



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:** July 6, 2023

**Posted:** July 11, 2023

[Address block redacted]

### **Re: OIG Advisory Opinion No. 23-04 (Favorable)**

Dear [redacted]:

The Office of Inspector General (“OIG”) is writing in response to your request on behalf of [redacted] (“Requestor”) for an advisory opinion regarding: (i) the use of Requestor’s online health care directory by Federal health care program beneficiaries to search for and book medical appointments with providers and the display of sponsored advertisements to Federal health care program beneficiaries on the directory and certain third-party websites (the “Existing Arrangement”); and (ii) certain proposed changes to the functionality of the directory (the “Proposed Changes,” and together with the Existing Arrangement, the “Arrangement”).<sup>1</sup> Specifically, you have inquired whether the Arrangement constitutes 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 the request, including all supplemental submissions, is true and correct and constitutes a complete description of the

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<sup>1</sup> We issued advisory opinion 19-04 (“AO 19-04”) to Requestor on September 5, 2019, which addressed Requestor’s proposal to implement the Existing Arrangement. Since issuing that opinion, OIG became aware that some aspects of the Existing Arrangement may have differed from those described in AO 19-04. To the extent Requestor has been operating the arrangement described in AO 19-04 inconsistent with any material certifications made to OIG in relation to that opinion, AO 19-04 would be inapplicable to such arrangement.

relevant facts and agreements among the parties in connection with the Arrangement, and we have relied solely on the facts and information Requestor provided. 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 Arrangement. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that: (i) although the Arrangement would generate prohibited remuneration under the Federal anti-kickback statute if the requisite intent were present, OIG will not (with respect to the Existing Arrangement), and OIG would not (with respect to the Proposed Changes), impose administrative sanctions on Requestor in connection with the 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 Arrangement could generate prohibited remuneration under the Beneficiary Inducements CMP, OIG will not (with respect to the Existing Arrangement), and OIG would not (with respect to the Proposed Changes), impose administrative sanctions on Requestor in connection with the 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>2</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. Requestor and the Marketplace**

Requestor is a technology company that operates a platform through its website and mobile application (collectively, the “Marketplace”) that allows individuals who access the Marketplace (“Users”), regardless of insurance status, to search and book medical appointments with physicians, nurse practitioners, dentists, chiropractors, dieticians, and other medical professionals who have contracted with Requestor to appear with individual profiles on the Marketplace (collectively, “Providers”). Users running a search on the Marketplace can specify search criteria such as the services needed, a geographic area, a preferred appointment time, and the User’s insurance.<sup>3</sup>

In response to User searches, the Marketplace generates organic, personalized search results listing Providers (the “Marketplace Results”) using a proprietary algorithm. Currently, the

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<sup>2</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.

<sup>3</sup> If a User initiates a search on the Marketplace without specifying any search criteria, Requestor uses geotargeting to list Providers offering primary care services in the User’s geographic area. To initiate a more specific search, Users must enter at least one search criterion.

algorithm filters and prioritizes Providers in the Marketplace Results according to certain criteria, including criteria set by Users and other User-centric information (e.g., Providers' unconfirmed pending appointment bookings or cancellation rates). For example, according to Requestor, depending on the criteria specified by Users, Marketplace Results list Providers who accept the User's insurance, offer services within the User's geographic area, and are available within the User's designated timeframe.

The Marketplace allows Users to create an account and store certain medical and insurance information in advance of medical appointments with the goal of reducing the time spent in Providers' offices completing forms and the possibility of transcription errors by Providers' staffs. Requestor is not a provider or supplier of any medical items or services, is not affiliated with any Provider listed on the Marketplace, and does not expressly recommend any particular Provider to Users. One of Requestor's founders and owners is a physician, but Requestor certified that this individual is not practicing medicine and does not plan to practice medicine in the future.

Requestor does not charge Users a fee to use the Marketplace, but as discussed below, Providers pay fees to receive certain appointment bookings on the Marketplace, and the Marketplace notifies Users that Providers pay such fees. Additionally, other than the functionality of the Marketplace and the potential convenience associated with using the Marketplace, Requestor does not offer or give Federal health care program beneficiaries anything of value in connection with using the Marketplace.

