



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, unless otherwise approved by the requestor(s).]*

**Issued:** April 19, 2023

**Posted:** April 24, 2023

[Address block redacted]

### **Re: Notice of Modification of OIG Advisory Opinion No. 20-04**

Dear [redacted]:

The Office of Inspector General (“OIG”) is writing in response to your request on behalf of [redacted] (“Requestor”), to modify OIG Advisory Opinion No. 20-04 (“AO 20-04”), which we issued to Requestor on July 21, 2020. In AO 20-04, we opined favorably on Requestor’s proposal to purchase or receive donations of unpaid medical debt owed by qualifying patients from certain types of health care providers, including hospitals, and then forgive that debt (now, the “Existing Arrangement”). Requestor proposes to modify certain conditions related to the public disclosure of hospitals’ donation or sale of medical debt to Requestor (the “Proposed Modifications,” and when considered together with the Existing Arrangement as modified by certain other existing changes described in Section I.B below, the “Modified Arrangement”).

Requestor has inquired whether the Modified Arrangement, if undertaken, would constitute grounds for the imposition of sanctions under: the civil monetary penalty provision at section 1128A(a)(7) of the Social Security Act (the “Act”), as that section relates to the commission of acts described in section 1128B(b) of the Act (the “Federal anti-kickback statute”); the civil monetary penalty provision prohibiting inducements to beneficiaries, section 1128A(a)(5) of the Act (the “Beneficiary Inducements CMP”); or the exclusion authority at section 1128(b)(7) of the Act, as that section relates to the commission of acts described in the Federal anti-kickback statute and the Beneficiary Inducements CMP.

Requestor has certified that all of the information provided in connection with its request for a modification of AO 20-04, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties in connection with the Modified Arrangement, and we have relied solely on the facts and information Requestor provided. In particular, Requestor certified that, except as set forth in this notice of modification, it would operate the Modified Arrangement in accordance with facts Requestor certified in connection with AO 20-04. We have not undertaken an independent

investigation of the certified facts and information presented to us by Requestor. This opinion is limited to the relevant facts presented to us by Requestor in connection with the Modified Arrangement. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the relevant facts Requestor certified in connection with its request for a modification of AO 20-04, and for the reasons set forth in AO 20-04 and herein, we conclude that: (i) although the Modified Arrangement, if undertaken, would generate prohibited remuneration under the Federal anti-kickback statute if the requisite intent were present, the OIG would not impose administrative sanctions on Requestor in connection with the Modified Arrangement under sections 1128A(a)(7) or 1128(b)(7) of the Act, as those sections relate to the commission of acts described in the Federal anti-kickback statute; and (ii) although the Modified Arrangement, if undertaken, could generate prohibited remuneration under the Beneficiary Inducements CMP, the OIG would not impose administrative sanctions on Requestor in connection with the Modified Arrangement under the Beneficiary Inducements CMP or section 1128(b)(7) of the Act, as that section relates to the commission of acts described in the Beneficiary Inducements CMP.

This opinion may not be relied on by any person<sup>1</sup> other than Requestor and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

## **I. FACTUAL BACKGROUND**

### **A. Summary of the Existing Arrangement Set Forth in AO 20-04**

Requestor is a 501(c)(3) charitable organization that locates, buys, and forgives individual patients' medical debt. Under the Existing Arrangement, Requestor buys or receives donated debt directly from hospitals and certain other providers. The debt Requestor buys or receives under the Existing Arrangement is debt that a provider has tried and failed to collect and has deemed "uncollectible" under Medicare bad debt rules. Requestor uses objective eligibility criteria to determine which debt to forgive and informs patients whose debt Requestor forgives that their debt has been forgiven only after Requestor has forgiven it. As a condition of participation in the Existing Arrangement, providers agree not to publicize the sale or donation of debt to Requestor, and Requestor does not identify providers by name in promotional or marketing materials that are available to the public. However, when explaining the Existing Arrangement to potential provider partners, Requestor may, with permission, provide the names of other providers that have sold or donated medical debt to Requestor.

### **B. The Proposed Modifications**

Requestor proposes to modify the condition in the Existing Arrangement that currently prohibits: (i) providers from publicizing the sale or donation of debt to Requestor; and (ii) Requestor from

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<sup>1</sup> We use "person" herein to include persons, as referenced in the Federal anti-kickback statute and Beneficiary Inducements CMP, as well as individuals and entities, as referenced in the exclusion authority at section 1128(b)(7) of the Act.

identifying providers by name in promotional or marketing materials that are available to the public. In addition to the proposals described in more detail below, Requestor also provided two updates that have been, or soon will be, implemented in connection with the Existing Arrangement. First, Requestor increased its financial need qualification level such that patients with incomes up to 400 percent of the Federal poverty level can qualify for medical debt forgiveness. Second, rather than notifying patients of the debt forgiveness solely “by letter” (as specified in AO 20-04), Requestor also may notify patients by email. Additionally, Requestor clarified that patients are informed that, if the provider had informed a credit agency that a debt was due, then that provider updated the agency to report that the debt is now satisfied. Except for these changes and those specified below, all other conditions set forth in AO 20-04 would remain in place.

