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: July 23, 2012

Posted: July 30, 2012

[Name and address redacted]

Re: OIG Advisory Opinion No. 12-09

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding reduced-rate arrangements for the provision of therapy services at veterans' homes operated by [name redacted] (the "Arrangements"). Specifically, you have inquired whether the Arrangements 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.

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 Arrangements 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") 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 Arrangements. This opinion is limited to the Arrangements 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 "Board") is responsible for the care and assistance of [State's name redacted] (the "State's") veterans and their spouses. The Board operates four veterans' homes, including [name redacted] ("Home A"), [name redacted] ("Home B"), [name redacted] ("Home C"), and [name redacted] ("Home D") (together, the "Veterans' Homes"). The Veterans' Homes are long-term care facilities that provide medical, clinical, and nursing services. By State statute, the Board is the governing authority of all four facilities and solely responsible for the operation and maintenance of the Veterans' Homes. See [citation redacted]. The Veterans' Homes are not joint ventures or otherwise partnered with private entities.

Under the Arrangements, contractors provide physical therapy, occupational therapy, and speech pathology services (together, "Therapies") to the Veterans' Homes' residents. In accordance with State law, the Board issued a Request for Proposals ("RFP") to prospective contractors before entering into the Arrangements. As a general practice, State agencies are required to award contracts through competitive sealed bidding, a process that requires the agencies to provide adequate public notice prior to the bid opening date. The Board is not required to select the contractor offering the lowest cost proposal but must select the contractor who, in the Board's discretion, offers the proposal most advantageous to the State and its veterans. The Board certified that it complied with all bid requirements with respect to the Arrangements.

The Board issued one RFP for all four Veterans' Homes. The RFP requested a fixed price for each unit of therapy to be provided to residents at the Veterans' Homes and included the following payer conditions:

- For Therapies rendered to residents who either have been rated as in need of nursing home care for a U.S. Department of Veterans Affairs (the "VA") adjudicated service-connected disability, or have a singular or combined service-connected rating of 70% or more based on one or more service-connected disabilities or a rating of 100% disability based on individual unemployability

(collectively, "70% Service-Connected Veterans"), the Board is invoiced directly, regardless of whether the 70% Service-Connected Veteran is otherwise insured. The Board is solely responsible for payment.[1]

- For Therapies rendered to residents who are not 70% Service-Connected Veterans and who are Medicare, Medicaid, or third-party payer beneficiaries, the awarded bidder bills the insurer. Any remaining cost-sharing amount is invoiced directly to the resident beneficiary, who is in turn responsible for the payment. The Board is not responsible for any part of the payment.

- For Therapies rendered to residents who are not 70% Service-Connected Veterans and who are uninsured, the uninsured resident is invoiced directly and is individually responsible for payment of Therapies received. The Board is not responsible for any part of the payment.

Accordingly, the Board is solely responsible for expenses and costs incurred for Therapies rendered to 70% Service-Connected Veterans. For all non-70% Service-Connected Veterans, insurers and individual residents are responsible for payment, as applicable.

The Board reviewed the five proposals submitted and determined which contractors were responsive (i.e., conforming to the criteria of the RFP) and responsible (i.e., possessing the capability to fully perform Therapies and the reliability to assure good faith performance). The Board then compared the proposals on the basis of cost for Therapies. One proposal was rejected for failure to comply with the terms of the RFP.

The Board awarded contracts to two bidders. Both bidders offered to provide Therapies to non-70% Service-Connected Veterans at the Centers for Medicare and Medicaid Services Physician Fee Schedule ("Medicare Fee Schedule") rate, and both bidders submitted a rate for Therapies rendered to 70% Service-Connected Veterans that is lower than the Medicare Fee Schedule rate for Therapies. For Homes A and D, the Board awarded rights to provide Therapies for the duration of the contract to [name redacted] ("Contractor 1"), and for Homes B and C, the Board awarded rights to provide Therapies for the duration of the contract to [name redacted] ("Contractor 2") (together, the "Contractors"). The Board certified that each of the reduced rates offered by the Contractors, and also included in their contracts for Therapies with the Board, represents