## **B. Provider Fees**

Requestor charges Providers for all services Requestor provides in connection with the Marketplace, other than the sponsored advertisements described below, using only one fee model—fees for each appointment booked through the Marketplace where the User identifies as a potential new patient of the Provider and has not booked an appointment with that Provider through the Marketplace in the past<sup>4</sup> (“Per-Booking Fees”). Under the Arrangement, Requestor does not charge Providers an annual subscription fee.<sup>5</sup> Requestor sets the fee for each new-patient appointment booking in advance based on valuations by an independent, third-party valuation firm (the “Valuation Firm”). While the Per-Booking Fees vary by Providers' medical specialty, geographic location, and in certain circumstances, other relevant factors that affect fair

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<sup>4</sup> Requestor does not charge Providers a fee for appointment bookings when a User indicates that the User previously has seen the Provider or when a User books an appointment other than through the Marketplace (e.g., through the Provider's website).

<sup>5</sup> For some Providers with whom Requestor has an older contract, Requestor charges Providers using certain methodologies that it no longer uses in newer contracts (such as annual subscription fees). Because Requestor is phasing out these alternative payment methodologies and has not asked for an opinion regarding these methodologies, we do not consider them part of the Arrangement and express no opinion on them.

market value,<sup>6</sup> the Per-Booking Fees are agnostic regarding Users' insurance status (*i.e.*, whether the User identifies as self-insured, uninsured, commercially insured, or covered by a Federal health care program). Requestor certified that its fees do not, and any updates to such fees would not, exceed fair market value for the services Requestor provides to Providers in connection with the Marketplace.<sup>7</sup> Additionally, Requestor certified that the Per-Booking Fees are not determined in a manner that takes into account the value of Federal health care program referrals or other Federal health care program business generated by Requestor for the Providers paying the Per-Booking Fees.

Requestor does not charge Providers Per-Booking Fees for appointments: (i) where a User or Provider cancels within 24 hours of the booking; (ii) that cannot reasonably be attended or that the User shows no intention of attending (*e.g.*, if there are conflicting bookings made by the same User with different Providers); (iii) that reflect a product failure of the Marketplace (*e.g.*, if a User books an appointment in a time slot that the Marketplace mistakenly showed as available); or (iv) that otherwise violate certain community standards Requestor has established with respect to User or Provider behavior (*e.g.*, if a User booked an appointment using inaccurate information, such as a fake name).

Requestor permits Providers who pay Per-Booking Fees to set spending caps that: (i) limit the number of new-patient appointment bookings a Provider may receive during the month and the corresponding fees a Provider pays for such new-patient appointment bookings; and (ii) automatically reset at the start of the next month. Providers determine whether to establish a spending cap, what amount to establish, and whether to cancel or adjust a spending cap at any time during the month. Spending caps may be set for an individual Provider, a group of Providers, a practice location, or an entire practice or health system, but Providers cannot set caps for specific visit reasons (*e.g.*, a general consultation) or certain patient populations (*e.g.*, Medicaid enrollees). Spending caps do not impact the amount of the individual Per-Booking Fee charged for a new patient booking for spend-capped Providers that have not reached the specified cap for a particular month.<sup>8</sup>

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<sup>6</sup> According to Requestor, the Valuation Firm, in its discretion, may take additional factors into account when determining fair market value fees in circumstances where the data points available are insufficient to support its valuation. For example, if the number of health care professionals practicing a medical specialty in a geographic area does not allow for a statistically valid sample size, the Valuation Firm may factor in data for health care professionals from surrounding geographic areas or use other relevant data points to value specific fees.

<sup>7</sup> We are precluded by statute from opining on whether fair market value shall be or was paid for goods, services, or property. Section 1128D(b)(3)(A) of the Act.

<sup>8</sup> Because Requestor does not charge Providers Per-Booking Fees for bookings by existing patients, Requestor certified that spending caps do not affect existing-patient Users' ability to book through the Marketplace as long as such Users identify themselves as existing patients of the spend-capped Provider with whom they want to book an appointment.

