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: October 10, 2023

Posted: October 13, 2023

[Address block redacted]

Re: OIG Advisory Opinion No. 23-07 (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 pay bonuses to its employed physicians based on net profits derived from certain procedures performed by the physicians (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 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 person[1] 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 operates a multi-specialty physician practice that has approximately eleven physician employees (the "Physician Employees"). Requestor furnishes services for which payment is made by Federal health care programs. The Physician Employees receive certain employment compensation[2] from Requestor in exchange for the services they provide on behalf of Requestor, which include services for which payment may be made under Federal health care programs.

Under the Proposed Arrangement, Requestor proposes to implement an employment compensation bonus methodology for each of the Physician Employees, in addition to their base employment compensation, which would be in exchange for the services they provide on behalf of Requestor (including services for which payment may be made under Federal health care programs).[3] Specifically, when a Physician Employee performs outpatient surgical procedures at either of two ambulatory surgical centers ("ASCs") operated by Requestor[4] in a given calendar quarter, the Physician Employee would receive a bonus in the form of 30 percent of Requestor's net profits from the ASC facility fee collections attributable to that physician's procedures performed at the ASC for that quarter.

Requestor certified that all Physician Employees would be bona fide employees of Requestor in accordance with the definition of the term "employee" set forth at 26 U.S.C. § 3121(d)(2).

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[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] Requestor has not asked us to opine on, and we express no opinion regarding, compensation to Physician Employees outside of the Proposed Arrangement.

[3] Requestor certified that it would not furnish any "designated health services," as defined at 42 C.F.R. § 411.351, and that the Proposed Arrangement would not implicate the physician self-referral law, section 1877 of the Act. As stated below, we express no opinion with respect to the application of the physician self-referral law to the Proposed Arrangement.

[4] Requestor plans to operate the two ASCs as corporate divisions of Requestor (i.e., as divisions within the same legal entity as Requestor and not as subsidiaries of Requestor). Requestor certified that each of the ASCs would be a "distinct entity" (pursuant to the definition of "ASC" at 42 C.F.R. § 416.2) and would otherwise comply with Medicare conditions for coverage and other requirements applicable to ASCs. Requestor has not asked us to opine on, and we express no opinion regarding, remuneration related to any corporate restructuring of Requestor or any ownership distributions provided by Requestor.

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.[5] 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.[6] 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.[7] 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.

Congress has developed several statutory exceptions to the Federal anti-kickback statute.[8] In addition, the U.S. Department of Health and Human Services has promulgated safe harbor regulations that specify certain practices that are not treated as an offense under the Federal anti-kickback statute and do not serve as the basis for an exclusion.[9] However, safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the safe harbor. Compliance with a safe harbor is voluntary. Arrangements that do not comply with a safe harbor are evaluated on a case-by-case basis.

The statutory exception and regulatory safe harbor for employees are potentially applicable to the Proposed Arrangement. The statutory exception protects "any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for

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[5] Section 1128B(b) of the Act.

[6] Id.

[7] 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).

[8] Section 1128B(b)(3) of the Act.

[9] 42 C.F.R. § 1001.952.

employment in the provision of covered items or services."[10] The safe harbor regulations provide that the term "remuneration," as used in the Federal anti-kickback statute, does not include "any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs."[11] For purposes of the employees safe harbor, the term "employee" has the same meaning as it does for purposes of 26 U.S.C. § 3121(d)(2).[12]

B. Analysis

Under the Proposed Arrangement, Requestor would offer and pay each Physician Employee remuneration in the form of a quarterly bonus equal to 30 percent of Requestor's net profits from Requestor's ASC facility fee collections attributable to that physician's procedures performed at either of Requestor's ASCs for the preceding quarter (in addition to base employment compensation). When the relevant ASC procedures are referred by the Physician Employee and are reimbursable by a Federal health care program, the Federal anti-kickback statute would be implicated.

However, we conclude that the bonus compensation under the Proposed Arrangement would be protected by the statutory exception and regulatory safe harbor for employees because: (i) Requestor certified that the Physician Employees would be bona fide employees of Requestor in accordance with the definition of that term set forth at 26 U.S.C. § 3121(d)(2);[13] and (ii) the bonus compensation would constitute an amount paid by an employer to an employee for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs.

We note that a similar arrangement involving bonus payments to independent contractor physicians or other nonemployees or under a different corporate structure (in which, for example, the physicians were owners of the ASCs and paid themselves the bonuses contemplated by the Proposed Arrangement as ownership distributions) may raise fraud and abuse concerns under the Federal anti-kickback statute. Payment structures that tie compensation to profits generated from services furnished to patients referred by the compensated party are suspect under the Federal anti-kickback statute. Here, however, because the Proposed Arrangement would satisfy the statutory exception and regulatory safe harbor for employees, the remuneration exchanged under the Proposed Arrangement would not constitute prohibited remuneration under

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[10] Section 1128B(b)(3)(B) of the Act.

[11] 42 C.F.R. § 1001.952(i).

[12] Id.

[13] Advisory opinions do not address whether an individual is a bona fide employee. Section 1128D(b)(3)(B) of the Act. Thus, for purposes of this advisory opinion, we rely on Requestor's certification that the Physician Employees would be bona fide employees in accordance with the definition of that term set forth at 26 U.S.C. § 3121(d)(2).

the Federal anti-kickback statute despite the potential risks of fraud and abuse this type of compensation generally could present.

Finally, in issuing this advisory opinion, we rely on Requestor's certification that the Proposed Arrangement would not implicate the physician self-referral law, section 1877 of the Act. Although we express no opinion with respect to the application of the physician self-referral law to the Proposed Arrangement, we note that if the Proposed Arrangement would violate that law, the request for this advisory opinion would pose a hypothetical situation and thus would not qualify as an advisory opinion request.[14]

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 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 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.

[14] See 42 C.F.R. § 1008.15(b).

- 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
Acting Assistant Inspector General for Legal Affairs