



*[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:** May 13, 2011

**Posted:** May 20, 2011

[Name and address redacted]

Re: OIG Advisory Opinion No. 11-06

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding an online referral service operated by [name redacted], whereby post-acute care providers would pay a fee to electronically receive and respond to referral requests from hospitals for post-discharge care (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (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 the Proposed Arrangement could potentially generate prohibited remuneration under the anti-kickback statute and that the Office of Inspector General ("OIG") could potentially 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. Any definitive conclusion regarding the existence of an anti-kickback violation requires a determination of the parties' intent, which determination is beyond the scope of the advisory opinion process.

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] (the “Requestor”) is a for-profit corporation that provides software, online tools, and related discharge planning support services to hospitals across the nation. It operates an online referral service, [name redacted] (the “System”), that provides hospitals with access to a nationwide listing of all licensed post-acute care providers, including skilled nursing facilities, home health agencies, and assisted living facilities (“Providers”). The Requestor typically compiles this listing by reviewing state licensure databases of post-acute care providers.

Hospitals use the System to identify and select the Providers that are best-suited to meet the post-acute care needs of hospital patients who are ready to be discharged, including Federal health care program beneficiaries, and to send referral requests to the selected Providers. When initiating a referral, a hospital provides to the Requestor, via the System, the patient’s name and identifying information, as well as any medical records a Provider needs to make an informed decision regarding whether to accept the patient. The Requestor then forwards this information to the Providers selected by the hospital.<sup>1</sup> According to the Requestor, many hospitals provide referrals to post-acute care providers on a first-come, first-served basis; consequently, the first Provider that responds to the hospital’s inquiry typically will receive that patient.

Hospitals pay a fee to the Requestor to utilize the System. The Requestor has certified that the amounts paid by the hospitals are equal to fair market value and are not tied, directly or indirectly, to the volume or value of referrals or other business generated between the parties. The Requestor further certified that the revenues it collects under its arrangements with the hospitals exceed the associated costs of the System.<sup>2</sup>

Currently, Providers are not charged a fee to use the System to electronically receive or respond to hospital referral requests. Under the Proposed Arrangement, the Requestor would begin charging Providers that wish to use these online capabilities a one-time implementation fee of approximately [amount redacted], and a monthly fee of

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<sup>1</sup> We have not been asked to opine on, and we offer no opinion regarding, whether the transmission of patient information from the hospital to the Requestor, and from the Requestor to the Providers, complies with state and Federal privacy laws.

<sup>2</sup> We have not been asked to opine on, and express no opinion about, the arrangement between the Requestor and the participating hospitals.

approximately [amount redacted]. The Requestor has certified that the fees would not vary based on the volume or value of referrals or other business generated between the parties.

Providers that choose not to pay the Requestor's fees would continue to be listed in the System but would not be able to electronically receive or respond to the hospitals' referral requests. Rather, the Requestor would notify non-paying Providers of hospital referral requests via facsimile. Non-paying Providers that wished to respond to hospital referral requests would then be required to either call or fax the hospital. According to the Requestor, non-paying Providers would be significantly disadvantaged vis-à-vis paying Providers under the Proposed Arrangement—and may effectively be eliminated from any chance of receiving the patient—because they would not be able to communicate with hospital discharge planners and accept referrals in a timely manner.

The Requestor set the implementation and monthly fees based on research it performed regarding the System's value to Providers. According to the Requestor, some Providers indicated that they would be willing to pay the estimated fees to electronically receive and respond to hospital referral requests, whereas other Providers indicated that their profit margins are so slim that they could not afford to pay for such online access. The Requestor has certified that, once it has recouped the System's development costs, it would be more expensive to fax referral requests to non-paying Providers than it would be to transmit them electronically.

## II. LEGAL ANALYSIS

### A. Law

The anti-kickback statute makes it a criminal offense knowingly and willfully to 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.

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. 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.