[1] The Board pays for these Therapies from its budget, which is funded in part with State funds and in part with per diem payments received from the VA for all 70% Service-Connected Veterans, in accordance with 38 C.F.R. Part 51.

fair market value,[2] and each is above the respective Contractor's costs to provide the Therapies.[3]

All residents receiving Therapies in the Veterans' Homes (or their designated family members) may request a provider other than Contractor 1 or Contractor 2, as applicable. In those instances, Veterans' Home personnel assist the resident in obtaining Therapies from an outside source and ensure that a written agreement is entered into between the requested provider and the specific resident.[4]

Only Veterans' Homes' physicians[5] are able to order Therapies; Therapies may not be ordered by the Contractors or their employees. The Board certified that the physicians have no financial interest in the contracts with the Contractors. In addition, the Board certified that, to the best of its knowledge, the Veterans' Homes' physicians have no financial relationships with the Contractors.

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

[2] We are precluded by statute from opining on whether fair market value shall be or was paid for goods, services, or property. See 42 U.S.C. § 1320a-7d(b)(3)(A).

[3] Although the Contractors are not requestors of this advisory opinion, the Board certified as to these facts by providing letters from each of the Contractors in which the Contractors certified that the rates for Therapies in their responses to the RFP, and subsequently included in their contracts for Therapies with the Board, are fair market value and exceed their respective costs for providing Therapies to the residents. For purposes of this advisory opinion, we rely on these certifications regarding the Contractors' rates. If the Contractors' rates are contrary to, or inconsistent with, these certifications, this advisory opinion is without force and effect.

[4] The Board stated that, while it is obligated to respect residents' (and their families') choice of alternative provider, that choice is not frequently exercised.

[5] No opinion has been sought, and we express no opinion, about the financial relationship between the Board and the physicians who care for Veterans' Homes' residents.

"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.

B. Analysis

As we state in OIG's 2008 Supplemental Compliance Program Guidance for Nursing Homes, "if any direct or indirect link exists between a price offered by a supplier or provider to a nursing facility for items or services that the nursing facility pays for out-of-pocket and referrals of Federal business for which the supplier or provider can bill a Federal health care program, the anti-kickback statute is implicated." 73 Fed. Reg. 56,832, 56,844 (Sept. 30, 2008). Similarly, here, the Board could be giving the Contractors access to Federal health care program business in the Veterans' Homes[6] in exchange for discounted rates on Therapies for which the Board is responsible to pay out of its own funds—namely, Therapies rendered to 70% Service-Connected Veterans.

As we explain in various forms of guidance,[7] our concern with such "swapping" arrangements is the purposeful discounting of a referral source's out-of-pocket and/or other business to induce the referral of Federal health care program business. In

[6] While the Contractors do not have exclusive rights to serve residents in the Veterans' Homes, it is clear that the Contractors are able to provide services to many residents as a direct result of the contracts with the Board. In effect, through the contracts, the Board refers its residents to the Contractors for Therapies.

[7] See, e.g., OIG Advisory Opinions 99-2, 99-13, and 10-26; OIG's September 22, 1999 letter on Discount Arrangements Between Clinical Labs and SNFs; and OIG's April 20, 2000 letter on Discount Arrangements Involving Ambulance Companies, Hospitals, and Skilled Nursing Facilities.

evaluating whether an improper nexus exists between the discounted business and referrals of Federal health care program business in a particular arrangement, we look for indicia that the discounted rate is not commercially reasonable in the absence of other, non-discounted business. For example, rates that are below a provider's total costs of providing services give rise to an inference that the provider may be swapping the below-cost rates on business for which the buyer bears the business risk in exchange for separately billable, non-discounted Federal health care program business. Another pricing arrangement that raises significant concerns is one that involves discounted prices to one buyer that are lower than the prices the provider offers to other buyers with similar volumes of business, but no potentially available separately billable Federal health care program business. Other suspect practices include, but are not limited to, discounts that are coupled with exclusive provider agreements and discounts or other pricing schemes (such as capitation arrangements) made in conjunction with explicit or implicit agreements to refer other available Federal health care program business. In such situations, the provider can recoup losses incurred on the discounted business, potentially through overutilization or abusive billing practices.

