



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, unless otherwise approved by the requestor(s).]

Issued: December 28, 2023

Posted: January 3, 2024

[Address block redacted]

Re: OIG Advisory Opinion No. 23-12 (Favorable)

Dear [redacted]:

The Office of Inspector General (“OIG”) is writing in response to your request for an advisory opinion on behalf of [redacted] (“Requestor”), regarding a one-time, voluntary redemption offer to physician partners reaching age 67 to have their partnership units repurchased by the partnership over a 2-year period, contingent upon the physician partners’ agreement to retire from the practice of medicine (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”).

Requestor has certified that all of the information provided in the request, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties in connection with the Arrangement, and we have relied solely on the facts and information Requestor provided. We have not undertaken an independent investigation of the certified facts and information presented to us by Requestor. This opinion is limited to the relevant facts presented to us by Requestor in connection with the Arrangement. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Arrangement would generate prohibited remuneration under the Federal anti-kickback statute if the requisite intent were present, OIG will not impose administrative sanctions on Requestor in connection with the Arrangement under sections 1128A(a)(7) or 1128(b)(7) of the Act, as those sections relate to the commission of acts described in the Federal anti-kickback statute.

This opinion may not be relied on by any person¹ other than Requestor and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

Requestor is organized as a limited liability partnership that operates a hospital and wholly owns an entity that operates a second hospital (the “Hospitals”).² Requestor has two classes of partners: (i) the Class H unitholder, [redacted], a medical center entity that is wholly owned by a nonprofit corporation (the “Medical Center”); and (ii) the Class P unitholders, comprised of individual physicians with direct partnership interests (“Units”) in Requestor (“Physician Partners”).³

Requestor is organized pursuant to a partnership agreement that sets forth terms of the partnership, including eligibility requirements, and also, in relevant part, expressly allows Physician Partners to: (i) hold medical staff privileges at any location at any time (regardless of the competitive nature of the location); (ii) treat patients at any location at any time (regardless of the competitive nature of the location); and (iii) refer patients to any location at any time (regardless of the competitive nature of the location). In other words, Requestor certified that Physician Partners are not limited to practicing at the Hospitals or facilities owned or controlled by any partners of Requestor and are permitted to refer patients to any individual (e.g., physician, advanced practice provider, etc.) or facility regardless of whether the individual or facility is affiliated with Requestor, any of Requestor’s partners, or the Hospitals.

The partnership agreement permits the redemption of Units upon a Physician Partner’s voluntary retirement from the practice of medicine. The partnership agreement does not define or otherwise contain a mandatory retirement provision (e.g., requiring retirement at a particular age or if the Physician Partners reduce the number of days or hours that they work). According to Requestor, the lack of a defined retirement requirement has led to economic uncertainty for Requestor. While the partnership has redeemed all Units of all Physician Partners who have voluntarily retired thus far, it is difficult for Requestor to predict when the redemption-upon-retirement provisions will be exercised, and, as the Physician Partner population ages, Requestor could face a liquidity crisis if a large number of Physician Partners unexpectedly retire in close succession. Requestor certified that the Arrangement is designed to manage this economic uncertainty without mandating a retirement age for Physician Partners.

¹ We use “person” herein to include persons, as referenced in the Federal anti-kickback statute, as well as individuals and entities, as referenced in the exclusion authority at section 1128(b)(7) of the Act.

² As stated in Part IV below, we express no opinion with respect to the application of the physician self-referral law, section 1877 of the Act, to the Arrangement.

³ We have not been asked to opine on, and we express no opinion regarding, any arrangements between and among Requestor, the partners of Requestor, or any other person affiliated with Requestor, other than the Arrangement.