Requestor certified that many hospitals are required to provide community benefits and to adopt financial assistance policies, and certain Federal and State laws may require them to publicize such community benefits and financial assistance policies. For example, Requestor cited to the Internal Revenue Code requirement that tax-exempt hospitals establish and publicize a written financial assistance policy<sup>2</sup> and Internal Revenue Service Schedule H (Form 990),<sup>3</sup> which tax-exempt hospitals are required to file to demonstrate the financial assistance and community benefits provided. Requestor further certified that many states require both for-profit and non-profit hospitals to provide community benefits and publicly report such benefits.

Requestor certified that, under the Proposed Modifications, Requestor would retain the requirement that, “[a]s a condition to participation, providers would agree not to publicize the sale or donation of debt to Requestor” but would include a limited caveat. Specifically, Requestor certified that this condition of participation would be modified to allow the participating hospital to disclose the sale or donation of patient debt to Requestor but only in a context relating to reporting the hospital’s community benefits, financial assistance policies, or both. In addition, this condition of participation would specify that any participating hospital disclosing the sale or donation of debt must acknowledge in any such disclosure that it made good faith efforts to collect patients’ medical debt and that Requestor’s financial need requirements were met. This modified condition of participation would prohibit participating hospitals from publicizing or otherwise disclosing the sale or donation of their debt to Requestor in a context relating to any promotion, advertisement, marketing materials, or other public statement relating to the hospitals’ services.

In addition, as another change to the Existing Arrangement, Requestor proposes to identify certain providers by name in publicly available promotional and marketing materials. In particular, Requestor could publicize its debt relief and identify hospitals that sold or donated such debt by name in testimonials or other materials on Requestor’s website relating to its existing partnerships with hospitals. To the extent a testimonial refers to debt that Requestor has forgiven for patients, the testimonial would be clear that the hospital sold or transferred the debt to Requestor and that Requestor forgave such debt.

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<sup>2</sup> See 26 U.S.C. § 501(r)(4).

<sup>3</sup> Form 990, <https://www.irs.gov/pub/irs-pdf/f990sh.pdf>.

Requestor certified that, other than the modifications described above, no other facts to which it certified in connection with AO 20-04 would change.

## II. LEGAL ANALYSIS

### A. Law

#### 1. Federal Anti-Kickback Statute

The Federal anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of an individual to a person for the furnishing of, or arranging for the furnishing of, any item or service reimbursable under a Federal health care program.<sup>4</sup> The statute's prohibition also extends to remuneration to induce, or in return for, the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item reimbursable by a Federal health care program.<sup>5</sup> For purposes of the Federal 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 is to induce referrals for items or services reimbursable by a Federal health care program.<sup>6</sup> Violation of the statute constitutes a felony punishable by a maximum fine of \$100,000, imprisonment up to 10 years, or both. Conviction also will lead to exclusion from Federal health care programs, including Medicare and Medicaid. When a person commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such person under section 1128A(a)(7) of the Act. The OIG also may initiate administrative proceedings to exclude such person from Federal health care programs under section 1128(b)(7) of the Act.

#### 2. Beneficiary Inducements CMP

The Beneficiary Inducements 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 beneficiary that the person knows or should know is likely to influence the beneficiary's selection of a particular provider, practitioner, or supplier for the order or receipt of any item or service for which payment may be made, in whole or in part, by Medicare or a State health care program. The OIG also may initiate administrative proceedings to exclude such person from

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<sup>4</sup> Section 1128B(b) of the Act.

<sup>5</sup> Id.

<sup>6</sup> 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).

Federal health care programs. Section 1128A(i)(6) of the Act defines “remuneration” for purposes of the Beneficiary Inducements CMP as including “transfers of items or services for free or for other than fair market value.”

