



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: October 22, 2018

Posted: October 29, 2018

[Name and address redacted]

Re: OIG Advisory Opinion No. 18-12

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding the use of a “preferred hospital” network as part of Medicare Supplemental Health Insurance (“Medigap”) policies, whereby an insurance company would contract indirectly with hospitals for discounts on the otherwise-applicable Medicare inpatient deductibles for its policyholders and, in turn, would provide a premium credit of \$100 off the next renewal premium to policyholders who use a network hospital for an inpatient stay (the “Proposed Arrangement”). Specifically, you have inquired whether the Proposed Arrangement would constitute 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, although the Proposed 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”) would 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 Proposed Arrangement. In addition, the OIG would not impose administrative sanctions on [name redacted] under section 1128A(a)(5) 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], 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”) is a licensed offeror of Medigap policies. Requestor proposes to enter into an agreement with a preferred hospital organization, [name redacted] (the “PHO”), which has contracts with hospitals throughout the country (the “Network Hospitals”). Under these contracts, the Network Hospitals would provide discounts of up to 100 percent on Medicare inpatient deductibles incurred by Requestor’s Medigap plan policyholders (the “Policyholders”) that otherwise would be covered by Requestor. The discounts would apply only to the Medicare Part A inpatient hospital deductibles covered by the Medigap plans and not to any other cost-sharing amounts. The Network Hospitals would provide no other benefit to Requestor or its Policyholders as part of the Proposed Arrangement. Each time Requestor receives this discount from a Network Hospital, it would pay the PHO a fee for administrative services.

If Requestor’s Policyholders were to be admitted to a hospital other than a Network Hospital, Requestor would pay the full Part A hospital deductible, as provided under the applicable Medigap plan. The Proposed Arrangement would not affect the liability of any Policyholder for payments for covered services, whether provided by a Network Hospital or any other hospital. The PHO’s hospital network would be open to any accredited, Medicare-certified hospital that meets the requirements of applicable state laws and that contractually agrees to discount all or a portion of the Part A deductible for Policyholders. Further, Requestor certified that Policyholders’ physicians and surgeons would not receive any remuneration under the Proposed Arrangement in return for referring patients to a Network Hospital.

Requestor would return a portion of the savings resulting from the Proposed Arrangement directly to any Policyholder who had an inpatient stay at a Network Hospital. The savings would be shared with the Policyholder in the form of a \$100 credit towards the Policyholder's next renewal premium owed to Requestor. This feature of Requestor's Medigap plans would be announced to existing Policyholders in an initial notification letter as well as a program identification card containing an icon indicating the participation of the plan in the network. Policyholders also would receive information biannually regarding participation of the Network Hospitals. Requestor certified that these materials would make it clear that use of a non-Network Hospital would have no effect on a Policyholder's liability for any costs covered under the plan, nor would the Policyholder be penalized in any other way for the use of a non-Network Hospital.¹

Savings realized by Requestor under the Proposed Arrangement would be reflected in Requestor's annual experience exhibits (which reflect loss ratios) filed with the various state insurance departments that regulate the premium rates charged by Medigap insurers. Thus, the savings realized from the Proposed Arrangement would be taken into account when state insurance departments review and approve the rates.

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

¹ We rely on this certification regarding Requestor's disclosures to Policyholders of their rights to use any hospital without penalty. If it is incorrect, this opinion is without force and effect.

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.

The U.S. Department of Health and Human Services has promulgated safe harbor regulations that define practices that are not subject to the anti-kickback statute because such practices would be unlikely to result in fraud or abuse. See 42 C.F.R. § 1001.952. The safe harbors set forth specific conditions that, if met, assure entities involved of not being prosecuted or sanctioned for the arrangement qualifying for the safe harbor. However, safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the safe harbor. Two safe harbors potentially apply to the Proposed Arrangement. The safe harbor for waivers of beneficiary coinsurance and deductible amounts, 42 C.F.R. § 1001.952(k), permits hospitals to waive the Medicare Part A inpatient deductible in certain circumstances. Meanwhile, the safe harbor for reduced premium amounts offered by health plans, 42 C.F.R. § 1001.952(l), allows plans to reduce an enrollee's obligation to pay cost-sharing or premium amounts in certain circumstances.

Section 1128A(a)(5) of the Act 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 section 1128A(a)(5) of the Act as including "transfers of items or services for free or for other than fair market value."

B. Analysis

The Proposed Arrangement is a straightforward agreement by the Network Hospitals to discount the Medicare inpatient deductible for Requestor's Policyholders—an amount for which Requestor otherwise would be liable. The law is clear that prohibited remuneration under the anti-kickback statute may include waivers of Medicare cost-sharing amounts. Likewise, relief of a financial obligation may constitute a prohibited kickback. In addition, Requestor would pass back a portion of its savings, in the form of premium credits, to any Policyholder who has an inpatient stay at a Network Hospital. The premium credits would implicate not only the anti-kickback statute (as remuneration for selecting the Network Hospital) but also the civil monetary penalty prohibition on

inducements to beneficiaries. Accordingly, we must examine both prongs of the Proposed Arrangement.

