



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 associated with the individual or entity, unless otherwise approved by the requestor.]*

**Issued:** December 21, 2015

**Posted:** December 29, 2015

[Names and addresses redacted]

**Re:   OIG Advisory Opinion No. 15-15**

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding a proposal for a hospital to bill a radiology group for transcription of the radiology group's reports for individuals who are not hospital patients, but rather patients of a third-party clinic that provides the technical component of the radiology exams (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (the "Act"), or the civil monetary penalty provision at section 1128A(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act, the Federal anti-kickback statute.

You have certified that all of the information provided in your request, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties.

In issuing this opinion, we have relied solely on the facts and information presented to us. We have not undertaken an independent investigation of such information. This opinion is limited to the facts presented. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the Office of Inspector General

(“OIG”) would not impose administrative sanctions on [name redacted] or [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement. This opinion is limited to the Proposed 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] and [name redacted], the requestors 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**

### **A. Proposed Arrangement**

[Name redacted] (the “Hospital”) is a licensed acute care hospital located in a sparsely populated region of [state redacted]. [Name redacted] (the “Clinic”) is a family medicine practice in a rural community in that region. The Clinic physicians are not members of the Hospital staff but order certain diagnostic tests from the Hospital and sometimes refer patients there. They are thus referral sources for the Hospital. The Clinic and the Hospital jointly requested this advisory opinion and are collectively referred to herein as the Requestors.

[Name redacted] (the “Radiology Practice” or the “Practice”) is the only radiology practice within a 100-mile radius of either the Clinic or the Hospital and provides services to numerous physician practices and hospitals. The Hospital contracts with the Radiology Practice to supervise all of the Hospital’s radiology services and to furnish professional interpretations of all radiologic imaging taken at the Hospital. According to the Requestors, the members of the Radiology Practice (the “Radiologists”) can influence referrals to the Hospital for diagnostic and interventional radiology services.

The Clinic employs technologists who provide radiologic imaging services for Clinic patients. The Clinic electronically transmits the resulting images to the Radiology Practice for interpretation; the Clinic is thus a referral source for the Practice. The Radiologists read and interpret the images, dictate reports, and send the dictated reports to the Hospital. Hospital employees transcribe the reports and return the transcriptions to the Radiologists, who provide the final reports of the radiology exams to the Clinic. The Clinic bills third-party payors, including Medicare and Medicaid, for the technical component of the radiology services, and the Radiology Practice bills these same payors for the professional component. Many patients who receive radiology services from the Clinic and the Radiology Practice are Federal health care program beneficiaries.

Under the Proposed Arrangement, the Hospital would bill the Radiology Practice for the Hospital's transcription services. The Requestors certified that the Hospital would bill a flat rate per line of transcription, consistent with the fair market value of the rendered service.<sup>1</sup> The Clinic would not pay any portion of the transcription cost through reimbursement of the Radiology Practice or otherwise.

## **B. Applicable CMS Payment Policy**

The Centers for Medicare & Medicaid Services ("CMS") Medicare Claims Processing Manual, Pub. No. 100-04, Chapter 13, section 20, discusses Payment Conditions for Radiology Services. Paragraph 20.1 addresses the professional component of a radiology service and states: "The interpretation of a diagnostic procedure includes a written report."

Transcription is one of a series of steps required to prepare a written report interpreting a radiology exam. We have been advised by CMS that, in the Medicare context, transcription costs for radiology exam reports are considered to be indirect expenses (i.e., non-clinical administrative expenses) under the methodology for establishing resource-based practice expense relative value units. Indirect expenses are not separately identifiable but are included in both the professional component and the technical component of each service, which are based, in part, on surveys of providers. To the extent that surveyed providers reported transcription costs, these costs are included in the calculation of the relevant fees. CMS takes the position that when the technical component and the professional component of radiology services are provided by different entities, the providers of these separate components may negotiate to determine who will pay for the transcription costs.

## **II. LEGAL ANALYSIS**

### **A. Law**

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

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<sup>1</sup> We are not authorized to opine on whether fair market value shall be or was paid or received for any goods, services, or property. See section 1128D(b)(3) of the Act.

