



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:** February 9, 2015

**Posted:** February 13, 2015

[Name and address redacted]

### **Re: OIG Advisory Opinion No. 15-02**

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding the effect of your exclusion from Medicare, Medicaid, and all other Federal health care programs. Specifically, you have inquired whether your receipt of Federal health care program payments for services performed by you and your medical practice prior to the effective date of your exclusion (the "Proposed Arrangement") would violate the terms of your exclusion and constitute grounds for the imposition of sanctions under the civil monetary penalty provision at section 1128A(a)(1)(D) of the Social Security Act (the "Act").

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 violate the terms of your exclusion and would not constitute grounds for the imposition of sanctions against you under section 1128A(a)(1)(D) of the Act. 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], 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**

Pursuant to a criminal plea and civil False Claims Act settlement to resolve various allegations of health care fraud, you were excluded from participation in Medicare, Medicaid, and all other Federal health care programs for a period of 20 years. The effective date of your exclusion is October 25, 2013 (the “Exclusion Date”). Under the terms of the global settlement, you also were required to divest all ownership in your medical practice, [name redacted] (the “Practice”). The sale of the Practice’s assets to [names redacted] (collectively, the “Buyer”) was finalized via an Asset Purchase Agreement dated October 31, 2013.

Prior to the Exclusion Date, you and the Practice performed services and submitted claims for those services to the Federal health care programs (the “Services”).<sup>1</sup> The Federal health care programs made payments for the Services after the Exclusion Date. The Buyer controlled the Practice’s bank account at the time the payments were made and received. Under the Proposed Arrangement, the Buyer would remit to you the Federal health care program payments for the Services. You have inquired whether the Proposed Arrangement would violate the terms of your exclusion and subject you to administrative sanctions.

## **II. LEGAL ANALYSIS**

### **A. Law**

When an individual is excluded pursuant to section 1128 of the Act, no payment may be made by Medicare, Medicaid, or any other Federal health care program for any item or service furnished by that individual on or after the effective date of the exclusion. See sections 1862(e)(1) and 1902(a)(39) of the Act. Additionally, no Federal health care program payments may be made for items or services furnished at the medical direction or on the prescription of an excluded physician, if the person furnishing the item or service knew or had reason to know of the exclusion. 42 C.F.R. § 1001.1901(b)(1). An excluded individual who submits, or causes to be submitted, claims to Federal health care

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<sup>1</sup> Pursuant to your global settlement agreement, you are prohibited from seeking payment for any of the health care billings covered by the agreement from any health care beneficiaries or their parents, sponsors, legally responsible individuals, or third party payors based upon the claims that meet the definition of “Covered Conduct” in the agreement. This advisory opinion has no effect on the terms of your global settlement agreement.

programs for items or services furnished during the exclusion period is subject to civil monetary penalty liability under section 1128A(a)(1)(D) of the Act (the “CMP”).<sup>2</sup>

## **B. Analysis**

The payment prohibition for excluded individuals set forth above applies only to items and services that the excluded individual rendered, or that were furnished at the medical direction or on the prescription of an excluded physician, on or after the effective date of the exclusion. As a result, it would not violate the terms of your exclusion for you to receive payment from the Federal health care programs for the Services, as they were performed by you and the Practice prior to the Exclusion Date.<sup>3</sup> Likewise, it would not violate the terms of your exclusion for the Buyer to remit to you payments received from the Federal health care programs for the Services. Accordingly, the Proposed Arrangement would not constitute grounds for the imposition of administrative sanctions against you under the CMP.

## **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 violate the terms of your exclusion and would not constitute grounds for the imposition of sanctions against you under section 1128A(a)(1)(D) of the Act. 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.

## **IV. LIMITATIONS**

The limitations applicable to this opinion include the following:

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<sup>2</sup> Such actions also may lead to criminal liability (*see, e.g.*, section 1128B(a)(3) of the Act) and may serve as the basis for denying reinstatement to the Federal health care programs (42 C.F.R. § 1001.1901(b)(3)).

<sup>3</sup> We express no opinion on whether the claims for Services were otherwise properly submitted to Federal health care programs in compliance with applicable laws or were otherwise legally payable to you. Nothing in this advisory opinion protects illegal conduct such as billing for medically unnecessary services, upcoding claims, billing for services not provided, or engaging in other illegal activities in violation of Federal anti-fraud and abuse authorities.

- 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 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 Office of Inspector General ("OIG") will not proceed against [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] 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