



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. 23-15 (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 Requestor’s proposal to offer physician practices that are current customers of Requestor certain gift cards for referring potential new physician practice customers (the “Proposed Arrangement”). Specifically, you have inquired whether the Proposed Arrangement, if undertaken, would constitute 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 Proposed 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 Proposed 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 the Proposed Arrangement, if undertaken, would not generate prohibited remuneration under the Federal anti-kickback statute. Accordingly, OIG would not impose administrative sanctions on Requestor in connection with the Proposed Arrangement under section 1128A(a)(7) of the Act, as that section relates to the commission of acts described in the Federal anti-kickback statute, or the exclusion authority at section 1128(b)(7) of the Act, as that section relates 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 provides consulting services to physician practices. The services include practice optimization services such as helping practices uncover workflow issues, data analytics services, electronic health record consulting services, compliance monitoring services, bi-annual Medicare Merit-Based Incentive Payment System (“MIPS”) eligibility checks, annual MIPS-related training, auditing MIPS-related performance measures, and assistance with submitting MIPS data. Requestor acknowledged that some of these services could result in customers receiving higher MIPS reimbursements from Medicare, but Requestor certified that it does not advise its customers to take any action, or otherwise promote any activity, that would violate applicable billing or other rules or regulations. Requestor also certified that it receives a fee for its services that is unrelated to whether a customer receives a greater or lesser reimbursement as a result of Requestor’s services.

Under the Proposed Arrangement, Requestor would give its current customers who recommend Requestor’s services to prospective physician practice customers a \$25 gift card per recommendation. If the recommendation is successful (i.e., if the potential physician practice customer hires Requestor), Requestor would give the customer making the recommendation another \$50 gift card for that successful recommendation.

Requestor certified that it does not recommend to any customer the purchasing, leasing, or ordering of any item or service for which payment may be made in whole or in part under a Federal health care program. Requestor further certified that: (i) none of the services that Requestor furnishes are or would be paid for, in whole or in part, directly or indirectly, by a Federal health care program; (ii) Requestor would not provide any items or services outside of the Proposed Arrangement that may be paid for, in whole or in part, directly or indirectly, by a Federal health care program; and (iii) Requestor does not have an ownership or investment interest in any other entity that provides items or services that are paid for, in whole or in part, directly or indirectly, by a Federal health care program.

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

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.

reimbursable under a Federal health care program.² 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.³ 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.⁴ 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 Proposed Arrangement would involve three potential streams of remuneration: (i) Requestor would give gift cards to physician practice customers who recommend Requestor to potential physician practice customers; (ii) physician practice customers would pay Requestor for consulting services; and (iii) physician practice customers potentially would receive an opportunity to earn a fee as a result of the consulting services in the form of higher MIPS reimbursements from Medicare. However, the Proposed Arrangement does not implicate the Federal anti-kickback statute. The first stream of remuneration would not implicate the Federal anti-kickback statute because the gift cards Requestor would provide to its customers would not be in return for the physician practices making referrals of, purchasing, arranging for, or recommending services that are reimbursable in whole or in part by a Federal health care program. Requestor certified that: (i) none of the services that Requestor furnishes are or would be paid for, in whole or in part, directly or indirectly, by a Federal health care program; (ii) Requestor would not provide any items or services outside of the Proposed Arrangement that may be paid for, in whole or in part, directly or indirectly, by a Federal health care program; and (iii) Requestor does not have an ownership or investment interest in any other entity that provides any items or services that are paid for, in whole or in part, directly or indirectly, by a Federal health care program.

² Section 1128B(b) of the Act.

³ Id.

⁴ 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).

Similarly, neither the second nor the third stream of remuneration would implicate the Federal anti-kickback statute. Requestor receives payments from physician practice customers for providing consulting services to those customers, but Requestor certified that it does not recommend to any customer the purchasing, leasing, or ordering of any item or service for which payment may be made in whole or in part under a Federal health care program. Additionally, those consulting services might result in higher MIPS-related payments from the Medicare program, giving customers the opportunity to earn a fee, but any remuneration those customers would receive under the Proposed Arrangement would not be in return for referrals for, the purchase of, or arranging for or recommending the purchase of, any item or service for which payment may be made in whole or in part under a Federal health care program.

III. CONCLUSION

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement, if undertaken, would not generate prohibited remuneration under the Federal anti-kickback statute. Accordingly, OIG would not impose administrative sanctions on Requestor in connection with the Proposed Arrangement under section 1128A(a)(7) of the Act, as that section relates to the commission of acts described in the Federal anti-kickback statute, or the exclusion authority at section 1128(b)(7) of the Act, as that section relates 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 Proposed 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 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.

- 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 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. 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 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 OIG.

Sincerely,

/Susan A. Edwards/

Susan A. Edwards
Assistant Inspector General for Legal Affairs