## C. Proposed Changes to the Marketplace

### 1. Marketplace Results Features

Requestor certified that the Marketplace removes Providers from Marketplace Results through the end of the applicable month when Providers reach spending caps. A User who identifies as a potential new patient of a spend-capped Provider cannot book an appointment with such Provider on the Marketplace for the remaining time the Provider is spend-capped (*i.e.*, the remainder of the month). Requestor certified that Users who identify as existing patients of a spend-capped Provider have the ability to book appointments with that spend-capped Provider, if the Provider has available appointments listed on the Marketplace.

Under the Proposed Changes, for Users who either identify as Federal health care program beneficiaries on the Marketplace or who decline to provide their insurance coverage information at the time of a search (“Non-Commercial Users”), Requestor would no longer filter Providers who have reached an established spending cap from Marketplace Results. Specifically, Providers who have reached their spending cap would appear in all search results for Non-Commercial Users where they meet the Non-Commercial Users’ search criteria, and Non-Commercial Users also would be able to view and click on the profiles of spend-capped Providers, although Users would not be able to book appointments with those Providers via the Marketplace at that time.

Requestor would make certain disclosures to Non-Commercial Users regarding spend-capped Providers.<sup>9</sup> First, in the Marketplace Results, Requestor would display language next to a spend-capped Provider’s name stating that the Provider has no availability on the Marketplace at that time for appointments that meet the Non-Commercial User’s search criteria. Second, Requestor would include an icon (such as the letter “i” with a circle around it) next to this language that, if clicked on or hovered over, displays a text box explaining relevant context for a Provider who cannot currently be booked, including that: (i) a Provider’s availability on the Marketplace may not reflect the Provider’s full availability because the Provider’s availability has changed, or the Provider has temporarily limited the number of appointment bookings the Provider may receive through the Marketplace; and (ii) Providers may be able to accommodate appointment requests if the Non-Commercial User reaches out to them directly. Additionally, for Non-Commercial Users, Requestor would include a “Notify Me” button next to a Provider’s name in the Marketplace Results that, if clicked, would send an automatic notification to the Non-Commercial User as soon as the Provider has available appointments on the Marketplace. This notification feature would apply to the profiles of Providers who are temporarily unavailable on the Marketplace for new-patient bookings because they have reached a spending cap or booked

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<sup>9</sup> The disclosures would not be visible to Users who identify as an existing patient of a specific Provider (even if the User is a Non-Commercial User) because those Users would be able to book appointments with such Provider regardless of the Provider’s spending cap, provided such Provider has available appointments listed on the Marketplace.

all the appointments that they have chosen to list on the Marketplace.<sup>10</sup> Requestor certified that the “Notify Me” button allows Non-Commercial Users to access that functionality without taking additional steps, such as inputting any additional information, beyond what is required to create a booking.

## 2. Marketplace Results Ordering

Under the Arrangement, the order in which Providers appear on the Marketplace is determined by an algorithm that uses machine learning to identify general preferences for Providers across Users. The algorithm attempts to order Providers in a manner that, based on Marketplace engagement data, most closely matches a User’s preferences. Requestor measures User engagement with Providers who are not subject to a spending cap based on clicks on the Provider profiles and appointment bookings. Under the Proposed Changes, for Providers who are subject to a spending cap, Requestor would measure User engagement based on clicks on the Provider profiles and the “Notify Me” button.

According to Requestor, the algorithm measures User engagement with Provider characteristics (e.g., geographic location or star ratings), but the algorithm does not use historical data on User engagement with specific Providers to determine the order in which those Providers appear in the Marketplace Results. In other words, the algorithm measures Users’ preferences for certain Provider characteristics—not for individual Providers. Requestor certified that a specific Provider receiving relatively few clicks or bookings in the past (i.e., low User engagement) would have no bearing on where the Provider would appear in the results of a current search. For example, all other factors being equal, if Users engage more with Providers who are located within 5 miles of the Users, and Dr. A has appointments available at an office location within 5 miles of a particular User running a search, Dr. A would appear higher in Marketplace Results than Providers located farther than 5 miles from the User. However, if a week later, Dr. A has appointments available only at a second office location located farther than 5 miles from that User, then in a new Marketplace search the second week, Dr. A would appear lower in Marketplace Results than Providers located within 5 miles of the User. In this example, the algorithm would have used clicks or bookings with Providers to determine that a User engages more with Providers who are located within 5 miles of the User’s residence, but it is the Provider characteristic—geographic proximity—that informs the future search results, not the identity of the specific Provider.

