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: August 24, 2017

Posted: August 31, 2017

[Name and address redacted]

SEE ALSO ATTACHED DISTRIBUTION LIST

Re: OIG Advisory Opinion No. 17-04

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding the use of a "preferred hospital" network as part of Medicare Supplemental Health Insurance ("Medigap") policies, whereby insurance companies indirectly contract with hospitals for discounts on the otherwise-applicable Medicare inpatient deductibles for their policyholders and, in turn, provide a premium credit of $100 to policyholders who use a network hospital for an inpatient stay (the "Arrangement"). Specifically, you have inquired whether the Arrangement constitutes grounds for the imposition of sanctions under the civil monetary penalty provision prohibiting inducements to beneficiaries, section 1128A(a)(5) of the Social Security Act (the "Act"), or under the exclusion authority at section 1128(b)(7) of 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 Arrangement 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 the entities named on the attached distribution list 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 Arrangement. In addition, the OIG will not impose administrative sanctions on the entities named on the attached distribution list under section 1128A(a)(5) of the Act in connection with the Arrangement. This opinion is limited to the Arrangement 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 the entities named on the attached distribution list, the requestors 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

The entities named on the attached distribution list ("Requestors") are wholly owned subsidiaries of a single parent company. Requestors are licensed offerors of Medigap policies. Requestors have entered into an agreement with a preferred hospital organization, [name redacted] (the "PHO"), which has contracts with hospitals throughout the country ("Network Hospitals"). Under these contracts, Network Hospitals provide discounts of up to 100 percent of the Medicare inpatient deductibles incurred by Requestors' Medigap plan policyholders (the "Policyholders") that otherwise would be covered by Requestors. The discounts apply only to the Medicare Part A inpatient hospital deductibles covered by the Medigap plans, and not to any other cost-sharing amounts. The Network Hospitals provide no other benefit to Requestors or the Policyholders under the Arrangement. Each time Requestors receive this discount from a Network Hospital, Requestors pay the PHO a fee for administrative services.

If a Policyholder were to be admitted to a hospital other than a Network Hospital, Requestors would pay the full Part A hospital deductible, as provided under the applicable Medigap plan. The Arrangement does not affect the liability of any Policyholder for payments for covered services, whether provided by a Network Hospital or any other hospital. The PHO's hospital network is open to any accredited, Medicare-certified hospital that meets the requirements of applicable state laws and that contractually agrees to discount all or a portion of the Part A deductible for Medigap policies. Requestors certified that the Policyholders' physicians and surgeons do not receive any remuneration under the Arrangement in return for referring patients to a Network Hospital.

Requestors return a portion of the savings resulting from the Arrangement directly to any Policyholder who has an inpatient stay at a Network Hospital in the form of a $100 credit toward a future renewal premium. Twice yearly, Requestors send Policyholders letters that explain this credit opportunity and mailings that identify Network Hospitals. Requestors certified that Policyholders receive clear written notice that use of a non-network hospital would have no effect on a Policyholder's liability for any costs covered under the plan, nor would the Policyholder be penalized in any other way for the use of a non-network hospital.[1]

Savings realized by Requestors under the Arrangement are reflected in Requestors' annual experience exhibits (which reflect loss ratios) filed with the various state insurance departments that regulate the premium rates charged by Medigap insurers. Thus, the savings realized from the Arrangement are taken into account when state insurance departments review and approve the rates.

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 "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. 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), 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

[1] We rely on this certification regarding disclosure to Policyholders of their rights to use any hospital without penalty. If it is incorrect, this opinion is without force and effect.

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.

The U.S. Department of Health and Human Services has promulgated safe harbor regulations that define practices that are not subject to the anti-kickback statute because such practices would be unlikely to result in fraud or abuse. See 42 C.F.R. § 1001.952. The safe harbors set forth specific conditions that, if met, assure entities involved of not being prosecuted or sanctioned for the arrangement qualifying for the safe harbor. However, safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the safe harbor. Two safe harbors potentially apply to the Arrangement. The safe harbor for waivers of beneficiary coinsurance and deductible amounts, 42 C.F.R. § 1001.952(k), permits hospitals to waive the Medicare Part A inpatient deductible in certain circumstances. Meanwhile, the safe harbor for reduced premium amounts offered by health plans, 42 C.F.R. § 1001.952(l), allows plans to reduce an enrollee's obligation to pay cost-sharing or premium amounts in certain circumstances.

Section 1128A(a)(5) of the Act provides for the imposition of civil monetary penalties against any person who offers or transfers remuneration to a Medicare or State health care program (including Medicaid) beneficiary that the benefactor knows or should know is likely to influence the beneficiary's selection of a particular provider, practitioner, or supplier of any item or service for which payment may be made, in whole or in part, by Medicare or a State health care program (including Medicaid). The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs. Section 1128A(i)(6) of the Act defines "remuneration" for purposes of section 1128A(a)(5) as including "transfers of items or services for free or for other than fair market value."

B. Analysis

The Arrangement is a straightforward agreement by the Network Hospitals to discount the Medicare inpatient deductible for Requestors' Policyholders—an amount for which Requestors otherwise would be liable. The law is clear that prohibited remuneration under the anti-kickback statute may include waivers of Medicare cost-sharing amounts. Likewise, relief of a financial obligation may constitute a prohibited kickback. In addition, Requestors pass back a portion of their savings, in the form of premium credits, to any Policyholder who has an inpatient stay at a Network Hospital. The premium credits implicate not only the anti-kickback statute (as remuneration for selecting the

Network Hospital), but also the civil monetary penalty prohibition on inducements to beneficiaries. Accordingly, we must examine both prongs of the Arrangement.