We conclude that the Arrangements do not give rise to an inference of an improper nexus between the discounted business and referrals of Federal health care program business. Although the Board is in a position to refer business to the Contractors, the Board certified that both rates for 70% Service-Connected Veterans represent fair market value and exceed each Contractors' respective costs to provide the Therapies. In these circumstances, the risk that the discounts on Therapies for 70% Service-Connected Veterans are tied to, or conditioned on, referrals of Federal health care program business is reduced.

Having concluded that the discounts here do not give rise to the inference that an improper nexus exists between the discounted rates offered for 70% Service-Connected Veterans and referrals of Federal business, we must examine the totality of facts and circumstances to determine the extent of the risk posed by the Arrangements. Based on the totality of facts and circumstances described herein, and for the reasons stated below, we conclude that the Arrangements present a sufficiently low risk of fraud and abuse in connection with the anti-kickback statute.

First, the Arrangements flow from an open, competitive RFP process that the Board conducted in accordance with [citation redacted]. State law authorizes and directs the Board to operate and manage the Veterans' Homes. States should have sufficient flexibility to organize such veterans' services in an efficient and economical manner. Issuing an RFP for Therapies reasonably falls within Board's statutory authority and appears calculated to meet the Board's statutory obligation to care for the Veterans' Homes' residents. Under these circumstances, we believe it is within the Board's

discretion to select the contractors who offer the proposals that are the most advantageous to the State and its veterans.[8]

Second, the risk that the Arrangements will result in inappropriate utilization is low, because Therapies may be ordered only by Veterans' Homes' physicians—none of whom has outside financial relationships with the Contractors—and not by the Contractors or their employees. Moreover, residents who are Federal health care program beneficiaries are responsible for paying cost-sharing amounts for Therapies received, and therefore have a financial incentive to monitor against the provision of unnecessary services.[9]

Third, the Arrangements are not likely to have a negative effect on patient care. The Contractors met all the terms of the RFPs, and the Board determined that the Contractors were likely to fully and reliably render Therapies at each Veterans' Home.

Fourth, the Arrangements should not have an adverse impact on competition. The Board held an open, competitive RFP process, pursuant to which the Board determined that the lowest responsive and responsible bidders were the Contractors. Under these circumstances, we believe it is within the Board's discretion to conclude it would be an improvident use of the public fisc to select a bidder that would charge more for Therapies.

Fifth, the State receives the full benefit of the discounted Therapies. One of the core evils addressed by the kickback and bribery statutes, whether involving public or private business, is the abuse of a position of trust, such as the ability to award contracts or business on behalf of a principal for personal financial gain. Here, the Board is a state agency, and the benefit of the financial savings it realizes under the Arrangements inure to the State's citizens in the form of conserved State resources. While this factor would not protect an arrangement that posed a significant risk of overutilization or other harms associated with violations of the anti-kickback statute, we consider it along with other factors weighing in favor of the Arrangements.

Importantly, we note that there is no ancillary or unrelated remuneration offered or paid by the Contractors to the Board. We might have reached a different result if the

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[8] We express no opinion regarding any billing or claims submission by the Contractors, nor do we express any opinion regarding the application of the exclusion authority at section 1128(b)(6)(A) of the Act if, as a result of the charges to Veterans' Homes under the Arrangements, the Contractors bill Medicare or Medicaid substantially more than they usually bill other customers.

[9] The routine waiver of cost-sharing amounts would itself implicate the anti-kickback statute and subject the Contractors to possible sanctions. Nothing in this opinion would protect the Contractors or any other party from sanctions in such circumstances.

Contractors had not competed solely on the basis of being the most responsive and responsible bidders for Therapies, for example, by offering to the Board some remuneration not directly related to the provision of Therapies, such as free physical therapy services for the Board's employees, or free durable medical equipment for the Veterans' Homes.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Arrangements 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 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 Arrangements. This opinion is limited to the Arrangements 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 Arrangements, 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 arrangements 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 Arrangements 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 Arrangements 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 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