



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: June 26, 2020

Posted: July 1, 2020

[Name and address redacted]

Re: OIG Advisory Opinion No. 20-03

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding an arrangement under which a discount medical plan organization (“DMPO”) pays chiropractors and chiropractic clinics a fee for each new DMPO member referred by the chiropractor or chiropractic clinic (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, although the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce or reward referrals of Federal health care program business were present, 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”), operates as a DMPO,¹ which is an entity that contracts with providers who agree to reduce their fees for the DMPO’s members. Requestor’s DMPO is limited to chiropractors and chiropractic clinics. Requestor contracts with all willing chiropractors or chiropractic clinics that meet the minimum requirements for participation, including maintaining an active chiropractic license, securing required malpractice coverage, and abiding by the terms set forth in the provider agreement. As a general rule, participating chiropractors and chiropractic clinics agree to discount their fee schedule rates by at least 10 percent and no more than 50 percent. Chiropractors and chiropractic clinics do not pay Requestor to participate in the network.

Requestor’s members are individuals who pay an annual membership fee, which covers the enrolling individual and any immediate family members in his or her household. Members are entitled to discounted rates from any chiropractor in the DMPO. According to Requestor, individuals might choose to be members of Requestor due to being uninsured, lacking chiropractic benefits under their insurance, or having a high deductible or other high cost-sharing requirements under their insurance plan. Requestor certified that Medicare covers only chiropractic services that are billed under one of three CPT billing codes, all of which relate to manual manipulation of the spine to correct a subluxation. All other billing codes are non-covered services, including the required initial exam to determine the need

¹ DMPOs are licensed in some states but not others. While DMPOs are not insurers, the National Association of Insurance Commissioners has developed the Discount Medical Plan Organization Act, available at <https://www.naic.org/store/free/MDL-98.pdf>, that Requestor certified some states have adopted to regulate these entities.

for chiropractic services. Benefits under other Federal health care programs vary by program. Requestor certified that Medicare beneficiaries may use the DMPO only for non-covered services because chiropractors that participate in Medicare are legally obligated to submit claims to Medicare for covered CPT codes.

Requestor markets its service to chiropractors through trade magazines, a public website, brochures, and continuing education seminars. Chiropractors may explain Requestor's service to patients and may facilitate enrollment. However, Requestor certified that all DMPO membership enrollment is completed online, and referring chiropractors are not required to take any action to facilitate patient enrollment. Under the Arrangement, Requestor pays the referring chiropractor five dollars (\$5.00) for each new membership processed. Requestor certified that this payment is paid only for the initial membership. As noted above, once enrolled as a DMPO member, an individual is not required to continue receiving chiropractic services from the referring chiropractor; membership in the DMPO gives members access to the contracted rates offered by any participating chiropractor or chiropractic clinic in the network.

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.

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. 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), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a felony punishable by a maximum fine of \$100,000, imprisonment up to ten 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 our analysis by acknowledging that the Arrangement about which Requestor asked us to opine relates solely to the \$5.00 fee Requestor pays to chiropractors who refer a patient for an initial membership. However, to assess risk under the anti-kickback statute, we believe it is important to look at the overall relationships between and among Requestor, the contracting chiropractors, and the members. Specifically, Requestor contracts with a network of chiropractors who offer discounted rates;² members pay Requestor an annual fee to access the discounted rates offered by these chiropractors; and Requestor rewards chiropractors for each new membership processed. There are two streams of remuneration flowing to or from Requestor. First, Requestor gives chiropractors a \$5.00 payment for each new membership that the chiropractor referred to Requestor. Second, participating chiropractors offer discounted rates through Requestor, allowing Requestor to earn membership fees from members. We analyze each in turn.

Payment to Chiropractors

We conclude that the \$5.00 payment that Requestor makes to referring chiropractors, though “remuneration,” does not implicate the anti-kickback statute. We note that the \$5.00 payment is a reward for a referral, but it rewards a referral to Requestor, and Requestor neither furnishes nor arranges for the furnishing of federally reimbursable items or services. While Requestor operates a network that could influence its members to choose one of the contracting chiropractors who provide federally reimbursable services (i.e., “arrange for” referrals), Requestor—unlike a Medicare Advantage plan, for example—is not arranging for federally reimbursable services. Under these facts, the chiropractor is both the potential referral recipient and the payment recipient. In other words, the referral and the payment go to the same person.

Discounted Rates and Membership Fees

We begin by noting that the DMPO business model is expressly recognized and permitted in several states. While this fact alone is not dispositive as to any particular arrangement, we believe that the fact that DMPOs are legal business entities is important background.

² We can opine only on Requestor’s arrangements with chiropractors and with members. Requestor is not in a position to certify to arrangements between chiropractors and patients who are Requestor’s members.

As a DMPO, Requestor contracts with chiropractors and chiropractic clinics that are willing to offer discounted rates to Requestor's members, and Requestor's members pay an annual fee for access to these rates. Therefore, chiropractors' agreement to offer discounted rates through the DMPO give Requestor an opportunity to earn a fee, namely, the membership fees, and therefore is remuneration. In addition, by negotiating the discounted rates with chiropractors on behalf of its members, Requestor could be viewed as "recommending" its network chiropractors to members. However, for the following reasons, we find this aspect of Requestor's business to present a low risk of fraud and abuse under the anti-kickback statute.

First, the discounted rates apply only to services not covered by Medicare for Medicare patients. Therefore, it seems unlikely that the usual concerns associated with the opportunity to earn a fee (e.g., channeling referrals of Federal health care program business) would apply here. In addition, membership in Requestor does not require members to use a particular chiropractor nor does it require the member to use DMPO benefits for all services. For example, if a patient's insurance (including other Federal health care programs, such as Medicaid) covers a particular service, the patient likely would pay the cost-sharing amount for the service rather than paying cash for the entire service at the time of service—even at a discounted rate.

Second, rather than advertising to patients, Requestor markets its service to chiropractors. Generally, a patient will learn about Requestor's service from a chiropractor that the patient already has selected. Because Requestor contracts with any willing chiropractor that meets the terms of participation, the membership for which the member pays an annual fee may expand a patient's access to chiropractors rather than limit it.

Finally, Requestor is essentially an intermediary. It does not provide health care items or services, bill Federal health care programs, receive any payment from Federal health care programs, or recommend any particular items or services. Instead, Requestor builds a network of any willing chiropractors, enters into agreements with those chiropractors to arrange for discounted rates, and then charges its members who benefit from those discounted rates an annual fee for these administrative services. While it is possible the participating chiropractors may gain some new patients who receive items or services that are billed to Federal health care programs, for the combination of the reasons stated above, we believe the risk of fraud and abuse is low.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce or

reward referrals of Federal health care program business were present, 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 by a person or entity other than [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 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 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 the OIG.

Sincerely,

/Robert K. DeConti/

Robert K. DeConti
Assistant Inspector General for Legal Affairs