1. Anti-kickback Statute

The Proposed Arrangement would not qualify for protection under either the safe harbor for waivers of beneficiary coinsurance and deductible amounts or the safe harbor for reduced premium amounts offered by health plans. The safe harbor for waivers of beneficiary coinsurance and deductible amounts would offer no protection to the Proposed Arrangement because that safe harbor specifically excludes such waivers when they are part of an agreement with insurers, such as Requestor, except in certain circumstances that are not applicable here. See 42 C.F.R. § 1001.952(k)(1)(iii). Similarly, the safe harbor for reduced premium amounts offered by health plans would offer no protection to the Proposed Arrangement. That safe harbor requires health plans to offer the same reduced cost-sharing or premium amounts to all enrollees, see 42 C.F.R. § 1001.952(l)(1), whereas, under the Proposed Arrangement, premium discounts would be offered only to those Policyholders who choose a Network Hospital.

Absent any safe harbor protection, we examine whether the Proposed Arrangement would pose more than a minimal risk of fraud and abuse under the anti-kickback statute. We conclude that the discounts on inpatient deductibles the Network Hospitals would provide to Requestor, and the premium credits Requestor would offer to Policyholders who have inpatient stays at the Network Hospitals, would present a sufficiently low risk of fraud or abuse under the anti-kickback statute for the following reasons.

First, neither the discounts nor the premium credits would increase or affect per-service Medicare payments. With the exception of certain pass-through payments and outlier payments, Part A payments for inpatient services are fixed; they are unaffected by beneficiary cost-sharing.

Second, the Proposed Arrangement would be unlikely to increase utilization. In particular, the discounts effectively would be invisible to Policyholders because they would apply only to the portion of the individual's cost-sharing obligations that his or her supplemental insurance otherwise would cover. In addition, we have long held that the waiver of fees for inpatient services is unlikely to result in significant increases in utilization. See, e.g., Preamble to Final Rule: OIG Anti-Kickback Provisions, 56 Fed. Reg. 35,952, 35,962 (July 29, 1991).

Third, the Proposed Arrangement should not unfairly affect competition among hospitals because membership in the PHO's hospital network would be open to any accredited, Medicare-certified hospital that meets the requirements of applicable state laws.

Fourth, the Proposed Arrangement would be unlikely to affect professional medical judgment because Policyholders' physicians and surgeons would receive no remuneration, and Policyholders would remain free to go to any hospital without incurring any additional out-of-pocket expense for their inpatient hospital stay.

Fifth, the Proposed Arrangement would operate transparently, as Requestor certified that it would clearly inform Policyholders of their freedom to choose any hospital without incurring additional liability or a penalty.

2. Civil Monetary Penalties Law

The premium credits also would implicate the prohibition on inducements to beneficiaries. Unlike incentives to enroll in an insurance plan, which do not implicate the prohibition, see Final Rule Revising OIG Civil Monetary Penalties, 65 Fed. Reg. 24,000, 24,407 (Apr. 26, 2000), the premium credits under the Proposed Arrangement would be offered to induce the Policyholders to select a particular provider (i.e., a Network Hospital) from a broader group of eligible providers. Such an inducement would fall within the prohibition. Id.

The definition of remuneration for purposes of section 1128A(a)(5) of the Act includes an exception for differentials in coinsurance and deductible amounts as part of a benefit plan design, as long as the differentials are properly disclosed to affected parties and meet certain other applicable requirements. See section 1128A(i)(6)(C) of the Act. This exception permits benefit plan designs under which plan enrollees pay different cost-sharing amounts depending on whether, for example, they use network or non-network providers. Although the premium credit would not technically be a differential in a coinsurance or deductible amount, it would have substantially the same purpose and effect as such a differential. We therefore conclude that the premium credit would present a sufficiently low risk of fraud or abuse under the prohibition on inducements to beneficiaries.

The Proposed Arrangement has the potential to lower Medigap costs for Policyholders who select a Network Hospital, without increasing costs for those who do not. Moreover, because savings realized from the Proposed Arrangement would be reported to the state insurance rate-setting regulator, the Proposed Arrangement has the potential to lower costs for all Policyholders.

Based on the totality of the facts and circumstances, and given the sufficiently low risk of fraud or abuse and the potential savings for beneficiaries, we would not impose administrative sanctions on Requestor under the anti-kickback statute or the prohibition on inducements to beneficiaries in connection with the Proposed Arrangement.

We note, however, that our opinion relates only to the application of the anti-kickback statute and the prohibition on inducements to beneficiaries. We have no authority and do not express any opinion as to whether the Proposed Arrangement would comply with other Federal laws and regulations, including those administered by the Centers for Medicare & Medicaid Services, or with any state laws, including state insurance laws.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Proposed 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 would 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 Proposed Arrangement. In addition, the OIG would not impose administrative sanctions on [name redacted] under section 1128A(a)(5) 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.

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 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] 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,

/Robert K. DeConti/

Robert K. DeConti
Assistant Inspector General for Legal Affairs