



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: August 6, 2015

Posted: August 13, 2015

[Name and address redacted]

Re: OIG Advisory Opinion No. 15-12

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding a home health provider's policy to offer free introductory visits to patients who have chosen it as their home health provider (the "Arrangement"). Specifically, you have inquired whether the Arrangement constitutes grounds for the imposition of sanctions under the civil monetary penalty provision prohibiting inducements to beneficiaries, section 1128A(a)(5) of the Social Security Act (the "Act"), or under the exclusion authority at section 1128(b)(7) of 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 Arrangement does not generate prohibited remuneration under the Federal anti-kickback statute. Accordingly, 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. In addition, the Arrangement does not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act. 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] (the “Requestor”) is a for-profit entity that provides home health services to, among others, patients who participate in Medicare, Medicaid, and other Federal health care programs. According to the Requestor, a physician or a health care professional serving as a hospital discharge planner or case manager presents a list of home health providers to a patient requiring home health services. If the patient chooses the Requestor, the physician or health care professional contacts the Requestor to inform it of the patient’s decision. The Requestor certified that it has no involvement in the patient’s selection process. The Requestor further certified that it does not offer or pay, either directly or indirectly, overtly or covertly, any remuneration to the physicians, health care professionals, or other individuals or entities that are referral sources involved in the patient’s selection process.

Once the Requestor receives notification that a patient selected it, an employee of the Requestor (the “Liaison”) contacts the patient by telephone to see if he or she would like to have an initial visit with the Liaison (the “Introductory Visit”). If the patient agrees, he or she elects whether to have the Introductory Visit conducted in person, by phone, or by email.¹

According to the Requestor, the primary purpose of the Introductory Visit is to facilitate the patient’s transition to home health services in an effort to increase compliance with the post-acute treatment plan. To that end, during the Introductory Visit the Liaison: (1) provides an overview of the home health experience; (2) gives the patient written materials that list the contact information for some of the Requestor’s administrative and clinical employees; and (3) shares pictures of members of the Requestor’s care team who will furnish the home health services.² The Liaison does not provide any type of

¹ The Requestor certified that the in-person Introductory Visit may take place in a hospital where the patient is receiving care, in a physician’s office, or in the patient’s home.

² If the Liaison does not conduct the Introductory Visit in person, the Liaison may, at the patient’s request, send the contact information and pictures of the care team via email.

diagnostic or therapeutic service reimbursed by Federal health care programs during the Introductory Visit, and does not leave any other items or materials with the patient.

Although the Liaison is a licensed practical nurse with knowledge of home health operations, the Requestor certified that the Liaison's services during the Introductory Visit do not require any clinical training. The Requestor further certified that the Liaison does not contact the patient prior to receiving notification from the physician or health care professional that the patient has selected the Requestor as his or her home health provider.

The Requestor certified that the Introductory Visit is not a covered service under Medicare or Medicaid, and similarly is not reimbursed by third-party payors. The Requestor further certified that it does not submit any claims for reimbursement to any Federal health care program or third-party payor for the Introductory Visit, does not claim costs associated with the Introductory Visit on any cost reports, and does not otherwise shift the burden of these costs to any Federal health care program, other payors, or patients.

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. 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.

Section 1128A(a)(5) of the Act (the “CMP”) provides for the imposition of civil monetary penalties against any person who offers or transfers remuneration to a Medicare or State health care program (including Medicaid) beneficiary that the benefactor knows or should know is likely to influence the beneficiary’s selection of a particular provider, practitioner, or supplier of any item or service for which payment may be made, in whole or in part, by Medicare or a State health care program (including Medicaid). The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs. Section 1128A(i)(6) of the Act defines “remuneration” for purposes of the CMP as including “transfers of items or services for free or for other than fair market value.” The OIG has previously taken the position that “incentives that are only nominal in value are not prohibited by the statute,” and has interpreted “nominal in value” to mean “no more than \$10 per item, or \$50 in the aggregate on an annual basis.” 65 Fed. Reg. 24,400, 24,410–11 (Apr. 26, 2000) (preamble to the final rule on Civil Money Penalties).

B. Analysis

The Federal anti-kickback statute is not implicated if remuneration is not offered, paid, solicited, or received. Similarly, the CMP is not implicated if remuneration is not offered or transferred to a Medicare or State health care program beneficiary. For purposes of this analysis, the threshold question is whether the Introductory Visits under the Arrangement constitute remuneration to patients.

For the following reasons, we believe that the Introductory Visits do not provide any actual or expected economic benefit to patients, and therefore do not constitute remuneration. First, during the Introductory Visits, patients receive only information about the Requestor’s employees, including photographs of patients’ care team members, and an overview of the home health experience. The primary purpose of these activities is to facilitate patients’ transitions to home health services in an effort to increase compliance with their post-acute treatment plans. Second, the Liaison does not provide any federally reimbursable diagnostic or therapeutic services during the Introductory Visits. Finally, the Introductory Visits provide a means to help ensure patients’ personal safety by familiarizing them with members of the care team who will later come into their homes. Although these features of the Arrangement may have some intrinsic value to patients because of the established care relationship they have with the Requestor as their selected home health provider, we believe the intangible worth to patients created by this Arrangement does not implicate the Federal anti-kickback statute or the CMP.

Insofar as the Introductory Visits have only some intrinsic value to patients and involve the simple provision of information, they differ from other visits or assessments by health

care providers that may constitute remuneration because they are reimbursable or provide services of more than nominal value to patients.³ Moreover, the Introductory Visits provided under the Arrangement are distinguishable from other potentially problematic arrangements because patients already have selected the Requestor as their home health provider when the Liaison contacts them, and the Introductory Visits are a logical and reasonable first step in the care relationships that have been established.

For the reasons stated above, we believe that the Introductory Visits do not constitute remuneration to patients. The Arrangement therefore does not implicate either the anti-kickback statute or the CMP.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Arrangement does not generate prohibited remuneration under the Federal anti-kickback statute. Accordingly, 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. In addition, the Arrangement does not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act.

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,

³ When determining whether a service has economic value to patients, we reiterate that the absence of a paying market for such service is not dispositive. Such absence could indicate that: (1) the service has little or no value; (2) the service is novel or emerging in the marketplace; or (3) the market has been distorted by the availability of free services.

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,

/Gregory E. Demske/

Gregory E. Demske
Chief Counsel to the Inspector General