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<sup>10</sup> If a User navigates directly to a specific Provider’s profile on the Marketplace, a Provider who has reached a spending cap and one who simply has no appointment availability would appear the same—the Marketplace would provide the disclosures referenced above to Non-Commercial Users and would offer the notification feature. If a User initiates a general search for a type of Provider within a particular timeframe, for a Provider who has reached a spending cap, the Marketplace would provide the disclosures referenced above to Non-Commercial Users and would offer the notification feature; however, for a Provider who does not have appointment availability within the specified timeframe but who does have future availability and who otherwise has not reached a spending cap, the Marketplace would show Users the next available appointment that can be booked on the Marketplace.

The algorithm currently uses more than 180 different criteria for Users (e.g., location, time of search, visit reason) and Providers (e.g., geography, star ratings) to order search results. Requestor certified that the algorithm does not place a fixed weight on any one criterion but learns over time that Users who input certain search queries most often engage with Providers with a specific set of characteristics. In ordering Providers in search results under the Proposed Changes, one characteristic the algorithm would consider is how frequently Users engage with spend-capped Providers (i.e., the algorithm would measure whether a User interacts more or less with Providers who have a spending cap and would use that information, among the other criteria it considers, to order Providers in search results).

Requestor certified that, with respect to Non-Commercial Users, the algorithm would not filter or prioritize Providers based on: (i) the amount Providers pay or are willing to pay Requestor; (ii) whether Providers have a spending cap; (iii) Providers' historical use of spending caps (or the amount of the spending cap); (iv) the volume or value of any Federal health care program business generated for Providers through the Marketplace; or (v) any other non-User-centric criteria. Under the Proposed Changes, however, it is possible that the algorithm would use User-engagement data with spend-capped Providers to deprioritize such Providers, who, by virtue of setting a spending cap, are limiting the amount they are willing to pay Requestor. This may be particularly likely if both: (i) Users engage less with spend-capped Providers; and (ii) the algorithm places a relatively greater weight on the "spend-cap status" criterion than other criteria when producing search results. Requestor certified that it does not know whether the algorithm would deprioritize spend-capped Providers for a few reasons, including the fact that: (i) the Proposed Changes have not yet been implemented; (ii) the algorithm would use a multitude of criteria to order Marketplace Results; and (iii) the algorithm's weighting of criteria would not be fixed.<sup>11</sup>

#### **D. Sponsored Advertisements**

Under the Existing Arrangement, in addition to Marketplace Results, Providers also may purchase banner advertisements from Requestor ("Sponsored Results"). Specifically, Providers have the option to purchase Sponsored Results that are displayed at the top, or on the side, of Marketplace Results and on third-party websites. Sponsored Results advertise Providers but do not promote any particular item or service. Sponsored Results on the Marketplace and on third-party websites are visible to all Users, including Federal health care program beneficiaries. Requestor advertises Providers to Federal health care program beneficiaries only on the Marketplace and third-party websites, and Requestor's advertising activities, including the

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<sup>11</sup> We acknowledge that Requestor does not know how the algorithm's use of User-engagement data with spend-capped Providers would affect the ordering of Marketplace Results. However, we caution that, due to Requestor's selection of User-engagement data with spend-capped Providers as a criterion the algorithm uses to prioritize Marketplace Results, the algorithm could routinely deprioritize spend-capped Providers in Marketplace Results, which would be inconsistent with Requestor's certification that it would not prioritize Marketplace Results based on the amount Providers pay or are willing to pay Requestor or whether Providers have a spending cap.

display of Sponsored Results and general advertisements for Requestor, do not specifically target Federal health care program beneficiaries.

Sponsored Results on the Marketplace appear when Providers match Users' search criteria. Requestor certified that Sponsored Results are clearly labeled as such and are readily distinguishable from the Marketplace Results. With respect to third-party websites, Requestor has purchased online advertising on both health-care and non-health-care-related websites that provide increased exposure for Providers who purchase Sponsored Results. Requestor certified that the Sponsored Results on these sites also are clearly labeled as advertisements. According to a third-party expert hired by Requestor, the vast majority of Medicare enrollees would understand that the Sponsored Results are paid advertising.