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. See, e.g., United States v. Borrasi, 639 F.3d 774 (7th Cir. 2011); 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), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. Conviction will also lead to automatic exclusion from Federal health care programs, including Medicare and Medicaid. Where a party commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such party under section 1128A(a)(7) of the Act. The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs under section 1128(b)(7) of the Act.

## **B. Analysis**

The Clinic and the Hospital have asked whether the Proposed Arrangement would result in OIG administrative sanctions for acts proscribed by the Federal anti-kickback statute. Both the Clinic and the Radiology Practice are possible referral sources for the Hospital, and the Clinic is a referral source for the Practice.

When a party in a position to benefit from referrals provides remuneration to an existing or potential referral source, through the relief of administrative expenses or otherwise, there is a risk that at least one purpose of such remuneration is to influence referrals. We therefore address whether the Proposed Arrangement involves remuneration to a referral source.

Under the Proposed Arrangement, the Hospital would bill the Radiology Practice for transcription services that the Hospital provides, at the request of the Practice, in connection with reports generated by the Practice for individuals who are not Hospital patients. The Hospital is entitled to be paid for these services. It is logical that, in the absence of an express agreement by a third party to be billed for these services, the Hospital would bill the Practice. Accordingly we find that no remuneration would pass from the Hospital to the Clinic under the Proposed Arrangement.

The Requestors have indicated that, as part of the Proposed Arrangement, the Clinic would not pay for any transcription costs billed by the Hospital to the Practice. We therefore address the possibility that the Radiology Practice's payment of transcription costs would constitute remuneration from the Practice to the Clinic for the Clinic's referrals of the professional component of the radiology exams.

We would view the risk of remuneration for referrals as substantial if, under Medicare payment rules, the transcription costs were attributed solely to the technical component of

the radiology exam. In such a scenario, an expense for which the Clinic is exclusively reimbursed would be shifted to a party to which it refers. We are informed by CMS, however, that Medicare payment for both the technical and professional components includes reimbursement for indirect expenses and, to the extent that these expenses include transcription costs, such costs are covered by the Medicare payment. When the technical and professional components are performed by different parties, it is CMS's position that the parties may determine who will pay the transcription costs.

Where two different parties receive reimbursement for the same expense, the possibility arises of remuneration passing between the parties when the expense is, in a particular instance, borne by one party to the exclusion of the other. In the Proposed Arrangement, however, we do not find that remuneration would pass between the Radiology Practice and the Clinic. As noted above, the Medicare Claims Processing Manual addresses the conditions of payment for the professional component of a radiology exam and states: "The interpretation of a diagnostic procedure includes a written report." Because a condition of payment for the professional component of a radiology exam is the preparation of a written report, we conclude that the payment by the Radiology Practice for the transcription of its own reports would not constitute remuneration by the Practice to the Clinic.<sup>2</sup>

Accordingly, based on the totality of facts and circumstances, we conclude that the Proposed Arrangement would not generate remuneration for a referral source.

### **III. CONCLUSION**

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the OIG would not impose administrative sanctions on [name redacted] or [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement. This opinion is limited to the Proposed 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.

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<sup>2</sup> We offer no opinion regarding whether, when the technical component and the professional component of radiology exams are provided by different entities, the provider of the professional component is required to pay the cost of transcribing the report. We conclude only that, in the circumstances of the Proposed Arrangement, payment for the transcription services by the entity furnishing the professional component does not constitute remuneration to the entity furnishing the technical component for purposes of the anti-kickback statute.

#### **IV. LIMITATIONS**

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name redacted] and [name redacted], the requestors 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 by a person or entity other than [name redacted] or [name redacted] to prove that the person or entity did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is expressed or implied herein with respect to the application of any other Federal, state, or local statute, rule, regulation, ordinance, or other law that may be applicable to the Proposed Arrangement, including, without limitation, the physician self-referral law, section 1877 of the Act (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] or [name redacted] with respect to any action that is part of the Proposed 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 Proposed 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] or [name redacted] with respect to any action

that is part of the Proposed 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,

/ Gregory E. Demske/

Gregory E. Demske  
Chief Counsel to the Inspector General