities would provide Discounts on the daily rates they charge for Participating Payor-covered stays. Even though the Proposed Arrangement would be limited to private long-term care insurers, all of the Network Nursing Facilities would also offer items or services payable by Federal health care programs, and some Policyholders who select Network Nursing Facilities may be Beneficiaries.

The Proposed Arrangement implicates both the anti-kickback statute and the CMP. Relief of a financial obligation may constitute a prohibited kickback if that relief is offered to induce, or received in return for, referrals of items or services payable by a Federal health care program. Under the CMP, the key question is whether the Network Nursing Facilities would offer the Discounts to influence a Beneficiary’s selection of a particular

nursing facility for items or services payable by Medicare or Medicaid. We first analyze the Proposed Arrangement under the CMP.

We recognize that a Beneficiary may select a Network Nursing Facility for stays covered by a Participating Payor at least in part because of the Discount. In the event that the Beneficiary requires a federally reimbursable stay, item, or service, he or she may choose to receive it from the same Network Nursing Facility, particularly if the Beneficiary is residing at the Network Nursing Facility at the time the federally reimbursable stay, item, or service becomes necessary. We nevertheless conclude that the risk of improper beneficiary inducements under the Proposed Arrangement is sufficiently low for the combination of the following reasons.

First, whether a Beneficiary's circumstances may change to require a federally reimbursable stay at some point in the future is outside a Network Nursing Facility's control. This scenario is distinguishable from, for example, a patient who receives a surgical procedure with required follow-up care, or a patient with a condition requiring a series of treatments. In both of those examples, the need for subsequent care is certain, whereas here, the Network Nursing Facility will not know whether a Beneficiary may later require a federally reimbursable stay at the time it offers the Discount. In addition, the Beneficiary would not be required to select the Network Nursing Facility for his or her federally reimbursable stay to receive the Discount. Accordingly, we find little risk that the Proposed Arrangement's underlying purpose is to pull through this type of Federal health care program business.

Second, although some Beneficiaries may need certain federally reimbursable items or services that a Network Nursing Facility could furnish while the Beneficiaries are in a Participating Payor-covered stay, the Beneficiaries would not be required to receive those items or services from the Network Nursing Facility to receive the Discount. The availability of the Discount on the days of stay covered by the Participating Payor does not increase the already-present likelihood that a Beneficiary may choose to receive the items or services from the nursing facility in which he or she resides, e.g., for reasons of convenience and known quality of care.

Third, any nursing facility that is willing to offer the Discount and that meets Requestor's quality standards—as measured by Nursing Home Compare, an independent Federal government source—may participate in the Network.⁷ Although Beneficiaries would receive the Discount only if they select a Network Nursing Facility, the Proposed Arrangement would not affect the other terms of a Participating Payor's plan.

⁷ We offer no opinion on Nursing Home Compare's quality measures, which CMS developed to assist consumers in finding and comparing nursing home quality information.

Beneficiaries would remain free to select a non-Network Nursing Facility and receive their contracted-for coverage, only without the benefit of the Discount. The Proposed Arrangement would operate transparently, in that the Participating Payors would provide Beneficiaries with clear written notification of these terms and the Beneficiary's freedom to choose a non-Network Nursing Facility. In this regard, the Proposed Arrangement should not unfairly affect competition among nursing facilities.

Fourth, although the Discount would be offered to induce Beneficiaries to select a particular type of nursing facility (i.e., a Network Nursing Facility) from a broader group of eligible nursing facilities, access to Requestor's Network is sufficiently open to avoid the type of highly problematic steering arrangements that are structured to "leapfrog" or bypass providers equipped to provide quality medical care.

Fifth, a Beneficiary's decision about where to receive long-term care services that are not covered by a Federal health care program often involves a number of factors and may reflect a preference for a particular lifestyle. Considerations unrelated to the Discount and future health care needs are likely to influence a Beneficiary's decision-making process about where to reside.

For these reasons—and given the potential savings for Policyholders, including Beneficiaries—in an exercise of our discretion, we would not impose administrative sanctions on Requestor under the CMP in connection with the Proposed Arrangement. We also conclude that the risk of fraud and abuse posed by the Proposed Arrangement under the anti-kickback statute is sufficiently low, both for the combination of reasons set forth above and because physicians, discharge planners, and others participating in site-of-care decisions about Policyholders' long-term care needs would receive no remuneration under the Proposed Arrangement.⁸

This opinion is limited to the Proposed Arrangement; we have not been asked to opine on, and offer no opinion regarding, the implementation of the Proposed Arrangement in any location other than the State. In addition, we have no authority to opine, and express no opinion, as to whether the Proposed Arrangement complies with other Federal laws

⁸ Although one of the Requestor's owners has ownership interests in nursing facilities that participate in Federal health care programs located outside of the State, none of Requestor's owners have an interest in any other lines of business related to items and services payable by Federal health care programs. Requestor seeks to implement the Proposed Arrangement for nursing facilities only in the State. As such, Requestor is not in a position to generate or receive Federal health care program business in connection with the Proposed Arrangement. Requestor's sole source of remuneration under the Proposed Arrangement would be the administrative fee paid by the Participating Payor when a Discount is received from a Network Nursing Facility.

and regulations, including those administered by CMS, or with any state laws, including state insurance laws.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Proposed Arrangement could potentially generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce or reward referrals of Federal health care program business were present, the OIG would not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement. In addition, the OIG would not impose administrative sanctions on [name redacted] under section 1128A(a)(5) of the Act in connection with the Proposed Arrangement. This opinion is limited to the Proposed Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name redacted], the requestor of this opinion. This advisory opinion has no application to, and cannot be relied upon by, any other individual or entity.
- This advisory opinion may not be introduced into evidence by a person or entity other than [name redacted] to prove that the person or entity did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is expressed or implied herein with respect to the application of any other Federal, state, or local statute, rule, regulation, ordinance, or other law that may be applicable to the Proposed Arrangement, including, without limitation, the physician self-referral law, section 1877 of the Act (or that provision's application to the Medicaid program at section 1903(s) of the Act).
- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.

- This advisory opinion is limited in scope to the specific arrangement described in this letter and has no applicability to other arrangements, even those which appear similar in nature or scope.
- No opinion is expressed herein regarding the liability of any party under the False Claims Act or other legal authorities for any improper billing, claims submission, cost reporting, or related conduct.

This opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008.

The OIG will not proceed against [name redacted] with respect to any action that is part of the Proposed Arrangement taken in good faith reliance upon this advisory opinion, as long as all of the material facts have been fully, completely, and accurately presented, and the Proposed Arrangement in practice comports with the information provided. The OIG reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, to rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against [name redacted] with respect to any action that is part of the Proposed Arrangement taken in good faith reliance upon this advisory opinion, where all of the relevant facts were fully, completely, and accurately presented and where such action was promptly discontinued upon notification of the modification or termination of this advisory opinion. An advisory opinion may be rescinded only if the relevant and material facts have not been fully, completely, and accurately disclosed to the OIG.

Sincerely,

/Robert K. DeConti/

Robert K. DeConti
Assistant Inspector General for Legal Affairs