Requestor charges Providers for Sponsored Results using either a per-impression advertising fee (the "Per-Impression Advertising Fee") or a per-click advertising fee (the "Per-Click Advertising Fee"). An "impression" is the display of an advertisement that is viewed by a User. When a User views a page on the Marketplace, that viewing constitutes an "impression" for each advertisement that is displayed on the page. A Per-Click Advertising Fee applies when a User clicks on a Provider's Sponsored Result. Requestor certified that neither the Per-Impression Advertising Fee nor the Per-Click Advertising Fee: (i) exceed fair market value; (ii) depend on a User's insurance status or whether a User books an appointment or becomes a patient of a Provider; or (iii) vary with the volume or value of items or services any Provider furnishes to Users.

Requestor determines the amount it charges per impression and per click through either of two methods: (i) a bidding process that allows Providers to bid in an advertisement auction for User searches for which the Provider is relevant; or (ii) keyword advertising, whereby Providers can bid different amounts for different search terms for which the Providers want to display advertisements. Under the bidding process, Requestor sets a minimum bid amount, and Providers bid on certain terms. For example, a chiropractor may enter the bidding process for Users searching both for "chiropractor" and "back pain" because, in each instance, chiropractors may be relevant to Users' searches. With keyword advertising, Providers can bid different amounts for different terms. For example, a chiropractor bidding for keyword advertising could bid one amount for the search term "chiropractor" and a different amount for the search term "back pain."

## **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>12</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>13</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>14</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, OIG may initiate administrative proceedings to impose civil monetary penalties on such person under section 1128A(a)(7) of the Act. 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. OIG also may initiate administrative proceedings to exclude such person from 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

#### 1. Federal Anti-Kickback Statute

The Arrangement implicates the Federal anti-kickback statute. First, under the Arrangement, Providers pay Requestor (through Per-Booking Fees, and if they purchase Sponsored Results, through either Per-Impression Advertising Fees or Per-Click Advertising Fees) to recommend them (and by extension the purchase of their items and services) to prospective patients, including Federal health care program beneficiaries, by listing Providers on the Marketplace and

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<sup>12</sup> Section 1128B(b) of the Act.

<sup>13</sup> Id.

<sup>14</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).

third-party websites. Second, Providers pay Requestor Per-Booking Fees to arrange for the provision of items and services, some of which may be reimbursable by a Federal health care program, through the Marketplace's appointment-booking functionality. Third, Requestor provides remuneration to Users in the form of the free use of the Marketplace, and Requestor's provision of this remuneration to Users may induce Users to purchase from Providers items or services that are reimbursable by a Federal health care program. No safe harbor applies to the Arrangement.

Because the Arrangement implicates the Federal anti-kickback statute and is not protected by a safe harbor, we evaluate the Arrangement based on the totality of the facts and circumstances. Requestor's display of both the Marketplace Results and the Sponsored Results constitutes advertising activity, which we evaluate by considering a number of factors, such as: (i) the amount and structure of the compensation; (ii) the identity of the party engaged in the marketing activity and the party's relationship with its target audience; (iii) the nature of the marketing activity; (iv) the item or service being marketed; (v) the target population; and (vi) any safeguards to prevent fraud and abuse. For the following reasons, we believe the risk of fraud and abuse presented by the Arrangement is sufficiently low under the Federal anti-kickback statute for OIG to issue a favorable advisory opinion.

First, while the Per-Booking Fees vary by medical specialty, geographic location, and in certain circumstances, other relevant factors affecting fair market value, Requestor sets the Per-Booking Fee amounts in advance, and Requestor certified that its fees do not, and any updates to such fees would not, exceed fair market value for the services Requestor provides to Providers in connection with the Marketplace. Additionally, Requestor certified that the Per-Booking Fees Requestor charges are not determined in a manner that takes into account the value of Federal health care program referrals or other Federal health care program business generated by Requestor for the Providers paying the Per-Booking Fees. The Per-Booking Fees apply: (i) only when a User who identifies as a new patient books an appointment; (ii) regardless of the User's insurance status; and (iii) except in limited circumstances, regardless of whether the User cancels the appointment. Further, Requestor certified that, under the Proposed Changes, the Marketplace algorithm would not filter or prioritize Providers based on: (i) the amount Providers pay or are willing to pay Requestor; (ii) whether Providers have a spending cap; (iii) Providers' historical use of spending caps (or the amount of the spending cap); (iv) the volume or value of any Federal health care program business generated for Providers through the Marketplace; or (v) any other non-User-centric criteria. Based on this certification, the fees Providers pay Requestor would not affect the frequency with which Providers appear, or their placement, in Marketplace Results. In other words, while more new-patient appointment bookings result in Providers paying more Per-Booking Fees to Requestor, based on Requestor's certifications, those payments would not result in more frequent appearances, or favorable placements, in Marketplace Results.