Under the Arrangement, Requestor offers Physician Partners the option at age 67 to have their Units redeemed in three equal increments over a 2-year period; in exchange, the Physician Partners agree to retire from the practice of medicine within 6 months of receiving their first redemption payment (the “Redemption Offer”).⁴ Acceptance of a Redemption Offer is voluntary, and the Redemption Offer is offered to all Physician Partners who meet the applicable age criterion, regardless of their referrals or any business they would otherwise generate. Physician Partners who decline the Redemption Offer can continue as partners (subject to meeting all partnership requirements) until retirement or death, at which point their Units may be redeemed pursuant to the terms of the partnership agreement.

The Redemption Offer for 2023 (*i.e.*, the initial year of the Arrangement) includes a one-time, voluntary offer extended to all Physician Partners aged 67 or older as of December 31, 2023.⁵ Going forward, Requestor anticipates that all Physician Partners attaining the age of 67 in a calendar year will receive a substantially similar Redemption Offer during the fall of the applicable calendar year.⁶ Under the Arrangement, Requestor provides eligible Physician Partners a reasonable period of time to determine whether to accept the Redemption Offer (*e.g.*, 30 to 60 days). At all times during the Arrangement, Physician Partners who accept the Redemption Offer enter into an agreement with Requestor, pursuant to which: (i) Requestor repurchases the Physician Partner’s Units in three equal increments over a 2-year period; and (ii) the Physician Partners retire from the practice of medicine within 6 months of receiving their first redemption payment (the “Redemption Offer Agreement”). According to Requestor, under the Arrangement, the value of the Units generally may increase over the 2-year redemption period such that the Physician Partners accepting the Redemption Offer may receive additional remuneration compared to a one-time payment for redemption of their Units upon retirement, as prescribed by the partnership agreement. Under the Arrangement, one-third of the Physician Partner’s Units are repurchased by Requestor on the initial redemption date specified in the Redemption Offer Agreement and on the first and second anniversaries of the initial redemption date. The repurchase amount is equal to the fair market value of the Physician Partner’s Units as of each repurchase date.⁷ Physician Partners who accept the Redemption Offer are required to sign a document stating that they will not, or will not be in a position to, make a referral (as that term is defined by the physician self-referral law) of patients to the Hospitals, the Medical

⁴ According to Requestor, Physician Partners are provided 6 months to effectuate their retirement to allow for the orderly winding down of their medical practices, consistent with state law, which requires physicians to provide patients reasonable notice of their intent to retire.

⁵ No Physician Partner has more than one opportunity to accept a Redemption Offer. If a Physician Partner to whom the Redemption Offer is extended declines to accept it, the Physician Partner does not have a future opportunity to accept a Redemption Offer.

⁶ Requestor does not guarantee that a Redemption Offer will be made in perpetuity. However, if a Redemption Offer is offered during a particular calendar year, it will be made available to all Physician Partners turning 67 during that calendar year, never a subset thereof.

⁷ We are precluded by statute from opining on whether fair market value shall be or was paid for goods, services, or property. Section 1128D(b)(3)(A) of the Act.

Center, or to any other Physician Partner as of the earlier of the date they retire or no longer satisfy the partnership agreement’s eligibility requirements, whichever comes first (the “No-Referral Certificate”).

Units repurchased under a Redemption Offer Agreement are offered to existing and new Physician Partners through annual partnership offerings. Requestor certified that such Units are offered equally among all Physician Partners who subscribe to the offering, whether existing or new Physician Partners, and without regard to age or the volume or value of referrals or other business generated for the Hospitals, the Medical Center, or the other Physician Partners.

II. LEGAL ANALYSIS

A. Law

The Federal anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of an individual to a person for the furnishing of, or arranging for the furnishing of, any item or service reimbursable under a Federal health care program.⁸ The statute’s prohibition also extends to remuneration to induce, or in return for, the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item reimbursable by a Federal health care program.⁹ For purposes of the Federal 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 is to induce referrals for items or services reimbursable by a Federal health care program.¹⁰ Violation of the statute constitutes a felony punishable by a maximum fine of \$100,000, imprisonment up to 10 years, or both. Conviction also will lead to exclusion from Federal health care programs, including Medicare and Medicaid. When a person commits an act described in section 1128B(b) of the Act, OIG may initiate administrative proceedings to impose civil monetary penalties on such person under section 1128A(a)(7) of the Act. OIG also may initiate administrative proceedings to exclude such person from Federal health care programs under section 1128(b)(7) of the Act.