## **B. Analysis**

In AO 20-04, we highlighted the prohibition on publicizing the sale or donation of debt to Requestor as a safeguard. We noted that, because of this safeguard, providers would have a limited ability to use the Existing Arrangement as a tool to generate future business. However, we do not believe that the Proposed Modifications, with the limitations set forth above and with Requestor maintaining the other conditions set forth in AO 20-04, would materially increase the risk of fraud and abuse under either the Federal anti-kickback statute or the Beneficiary Inducements CMP. Consequently, and for the combination of reasons set forth below and in AO 20-04, we believe the risk of fraud and abuse presented by the Modified Arrangement is sufficiently low under the Federal anti-kickback statute to warrant a favorable advisory opinion, and, similarly, we would not impose sanctions under the Beneficiary Inducements CMP in connection with the Modified Arrangement.

### **1. Potential Disclosures by Participating Hospitals**

Because of the limitations Requestor would continue to impose on participating hospitals in connection with any publication or disclosure of a hospital’s role in selling or transferring patient debt, we continue to believe that any such disclosure might lead to a general sense of goodwill about the hospital but would not be likely to generate future business for the hospital. The conditions Requestor would impose on participating hospitals would limit any such publication or disclosure to the context of the hospitals’ financial assistance policies or any description of community benefits the hospitals have provided. Requestor would prohibit participating hospitals from disclosing the hospitals’ role in selling or transferring patient debt in any promotion, advertisement, marketing materials, or other public statement relating to the hospitals’ services. In addition, Requestor would require that any disclosure of a hospital’s sale or donation of its debt to Requestor would expressly explain that the debt was sold or donated to Requestor only after the hospital tried and failed to collect the debt and after Requestor determined that the patient meets Requestor’s financial need requirements. Therefore, these limited disclosures by the participating hospitals are unlikely to be perceived by patients as an incentive to seek care at participating hospitals (to the extent patients are even aware of the disclosures).

### **2. Disclosures by Requestor**

Under the Existing Arrangement, Requestor may provide the names of other providers that have sold or donated medical debt to Requestor directly to potential provider partners when explaining the Existing Arrangement to them. Under the Proposed Modifications, Requestor would be permitted to disclose this information on its website. Requestor certified that any testimonial would make it clear that the hospital donated or sold debt to Requestor rather than the hospital forgiving the debt itself. Because we believe it is unlikely that potential patients would be influenced or incentivized to seek treatment from a participating hospital on the basis of the hospital being named on a charitable organization’s website in this context, Requestor’s

disclosure of this information by virtue of testimonials shown on its website would not alter our analysis of the risk of the Existing Arrangement, as set forth in AO 20-04.

### 3. Additional Modifications

Requestor further modified the Existing Arrangement by: (i) raising the financial need qualification level to 400 percent of the Federal poverty level; and (ii) modifying and clarifying the patient notification process. Neither of these changes increases the risk of fraud and abuse under the Federal antikickback statute or the Beneficiary Inducements CMP. The means by which Requestor notifies patients that debt has been forgiven and whether such notification references the patient's credit report are not material changes that impact our assessment of the risk of fraud and abuse presented by the Modified Arrangement. While the increased financial need qualification level is a material change that could impact our assessment of such risks, Requestor continues to apply its own financial need criteria after the hospital has tried and failed to collect the debt. Therefore, we conclude that this particular modification does not increase the risk of fraud and abuse.

## III. CONCLUSION

Based on the relevant facts Requestor certified in connection with this modification of AO 20-04, and for the reasons set forth in AO 20-04 and herein, we conclude that: (i) although the Modified Arrangement, if undertaken, would generate prohibited remuneration under the Federal anti-kickback statute if the requisite intent were present, the OIG would not impose administrative sanctions on Requestor in connection with the Modified Arrangement under sections 1128A(a)(7) or 1128(b)(7) of the Act, as those sections relate to the commission of acts described in the Federal anti-kickback statute; and (ii) although the Modified Arrangement, if undertaken, could generate prohibited remuneration under the Beneficiary Inducements CMP, the OIG would not impose administrative sanctions on Requestor in connection with the Modified Arrangement under the Beneficiary Inducements CMP or section 1128(b)(7) of the Act, as that section relates to the commission of acts described in the Beneficiary Inducements CMP.

## IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is limited in scope to the Modified Arrangement and has no applicability to any other arrangements that may have been disclosed or referenced in your request for an advisory opinion or supplemental submissions.
- This advisory opinion is issued only to Requestor. This advisory opinion has no application to, and cannot be relied upon by, any other person.
- This advisory opinion may not be introduced into evidence by a person other than Requestor to prove that the person did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.

- This advisory opinion applies only to the statutory provisions specifically addressed in the analysis above. We express no opinion 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 Modified 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.
- We express no opinion herein regarding the liability of any person 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 Requestor with respect to any action that is part of the Modified 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 Modified 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 Requestor with respect to any action that is part of the Modified 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 M. Penezic/

Robert M. Penezic  
Acting Assistant Inspector General for Legal Affairs