With respect to the advertising fees, Requestor certified that neither the Per-Impression Advertising Fees nor the Per-Click Advertising Fees exceed fair market value. Additionally, the Per-Impression Advertising Fees and Per-Click Advertising Fees vary by the amounts Providers bid for advertising, but none of the advertising fees would take into account Users' insurance status or the volume or value of any business generated for Providers through the Marketplace or on third-party websites.

Second, Requestor is not a provider or supplier of any medical items or services, so its relationship with the target population under the Arrangement is distinguishable from potentially problematic arrangements involving marketing by health care providers and suppliers. In particular, “white coat” marketing by health care professionals, such as physicians, is subject to closer scrutiny, since health care providers and suppliers are in a position of trust and may exert undue influence when recommending health-care-related items or services, especially to their own patients. Because Requestor is not a provider or supplier of any medical items or services, is not affiliated with any Provider listed on the Marketplace, and does not expressly recommend any particular Provider to Users, this same concern is not present in the Arrangement.<sup>15</sup>

Third, Requestor’s advertising activities, including the display of Sponsored Results and general advertisements for Requestor, do not specifically target Federal health care program beneficiaries. The advertising activity under the Arrangement is essentially passive in nature because any contact with Requestor must be initiated by a Federal health care program beneficiary. Unlike more targeted forms of advertising, such as emails, mailings, or text messages, Requestor’s advertisements for Providers are visible to Federal health care program beneficiaries only if they visit the Marketplace or a third-party website where Sponsored Results are displayed. Further, the Sponsored Results are clearly marked as paid advertising.

Fourth, the marketing activity under the Arrangement would not relate to any specific items or services Users may obtain from Providers as a result of appointments booked through the Marketplace. The Sponsored Results advertise Providers who purchase Sponsored Results but do not promote any particular item or service. Requestor certified that, under the Arrangement, the Marketplace would generate Marketplace Results using an algorithm that filters and prioritizes Providers according to criteria specified by Users and other User-centric information, such as Providers’ cancellation rates. Importantly, with the implementation of the Proposed Changes, for Non-Commercial Users, Requestor would discontinue filtering out Providers who have reached any established spending cap from Marketplace Results. Specifically, Requestor certified that the Marketplace would not filter or prioritize Providers listed in Marketplace Results based on: (i) the amount Providers pay or are willing to pay Requestor; (ii) whether Providers have a spending cap; (iii) Providers’ historical use of spending caps (or the amount of the spending cap); (iv) the volume or value of any Federal health care program business generated for Providers through the Marketplace; or (v) any other non-User-centric criteria. Additionally, Requestor’s website notifies Users that Providers pay a fee for new-patient appointment bookings on the Marketplace, which reduces the chance that Users would think the Marketplace reflects the full scope of health care professionals available to them.

Fifth, under the Arrangement, Requestor’s potential User base is the general public, meaning any individual, regardless of insurance status, can access the Marketplace and view Marketplace Results and Sponsored Results. Although Requestor collects insurance information from Users, Requestor would not use this information to target Federal health care program beneficiaries or

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<sup>15</sup> While Sponsored Results could be viewed as recommendations of a particular Provider, the clear labeling of these advertisements as “sponsored” reduces the likelihood that Users would believe these Providers are being recommended for quality or any reason other than the fact that the Sponsored Results are paid advertising.

otherwise influence their decision-making. Requestor uses this information to match Users with Providers who accept their insurance and to allow Users to store medical and insurance information in advance of medical appointments with the goal of reducing the time Users spend in Providers' offices completing forms and the possibility of transcription errors by Providers' staffs.

