



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: April 1, 2014

Posted: April 8, 2014

[Name and address redacted]

Re: Final Notice of Termination of OIG Advisory Opinion No. 11-18

Dear [Name redacted]:

We are writing in reference to Office of Inspector General (“OIG”) Advisory Opinion No. 11-18, which was issued to [name redacted] (the “Requestor”) on November 30, 2011. In OIG Advisory Opinion No. 11-18 we concluded that, although the Requestor’s then-proposed arrangement to operate an online service that would facilitate the exchange of information between health care practitioners, providers, and suppliers (the “Arrangement”) could potentially generate prohibited remuneration under the Federal 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 the Requestor under sections 1128(b)(7) or 1128A(a)(7) of the Social Security Act (the “Act”) (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Arrangement.

Critical to our decision not to impose administrative sanctions on the Requestor in connection with the Arrangement was our conclusion that, based on the facts as certified by the Requestor and set forth in OIG Advisory Opinion No. 11-18, Section I, Factual Background, the Arrangement’s fee structure would be unlikely to influence an Ordering Health Professional’s¹ referral decisions in a material way. In accordance with our right to reconsider the questions and issues raised in advisory opinions, described both at 42 C.F.R. § 1008.45 and in OIG Advisory Opinion No. 11-18, we have reconsidered this

¹ Capitalized terms not otherwise defined herein are defined in OIG Advisory Opinion No. 11-18.

conclusion. Specifically, we now conclude that the financial incentive provided to Ordering Health Professionals under the Arrangement could induce the Ordering Health Professionals to select Trading Partners rather than Non-Trading Partners, particularly with respect to services the Ordering Health Professionals order with a high degree of frequency, such as laboratory tests.

The OIG continues to believe that the efficient exchange of health information between health professionals is a laudable goal. However, when evaluating an advisory opinion request regarding an exchange that involves referrals of Federal health care program business, the OIG also must consider whether the means used to achieve that goal present more than a minimal risk of fraud and abuse under the anti-kickback statute.

Under the Arrangement, Ordering Health Professionals who purchase the Coordination Service Package receive a discount on their monthly EHR Service subscription fees. Each time an Ordering Health Professional uses the Coordination Service to make a referral to a Non-Trading Partner, the discount is reduced by an amount equal to or less than \$1.00, until it disappears entirely. We concluded in OIG Advisory Opinion No. 11-18 that, although the Arrangement's fee structure could provide a financial incentive to Ordering Health Professionals to refer to Trading Partners rather than Non-Trading Partners, a number of factors, in combination, adequately reduced the risk that the financial incentive provided to Ordering Health Professionals could be an improper payment to induce referrals of Federal health care program business. Among those factors were that the discount, standing alone, would not induce an Ordering Health Professional to refer to any particular person or entity, because the per-referral reductions to the discount are low and are capped at the amount of the discount.

We have since reconsidered our conclusion. We no longer find that the factors to which we cite in OIG Advisory Opinion No. 11-18 are sufficient to mitigate against the risk that the discount could be an improper payment to induce referrals of Federal health care program business, particularly in the context of high-volume services, such as laboratory tests. Although the discount offered under the Arrangement may not influence an Ordering Health Professional to refer a patient to, for example, a Trading Partner specialist versus a Non-Trading Partner specialist, it may influence an Ordering Health Professional to choose a Trading Partner for services the Ordering Health Professional orders with a high degree of frequency, because ordering those services from a Non-Trading Partner effectively would require the Ordering Health Professional to forfeit the amount of the discount.

By letter dated October 1, 2013, the OIG provided the Requestor with a notice of intent to modify or terminate OIG Advisory Opinion No. 11-18 (the "Notice"). Pursuant to 42 C.F.R. § 1008.45, the OIG also provided the Requestor with a reasonable opportunity to respond to the Notice.

The Requestor subsequently informed the OIG that it would not propose a modification to the financial incentive provided to Ordering Health Professionals under the Arrangement. Because we now find that the financial incentive provided to Ordering Health Professionals under the Arrangement could induce Ordering Health Professionals to refer to Trading Partners rather than Non-Trading Partners, we can no longer conclude that the risk that the remuneration provided under the Arrangement is an improper payment to induce referrals of Federal health care program business is sufficiently low. Therefore, we hereby terminate OIG Advisory Opinion No. 11-18 effective immediately.

Pursuant to 42 C.F.R. § 1008.45(a), this letter serves as final notice of the OIG's termination of OIG Advisory Opinion No. 11-18; any definitive conclusion regarding the existence of an anti-kickback violation requires a determination of the parties' intent, which determination is beyond the scope of the advisory opinion process and this final notice. The termination of OIG Advisory Opinion No. 11-18 means that the advisory opinion is revoked as of the termination date and is no longer in force and effect after the termination date. See 42 C.F.R. § 1008.45(b)(2). This termination is without prejudice to the Requestor's right to submit an advisory opinion request with respect to any other existing arrangement or arrangement that the Requestor in good faith plans to undertake.

Sincerely,

/Gregory E. Demske/

Gregory E. Demske
Chief Counsel to the Inspector General