



[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: July 25, 2011

Posted: August 1, 2011

[Name and address redacted]

Re: OIG Advisory Opinion No. 11-10

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding an arrangement under which a company that sells a variety of health care management services will disburse pay-for-performance financial incentives on behalf of a state's Medicaid program (the "Arrangement"). Specifically, you have inquired whether the Arrangement constitutes 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 Office of Inspector General ("OIG") will not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of

the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

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

I. FACTUAL BACKGROUND

[Name redacted] (“Requestor”) sells a variety of health care management services, including behavioral health administrative services and disease management and care coordination services. The subject of this advisory opinion concerns certain administrative services rendered by Requestor to the [state agency redacted] (the “Department”) of [state redacted] (the “State”), in connection with the State’s Medicaid program.

The Department’s [program name redacted] (the “Medical Home Program”) is the State’s enhanced primary care case management and disease management program for certain State Medicaid beneficiaries. The disease management program component of the Medical Home Program provides comprehensive systemic care to chronically ill beneficiaries suffering from certain conditions, including, but not limited to, asthma, diabetes, chronic obstructive pulmonary disease, coronary artery disease, and congestive heart failure. Requestor and the Department entered into an agreement (the “Agreement”) pursuant to which Requestor agreed, among other things, to administer the disease management program on behalf of the Department.¹ The disease management program includes a pay-for-performance program in which physicians and dentists participate (the “Pay-for-Performance Program”).

The Department developed and implemented the Pay-for-Performance Program pursuant to a Medicaid waiver approved by the Centers for Medicare & Medicaid Services. Fundamental to the Pay-for-Performance Program are payments by the State’s Medicaid program to induce physicians and dentists to arrange for, order, or recommend certain specified services, with the goal of reducing overall medical costs by achieving better health outcomes for patients. Requestor certified that no payment will be made under the Pay-for-

¹ The Department selected Requestor pursuant to a competitive bidding process to succeed the entity with which the Department had previously contracted to develop and implement the Medical Home Program.

Performance Program to induce a physician or dentist to reduce or limit medically necessary services furnished to an individual.

The Agreement requires Requestor to disburse Department-approved financial incentives, in the form of checks drawn on a Requestor-owned bank account,² to the physicians and dentists who participate in the Pay-for-Performance Program and satisfy specified quality measures. The payments are funded by the State’s Medicaid program, and Requestor has no discretion or independent authority to determine or revise payment amounts. To prevent any confusion among providers, the Department clearly identifies itself or the Medical Home Program as the source of payment in all materials describing the Pay-for-Performance Program, and the checks that Requestor distributes indicate that payment is by the administrator of the Medical Home and Pay-for-Performance Programs.

Requestor certified that it earns a fair market value fee for the administrative services it provides. Requestor must return to the Department any Pay-for-Performance Program payments advanced to it by the Department that are not disbursed to participating physicians and dentists. The Department will receive periodic reports on the disbursements and will retain the right to audit Requestor’s performance to ensure compliance with the Agreement.

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

² According to Requestor, the Department stated that, for various internal administrative reasons, it is not practical for the Department itself to issue the checks to the physicians and dentists participating in the Pay-for-Performance Program.

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.

B. Analysis

We begin by emphasizing that this advisory opinion addresses the narrow question of whether the Arrangement, *i.e.*, Requestor's disbursement of Pay-for-Performance Program payments to physicians and dentists on behalf of the Department, implicates the anti-kickback statute. We are specifically not opining on other elements of the Agreement or the Pay-for-Performance Program.

The question of whether the Arrangement implicates the anti-kickback statute arises because of the appearance that Requestor is making payments to physicians and dentists by issuing Pay-for-Performance checks drawn on Requestor's bank account. Ideally, this ostensible problem would be solved by drawing payments from a State bank account; however, according to Requestor, it is not practical for the Department to do so.

It is the substance—not the form—of an arrangement that governs under the anti-kickback statute. Superficial appearances are not controlling. In the specific circumstances of the Arrangement, Requestor's duties as a payment administrator for the State's Pay-for-Performance Program do not implicate the anti-kickback statute. We reach this conclusion based on a combination of the following factors.

First, the payments are not made with Requestor's money; they are funded by the State.

Second, Requestor does not have control or discretion over the payments. When Requestor issues checks to physicians and dentists pursuant to the Arrangement, it is in every respect acting as an agent of the State: it is disbursing the State's funds, according to the State's rules, for the State's purposes, under the State's supervision. Moreover, because payments to physicians and dentists under the Pay-for-Performance Program do not reflect the use of Requestor's services, there will be no nexus between the payments and Requestor's services. Thus, in these circumstances, Requestor is not using another party's funds to disguise payments for referrals.

Third, the parties have taken meaningful steps to minimize any misimpression by physicians and dentists that Requestor is paying them for referrals of Medicaid business.

Pay-for-Performance Program materials clearly identify the Department and/or the Medical Home Program as the payor of financial incentives, and each check issued by Requestor on behalf of the State will indicate that payment is made by the administrator of the Medical Home and Pay-for-Performance Programs.

Finally, the Department supervises all payments disbursed by Requestor and retains the right to audit Requestor's performance under the Agreement.

For the foregoing reasons, we conclude that, in the specific circumstances of the Arrangement, Requestor's duties as a payment administrator for the Pay-for-Performance Program do not implicate the anti-kickback statute. Our conclusion derives from the particular facts presented; we might reach a different conclusion were we to consider, for example, a similar arrangement whereby an administrator had power to control payments that related to its products or services.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the OIG will not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name redacted], the requestor of this opinion. This advisory opinion has no application to, and cannot be relied upon by, any other individual or entity.
- This advisory opinion may not be introduced into evidence 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 Arrangement, including, without limitation, the physician self-referral law, section 1877 of

the Act (or that provision's application to the Medicaid program at section 1903(s) of the Act).

- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.
- This advisory opinion is limited in scope to the specific arrangement described in this letter and has no applicability to other arrangements, even those which appear similar in nature or scope.
- No opinion is expressed herein regarding the liability of any party under the False Claims Act or other legal authorities for any improper billing, claims submission, cost reporting, or related conduct.

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

The OIG will not proceed against [name redacted] with respect to any action that is part of the 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. The OIG reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, to rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against [name redacted] with respect to any action 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,

/Lewis Morris/

Lewis Morris
Chief Counsel to the Inspector General