The Department of Health and Human Services has promulgated safe harbor regulations that define practices that are not subject to the anti-kickback statute because such practices would be unlikely to result in fraud or abuse. See 42 C.F.R. § 1001.952. The safe harbors set forth specific conditions that, if met, assure entities involved of not being prosecuted or sanctioned for the arrangement qualifying for the safe harbor. However, safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the safe harbor.

The safe harbor for referral services, 42 C.F.R. § 1001.952(f), is potentially applicable to the Proposed Arrangement. It provides that, for purposes of the anti-kickback statute, the term “remuneration” does not include payments or exchanges of anything of value between a referral service and a participant in the service, provided certain conditions are met. Among those conditions are requirements that referral fees be assessed uniformly against all participants, be based only on the cost of operating the referral service, and not vary with the volume or value of referrals of Federal health care program business.

## **B. Analysis**

Under the Proposed Arrangement, Providers would pay the Requestor in return for the opportunity to use the System to electronically receive and respond to hospital referral requests for post-acute care services, including post-acute care services for Federal health care program beneficiaries. The Proposed Arrangement would implicate the anti-kickback statute, because the Requestor would be soliciting and accepting, and Providers would be paying, remuneration in return for the Requestor’s arranging for the furnishing of post-acute care services for which payment would be made by a Federal health care program.

The Proposed Arrangement does not qualify for protection under the safe harbor for referral services. It fails to satisfy several of the safe harbor’s requirements, including the requirement that referral fees be assessed uniformly against all participants and be based only on the cost of operating the referral service. See 42 C.F.R. § 1001.952(f)(2).

Because no safe harbor would protect the Proposed Arrangement, we must determine whether, given all of the relevant facts, the Proposed Arrangement would pose no more than a minimal risk under the anti-kickback statute. For the following reasons, we conclude that it would not.

First, based on the Requestor's certification, hospitals often discharge patients to Providers on a first-come, first-served basis, which means that Providers with the ability to electronically receive and respond to referral requests through the System would have a significant competitive advantage over non-paying Providers. In fact, according to the Requestor, non-paying Providers may effectively be eliminated from any chance of receiving the patient under the Proposed Arrangement. Thus, Providers that pay the Requestor's fees would be more likely to get the patients—not because they provide superior care but because they paid for the opportunity.

Second, the costs that the Requestor would incur to fax the referral requests to non-paying Providers would exceed the costs that it would incur to transmit them electronically. The Requestor would fax referral requests to non-paying Providers not because it would be easier or cheaper to do so, but rather to provide the paying Providers with a competitive advantage in obtaining referrals or, conversely, to penalize Providers that do not pay.<sup>3</sup>

Finally, the Requestor reported that some Providers indicated that they cannot afford to pay for online access to the System. Under the Proposed Arrangement, these Providers would be required to pay fees they cannot afford for services they require to remain competitive, or risk substantial loss of business. These—and indeed all—Providers that choose to participate in the Proposed Arrangement could face pressure to recoup the costs associated with participation. This pressure could create incentives to, among other things, prolong patient stays, provide separately billable, unnecessary services, or upcode resident Resource Utilization Group assignments—all of which could result in increased costs to the Federal health care programs.

For the above reasons, we cannot conclude that the Proposed Arrangement poses a sufficiently low level of risk that we should protect it.

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<sup>3</sup> This fact, together with the fact that the revenues the Requestor collects under its arrangements with the hospitals exceed the associated costs of the System, demonstrates that the proposed fees for Providers are not based only on the cost of operating the System. See 42 C.F.R. § 1001.952(f)(2).

### **III. CONCLUSION**

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement could potentially generate prohibited remuneration under the anti-kickback statute and that the OIG could potentially 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. Any definitive conclusion regarding the existence of an anti-kickback violation requires a determination of the parties' intent, which determination is beyond the scope of the advisory opinion process.

### **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 in any matter involving an entity or individual that is not a requestor of this opinion.
- 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.
- 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 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.

Sincerely,

/Lewis Morris/

Lewis Morris  
Chief Counsel to the Inspector General