



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: May 20, 2022

Posted: May 25, 2022

[Address block redacted]

Re: OIG Advisory Opinion No. 22-11

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 its proposal to employ [redacted] (the “Excluded Individual”), an individual who is excluded from participation in Federal health care programs, to perform marketing tasks relating to workers’ compensation programs (the “Proposed Arrangement”). Specifically, you have inquired whether the Proposed Arrangement, if undertaken, would constitute grounds for the imposition of sanctions under the civil monetary penalty provision at section 1128A(a)(6) of the Social Security Act (the “Act”).

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 and other publicly available information that we include in Section I. 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, supplemental submissions, and other publicly available information, we conclude that the Proposed Arrangement would not constitute grounds for the imposition of sanctions under section 1128A(a)(6) of the Act.

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 a medical group practice located in [redacted] (the “State”) that specializes in pain management. More than 70 percent of Requestor’s patients are being treated for injuries covered by a workers’ compensation (“WC”) program. Requestor certified that none of these WC programs are Federal health care programs as defined under section 1128B(f) of the Act. Notwithstanding the foregoing, Requestor also treats—and submits claims for items and services provided to—Federal health care program beneficiaries.

In 2016, the Excluded Individual, who was a licensed chiropractor, pleaded guilty to conspiracy, in violation of 18 U.S.C. § 371, in relation to receiving illegal kickbacks for referring WC patients to a certain hospital for spinal surgery. In April 2017, the State’s WC department suspended the Excluded Individual from participating in the State WC system as a physician, practitioner, or provider. The State’s Medicaid program excluded the Excluded Individual in May 2019, and the OIG excluded the Excluded Individual in March 2021, pursuant to section 1128(a)(3) of the Act.

Requestor hired the Excluded Individual as an administrative employee in March 2019. In this role, the Excluded Individual provided administrative services that related, at least in part, to Federal health care program beneficiaries.² Requestor placed the Excluded Individual on unpaid administrative leave in May 2021 and submitted a self-disclosure to the OIG in connection with Requestor’s employment of the Excluded Individual.

Under the Proposed Arrangement, Requestor would reestablish the Excluded Individual’s employment as a WC payor relations representative. In this role, the Excluded Individual’s primary job responsibilities would be marketing Requestor’s medical services to WC payors and attorneys who work with individuals covered by WC payors (“WC Attorneys”) in the southern part of the State. Specifically, Requestor certified that the Excluded Individual’s responsibilities primarily would consist of meeting with representatives from WC payors and WC Attorneys to: (i) explain Requestor’s services and the benefits of working with Requestor; and (ii) market Requestor’s ability to provide medical services to their clients. The Excluded Individual also would develop marketing materials, research potential contacts within the State WC industry, participate in WC industry groups, and provide information on WC to Requestor’s management. He also would work on a team that fields billing and payment inquiries from WC payors.

Requestor certified that the Excluded Individual would not provide marketing, billing, or any other services to Federal health care program beneficiaries or to any providers or suppliers who

¹ We use “person” herein to include persons as referenced in the exclusion authority at section 1128(b)(7) of the Act.

² This advisory opinion does not address potential liability based on Requestor’s past employment of the Excluded Individual.

refer Federal health care program beneficiaries to Requestor. Further, because the Excluded Individual would work from one of Requestor’s administrative offices where no patient visits occur, he would have no contact with any Federal health care program beneficiaries. Requestor certified that the Excluded Individual would not provide items or services, directly or indirectly, for which payment may be made by a Federal health care program. Requestor also certified that it would create a separate payroll division dedicated to WC, which would pool revenues derived from the reimbursement Requestor receives only from non-Federal health care program payors. The Excluded Individual’s salary, benefits, and expenses would be paid exclusively from this separate WC payroll.

II. LEGAL ANALYSIS

A. Law

Any person that arranges or contracts with an individual or entity that the person knows or should know is excluded from participation in a Federal health care program, for the provision of items or services for which payment may be made under such a program, is subject to civil monetary penalty liability under section 1128A(a)(6) of the Act.

In 2013, the OIG published the Updated Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs (the “SAB”) where we stated that, “if Federal health care programs do not pay, directly or indirectly, for the items or services being provided by the excluded individual, then a provider that participates in Federal health care programs may employ or contract with an excluded person to provide such items or services.”³

B. Analysis

Requestor certified that, under the Proposed Arrangement, the Excluded Individual would not provide items or services directly or indirectly to Federal health care program beneficiaries and would be paid from segregated payroll funds derived only from the reimbursement from non-Federal health care program WC payors.⁴ Requestor also specifically certified that Federal health care programs would not pay, directly or indirectly, for the Excluded Individual’s salary. Accordingly, the employment of the Excluded Individual under the Proposed Arrangement would not involve the provision of items or services for which payment may be made under a

³ OIG, Updated Special Advisory Bulletin on the Effect of Exclusion From Participation in Federal Health Care Programs, 78 Fed. Reg. 27,242 (May 9, 2013), <https://www.govinfo.gov/content/pkg/FR-2013-05-09/pdf/2013-11055.pdf>.

⁴ Although Requestor has elected to pay the Excluded Individual from segregated payroll funds derived only from non-Federal health care program payors, we note that the SAB says, “[a] provider need not maintain a separate account from which to pay the excluded person, as long as no claims are submitted to or payment is received from Federal health care programs for items or services that the excluded person provides and such items or services relate solely to non-Federal health care program patients.”

Federal health care program and therefore would not implicate our civil monetary penalty authority at section 1128A(a)(6) of the Act.

There are several caveats with respect to our conclusion about the Proposed Arrangement. First, this conclusion in no way affects the scope of the Excluded Individual's exclusion from Federal health care programs. In addition, we offer no opinion on whether the Proposed Arrangement would implicate or violate the terms of the Excluded Individual's suspension from participation in the State WC system. Finally, we believe the Proposed Arrangement raises concerns from a compliance perspective. Requestor proposes to employ the Excluded Individual—someone convicted of receiving illegal kickbacks in exchange for the referral of WC patients—in a marketing role that is designed to encourage WC payors and WC Attorneys to refer their clients to Requestor for medical services. Given the Excluded Individual's history of participating in kickback schemes involving referrals of WC patients, his employment presents a meaningful compliance risk for Requestor.

III. CONCLUSION

Based on the relevant facts certified in your request for an advisory opinion, supplemental submissions, and other publicly available information, we conclude that the Proposed Arrangement would not constitute grounds for the imposition of sanctions under section 1128A(a)(6) of the Act.

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.

The 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. 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 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 the OIG.

Sincerely,

/Robert K. DeConti/

Robert K. DeConti
Assistant Inspector General for Legal Affairs