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: June 25, 2026

Posted: June 30, 2026

[Address block redacted]

Re: OIG Advisory Opinion No. 26-15 (Unfavorable)

Dear [redacted]:

The Office of Inspector General ("OIG") is writing in response to your request for an advisory opinion on behalf of [redacted] ("Requestor"), regarding its payment of remuneration to a vendor for the use of an online referral management software (the "Arrangement"). Specifically, you have inquired whether the 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").

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 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 advisory opinion is limited to the relevant facts presented to us by Requestor in connection with the Arrangement.

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Arrangement would generate prohibited remuneration under the Federal anti-kickback statute, if the requisite intent were present, which would constitute grounds for the imposition of sanctions under sections 1128A(a)(7) and 1128(b)(7) of the Act.

This advisory opinion may not be relied on by any person[1] other than Requestor, has no applicability to any arrangements other than the Arrangement, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

Requestor operates home health agencies ("HHAs") that provide skilled and unskilled in-home care services to adults and children, including Federal health care program beneficiaries. Many of Requestor's patients are referred by hospitals for post-discharge care. Medicare regulations require hospitals to provide patients who will be discharged home and referred for home health services a list of HHAs "that are available to the patient, that are participating in the Medicare program, and that serve the geographic area (as defined by the HHA) in which the patient resides….HHAs must request to be listed by the hospital as available."[2] Requestor certified that referrals from hospitals to HHAs are often determined on a first-come, first-served basis, so the speed with which the HHA responds to a hospital's request for home health services for a particular patient post-discharge is determinative of securing referrals.

Under the Arrangement, Requestor pays a subscription fee to a health care technology and software company (the "Vendor") that provides, as pertinent to this advisory opinion, an online referral management software (the "Software"). The Software connects hospitals with HHAs for the purpose of referring patients to an HHA in the course of discharge planning. Requestor pays a fee to the Vendor for subscriptions to the Software,[3] which enables Requestor and other HHAs that subscribe to the Software to receive and accept electronic referrals from the hospitals soliciting HHA availability for individual patients who are being discharged.[4] Requestor's understanding is that the Software provides each participating hospital with a list of all HHAs in the region, without regard to whether the HHAs subscribe to the Software, but only those HHAs that pay to subscribe to the Software are able to receive electronic communications from the hospitals. Requestor understands that prices charged to HHAs for Software subscriptions vary based on a number of factors, such as the geographic location of the HHA or the number of jointly owned HHAs that purchase the Software (as the Vendor may provide a volume-based discount to HHAs with multiple locations). Based on its discussions with the Vendor, Requestor

---

[1] We use "person" herein to include persons, as referenced in the Federal anti-kickback statute, as well as individuals and entities, as referenced in the exclusion authority at section 1128(b)(7) of the Act.

[2] 42 C.F.R. § 482.43(d)(1).

[3] Requestor pays a separate subscription fee to the Vendor for each hospital from which it seeks to receive referrals through the Software.

[4] In order for the Software to transmit electronic referrals, an HHA must subscribe to the Software and pay a subscription fee; it is Requestor's understanding that hospitals also must pay a fee to the Vendor. We have not been asked to opine, and express no opinion, regarding arrangements between the hospitals and the Vendor.

understands that the charge to the HHAs is not based solely on the Vendor's cost to provide the referral service.

Requestor certified that, where a hospital has subscribed to the Software, but an HHA has not subscribed to the Software, a hospital would need to send a referral to the non-subscribed HHA via electronic facsimile, email, phone, or hand-delivery. If the HHA then wants to accept the referral, it must contact the appropriate person at the hospital directly by phone, whereas with the Software, HHAs can accept electronic referrals immediately through the Software. Requestor certified that, based on its experience, these alternative methods of receiving and responding to requests for availability from hospitals create delays that, in practice, effectively exclude HHAs that do not subscribe to the Software.

II. LEGAL ANALYSIS

A. Law

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.[5] 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.[6] 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.[7] 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.

---

[5] Section 1128B(b) of the Act.

[6] Id.

[7] 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).

Congress has developed several statutory exceptions to the Federal anti-kickback statute.[8] In addition, the U.S. Department of Health and Human Services has promulgated safe harbor regulations that specify certain practices that are not treated as an offense under the Federal anti-kickback statute and do not serve as the basis for an exclusion.[9] However, safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the safe harbor. Compliance with a safe harbor is voluntary. Arrangements that do not comply with a safe harbor are evaluated on a case-by-case basis.

The safe harbor for referral services is potentially applicable to the Arrangement.[10] It provides that, for purposes of the Federal 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: (i) be assessed uniformly against all participants; (ii) be based only on the cost of operating the referral service; and (iii) not vary with the volume or value of referrals of Federal health care program business.

B. Analysis

Under the Arrangement, Requestor pays a subscription fee to the Vendor in return for access to the Software, which facilitates electronically receiving and responding to hospital referral requests for home health services including for Federal health care program beneficiaries. The Arrangement implicates the Federal anti-kickback statute because Requestor is paying remuneration to the Vendor in return for the Vendor, through the Software, arranging for the furnishing of home health services for which payment may be made by a Federal health care program.

The 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.[11] Because no safe harbor protects the Arrangement, we must determine whether, given all of the relevant facts, the Arrangement poses no more than a minimal risk under the Federal anti-kickback statute. For the following reasons, we believe the risk of fraud and abuse presented by the Arrangement is not sufficiently low under the Federal anti-kickback statute for OIG to issue a favorable advisory opinion.

The Arrangement poses a risk of inappropriate steering and unfair competition. Based on Requestor's certifications, hospitals often discharge patients to HHAs on a first-come, first-served basis, which means that, based on Requestor's experience, HHAs with the ability to electronically receive and respond to referral requests through the Software would have a significant competitive advantage over non-paying HHAs. According to Requestor, the delays

---

[8] Section 1128B(b)(3) of the Act.

[9] 42 C.F.R. § 1001.952.

[10] 42 C.F.R. § 1001.952(f).

[11] See 42 C.F.R. § 1001.952(f)(2).

caused by the alternative methods of receiving and responding to referrals may effectively eliminate HHAs that choose not to subscribe to the Software from any chance of receiving patient referrals under the Arrangement. This anti-competitive effect of the Arrangement is further exacerbated when an HHA cannot afford the Software subscription. Consequently, it appears that HHAs paying the Vendor's fees would get patients because they paid for the opportunity rather than on the basis of the quality of care they offer.

The Arrangement also poses a risk of overutilization or inappropriate utilization. HHAs that choose to participate in the Arrangement could face pressure to recoup the costs associated with participation. This pressure could create incentives to, among other things, bill for services that are not medically necessary, which could result in increased costs to the Federal health care programs.

III. CONCLUSION

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Arrangement would generate prohibited remuneration under the Federal anti-kickback statute, if the requisite intent were present, which would constitute grounds for the imposition of sanctions under sections 1128A(a)(7) and 1128(b)(7) of the Act.

IV. LIMITATIONS

The limitations applicable to this advisory opinion include the following:

- This advisory opinion is limited in scope to the Arrangement. This advisory opinion has no applicability to any other arrangements, including, without limitation, any 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 advisory opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008. 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 advisory opinion.

Sincerely,

/Tamara T. Forys/

Tamara T. Forys
Acting Assistant Inspector General for Legal Affairs