1. Anti-kickback Statute

The Arrangement does not qualify for protection under either the safe harbor for waivers of beneficiary coinsurance and deductible amounts or the safe harbor for reduced premium amounts offered by health plans. The safe harbor for waivers of beneficiary coinsurance and deductible amounts offers no protection to the Arrangement because that safe harbor specifically excludes such waivers when they are part of an agreement with insurers, such as Requestors, except in certain circumstances that are not applicable here. See 42 C.F.R. § 1001.952(k)(1)(iii). Similarly, the safe harbor for reduced premium amounts offered by health plans offers no protection to the Arrangement. That safe harbor requires health plans to offer the same reduced cost-sharing or premium amounts to all enrollees, see 42 C.F.R. § 1001.952(l)(1), whereas, under the Arrangement, premium discounts are offered only to those Policyholders who choose Network Hospitals.

Absent any safe harbor protection, we must apply careful scrutiny to determine whether the Arrangement poses no more than a minimal risk of fraud and abuse under the anti-kickback statute. We conclude that, in combination with Medigap coverage, the discounts offered on inpatient deductibles by the Network Hospitals, and the premium credits offered by Requestors to Policyholders who have inpatient stays at Network Hospitals, present a sufficiently low risk of fraud or abuse under the anti-kickback statute for the following reasons.

First, neither the discounts nor the premium credits increase or affect per-service Medicare payments. With the exception of certain pass-through payments and outlier payments, Part A payments for inpatient services are fixed; they are unaffected by beneficiary cost-sharing.

Second, the Arrangement is unlikely to increase utilization. In particular, the discounts are effectively invisible to Policyholders, because they apply only to the portion of the individual's cost-sharing obligations that the individual's supplemental insurance otherwise would cover. In addition, we have long held that the waiver of fees for inpatient services is unlikely to result in significant increases in utilization. See, e.g., Preamble to Final Rule: OIG Anti-Kickback Provisions, 56 Fed. Reg. 35,952, 35,962 (July 29, 1991).

Third, the Arrangement does not unfairly affect competition among hospitals, because membership in the PHO's hospital network is open to any accredited, Medicare-certified hospital that meets the requirements of applicable state laws.

Fourth, the Arrangement is unlikely to affect professional medical judgment, because the Policyholders' physicians and surgeons receive no remuneration, and the Policyholders remain free to go to any hospital without incurring any additional out-of-pocket expense for their inpatient hospital stay.

Fifth, the Arrangement operates transparently in that Requestors certified that they make clear that the Policyholders have the freedom to choose any hospital without incurring additional liability or a penalty.

2. Civil Monetary Penalties Law

The premium credit also implicates the prohibition on inducements to beneficiaries. Unlike incentives to enroll in an insurance plan, which do not implicate the prohibition, see Final Rule Revising OIG Civil Monetary Penalties, 65 Fed. Reg. 24,000, 24,407 (April 26, 2000), the premium credits under the Arrangement are offered to induce the Policyholders to select a particular provider (i.e., a Network Hospital) from a broader group of eligible providers. Such inducements fall within the prohibition. Id.

The definition of remuneration for purposes of section 1128A(a)(5) of the Act includes an exception for differentials in coinsurance and deductible amounts as part of a benefit plan design, as long as the differentials are properly disclosed to affected parties and meet certain other applicable requirements. See section 1128A(i)(6)(C) of the Act. This exception permits benefit plan designs under which plan enrollees pay different cost-sharing amounts depending on whether, for example, they use network or non-network providers. Although the premium credit is not technically a differential in a coinsurance or deductible amount, it has substantially the same purpose and effect as such a differential. We therefore conclude that the premium credit presents a sufficiently low risk of fraud or abuse under the prohibition on inducements to beneficiaries.

The Arrangement has the potential to lower Medigap costs to Policyholders who select Network Hospitals, without increasing costs to those who do not. Moreover, because savings realized from the Arrangement are reported to state insurance rate-setting regulators, the Arrangement has the potential to lower costs for all Policyholders.

Based on the totality of the facts and circumstances, and given the sufficiently low risk of fraud or abuse and the potential savings for beneficiaries, we will not impose administrative sanctions on Requestors under the anti-kickback statute or the prohibition on inducements to beneficiaries in connection with the Arrangement.

We note, however, that our opinion relates only to the application of the anti-kickback statute and the prohibition on inducements to beneficiaries. We have no authority and do not express any opinion as to whether the Arrangement complies with other Federal laws

and regulations, including those administered by the Centers for Medicare & Medicaid Services, or with any state laws, including state insurance laws.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although the Arrangement 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 the entities named on the attached distribution list 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 Arrangement. In addition, the OIG will not impose administrative sanctions on the entities named on the attached distribution list under section 1128A(a)(5) of the Act in connection with the Arrangement. This opinion is limited to the Arrangement 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 the entities named on the attached distribution list, the requestors 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 the entities named on the attached distribution list 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 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.

- This advisory opinion is limited in scope to the specific arrangement 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 Requestors with respect to any action that is part of the 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 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 Requestors with respect to any action that is part of the 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,

/Gregory E. Demske/

Gregory E. Demske
Chief Counsel to the Inspector General

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OIG ADVISORY OPINION NO. 17-04

[Names and addresses redacted]