Sixth, under the Proposed Changes, Requestor would implement User transparency safeguards related to the appearance of spend-capped Providers in Marketplace Results. For Non-Commercial Users, Requestor would discontinue filtering out Providers who have reached any established spending cap from Marketplace Results, so Non-Commercial Users would be able to view and click on the profiles of spend-capped Providers. This change to the Marketplace would give Non-Commercial Users the opportunity to see Providers with whom they may want to schedule an appointment, notwithstanding that new-patient appointment bookings for such Providers would be temporarily unavailable on the Marketplace.

Additionally, Marketplace Results would display language next to a spend-capped Provider's name stating that the Provider has no availability on the Marketplace at that time for appointments that meet the Non-Commercial User's search criteria, and there would be an informational icon next to this language that, if clicked on or hovered over, displays a text box explaining relevant context for a Provider who cannot currently be booked, including that: (i) a Provider's availability on the Marketplace may not reflect the Provider's full availability because the Provider's availability has changed, or the Provider has temporarily limited the number of appointment bookings the Provider may receive through the Marketplace; and (ii) Providers may be able to accommodate appointment requests if the Non-Commercial User reaches out to them directly. Requestor also would include a "Notify Me" button next to a Provider's name in the Marketplace Results which would give Non-Commercial Users an option to be notified as soon as the Provider has available appointments on the Marketplace. These disclosures, which collectively would make clear that Providers may have appointments available other than through the Marketplace and provide the opportunity for Non-Commercial Users to receive an automatic notification when Provider appointments become available, reduce the risk that the Marketplace would inappropriately steer Non-Commercial Users to certain Providers.

Seventh, Requestor certified that the algorithm for ordering Marketplace Results would not prioritize Providers based on: (i) the amount Providers pay or are willing to pay Requestor; (ii) whether Providers have a spending cap; (iii) Providers' historical use of spending caps (or the amount of the spending cap); (iv) the volume or value of any Federal health care program business generated for Providers through the Marketplace; or (v) any other non-User-centric criteria. The algorithm attempts to order Providers in a manner that, based on Marketplace engagement data, most closely matches a User's preferences. For example, the algorithm does not use historical data on User engagement with specific Providers to determine the order in which those Providers appear in the Marketplace Results, which allows for Providers with historically less popular Marketplace characteristics to have an equal opportunity to be displayed higher in Marketplace Results if any of their Marketplace characteristics change (e.g., a Provider receives higher star ratings or reduces their cancellation rates).

Lastly, in addition to the safeguards listed above, Requestor does not offer or give anything of value to Federal health care program beneficiaries (other than the functionality of the

Marketplace and the potential convenience associated with using the Marketplace) to induce them to use the Marketplace or that otherwise might serve to influence their selection of a health care professional or other health care choices.

## 2. Beneficiary Inducements CMP

With respect to the Beneficiary Inducements CMP, we conclude that Requestor's provision of the Marketplace at no charge to Federal health care program beneficiaries could influence beneficiaries to select a Provider for the receipt of items and services that are reimbursable by a Federal health care program, and therefore the Arrangement implicates the Beneficiary Inducements CMP. For the reasons stated above, however, in an exercise of our discretion, we will not (with respect to the Existing Arrangement) and would not (with respect to the Proposed Changes) impose sanctions under the Beneficiary Inducements CMP in connection with the Arrangement.

### III. CONCLUSION

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that: (i) although the Arrangement would generate prohibited remuneration under the Federal anti-kickback statute if the requisite intent were present, OIG will not (with respect to the Existing Arrangement), and OIG would not (with respect to the Proposed Changes), impose administrative sanctions on Requestor in connection with the 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 Arrangement could generate prohibited remuneration under the Beneficiary Inducements CMP, OIG will not (with respect to the Existing Arrangement), and OIG would not (with respect to the Proposed Changes), impose administrative sanctions on Requestor in connection with the 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 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 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.

OIG will not proceed against Requestor with respect to any action that is part of the 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 Arrangement in practice comports with the information provided. 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, OIG will not proceed against Requestor with respect to any action that is part of the 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 OIG.

Sincerely,

/Susan A. Edwards/

Susan A. Edwards  
Chief, Industry Guidance Branch