B. Analysis

The Arrangement implicates the Federal anti-kickback statute because Requestor offers remuneration in the form of the Redemption Offer to eligible Physician Partners who refer patients, including Federal health care program beneficiaries, to other Physician Partners, the

⁸ Section 1128B(b) of the Act.

⁹ Id.

¹⁰ 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).

Medical Center, and the Hospitals, and who would continue to make such referrals for up to 6 months after the Physician Partners receive the first redemption payment under the Redemption Offer Agreement. No safe harbor applies to the Arrangement. Because the Arrangement implicates the Federal anti-kickback statute and is not protected by a safe harbor, we evaluate the Arrangement based on the totality of the facts and circumstances. For the following reasons, we believe the risk of fraud and abuse presented by the Arrangement is sufficiently low under the Federal anti-kickback statute for OIG to issue a favorable advisory opinion.

First, the Redemption Offer is made on an objective basis unrelated to the volume or value of referrals or other business generated by the Physician Partners. Specifically, the Redemption Offer, if extended in a given year, is extended to all Physician Partners upon attaining age 67 and is not conditioned on, or a reward for, Physician Partners making referrals to, or otherwise generating business for, the Medical Center, the Hospitals, or other Physician Partners. This aspect of the Redemption Offer reduces the risk that the Redemption Offer could result in steering and increased costs to Federal health care programs from overutilization or inappropriate utilization. Because the Redemption Offer is not conditioned on, or a reward for, referrals, the risk of overutilization also is lessened.

Second, remuneration paid pursuant to the Redemption Offer Agreement is unlikely to result in unfair competition. The terms of the Redemption Offer Agreement expressly include a No-Referral Certificate, prohibiting the Physician Partner from referring patients to the Medical Center, the Hospitals, or to a Physician Partner upon: (i) the Physician Partner's retirement date (which would occur within 6 months of the first payment under the Redemption Offer Agreement); or (ii) the date the Physician Partner no longer meets the requirements of the partnership agreement, whichever comes first. It is true that the Physician Partners who accept the Redemption Offer may continue to refer patients to the Medical Center, the Hospitals, and other Physician Partners for the 6-month period between the first payment under the Redemption Offer Agreement and retirement. However, because the period between the first payment under the Redemption Offer Agreement and retirement is time-limited and, as Requestor certified, is necessary to allow the Physician Partners who accept the Redemption Offer to wind down their medical practices consistent with state law requirements, it is unlikely that the Arrangement would cause the retiring Physician Partners to alter their referral patterns to benefit the Medical Center, the other Physician Partners, or the Hospitals during this 6-month period.

III. CONCLUSION

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Arrangement would generate prohibited remuneration under the Federal anti-kickback statute if the requisite intent were present, OIG will not impose administrative sanctions on Requestor in connection with the Arrangement under sections 1128A(a)(7) or 1128(b)(7) of the Act, as those sections relate to the commission of acts described in the Federal anti-kickback statute.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is limited in scope to the Arrangement and has no applicability to any other arrangements that may have been disclosed or referenced in your request for an advisory opinion or supplemental submissions.
- This advisory opinion is issued only to Requestor. This advisory opinion has no application to, and cannot be relied upon by, any other person.
- This advisory opinion may not be introduced into evidence by a person other than Requestor to prove that the person did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.
- This advisory opinion applies only to the statutory provisions specifically addressed in the analysis above. We express no opinion 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.
- We express no opinion herein regarding the liability of any person 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.

OIG will not proceed against Requestor 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. 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, OIG will not proceed against Requestor 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 OIG.

Sincerely,

/Susan E. Gillin/

Susan E. Gillin
Assistant Inspector General for Legal Affairs