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: September 5, 2019

Posted: September 10, 2019

[Name and address redacted]

Re: OIG Advisory Opinion No. 19-04

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding a technology company's proposal to make visible to Federal health care program beneficiaries: (i) its online healthcare directory for searching and booking medical appointments, where healthcare professionals pay, or would pay, per-click or per-booking fees to be listed in the directory; and (ii) sponsored advertisements on its online healthcare directory and third-party websites, where healthcare professionals pay, or would pay, per-impression or per-click fees for such sponsored advertisements (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute 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: (i) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) although the Proposed 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") would 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 Proposed Arrangement.

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] ("Requestor") operates a platform through its website and mobile applications (collectively, the "Marketplace") that allows users, regardless of insurance status, to search and book medical appointments[1] with healthcare professionals that match the user's search criteria, which may include the services needed, a specified geographic area, a preferred appointment time, and the user's medical insurance. Healthcare professionals listed on the Marketplace include physicians, nurse practitioners, dentists, chiropractors, dieticians, and other medical service professionals (collectively, "Providers"). In response to a search, the Marketplace generates up to 200 organic, personalized search results listing Providers (the "Marketplace Results") using a proprietary algorithm, which filters and prioritizes Providers according to criteria set by users[2] and other user-centric information, such as Providers' unconfirmed pending appointment bookings or cancellation rates. For example, depending on the criteria specified by users, Marketplace Results prioritize Providers who accept the user's insurance, offer services within the user's geographic area, and are available within the user's designated timeframe. The algorithm does not filter or prioritize Providers listed

[1] As explained below, users who are Federal health care program beneficiaries currently can search and book medical appointments only in certain states.

[2] If a user initiates a search on the Marketplace without specifying any search criteria, Requestor uses geotargeting to list Providers offering primary care services in the user's geographic area. To initiate a more specific search, users must enter at least one search criterion.

in Marketplace Results based on the amount Providers pay Requestor or any other non-user-centric criteria.

The Marketplace allows users to create an account and store certain medical and insurance information in advance of medical appointments with the goal of reducing the time spent in Providers' offices completing forms and the possibility of transcription errors by Providers' staffs. Requestor is not a provider or supplier, is not affiliated with any Provider listed on the Marketplace, and does not expressly recommend any particular Provider to users. One of Requestor's founders and owners, [name redacted], is a physician, but Requestor certified that he is not practicing medicine and does not plan to practice medicine in the future.

Requestor does not charge users a fee to utilize the Marketplace. It offers users who are not Federal health care program beneficiaries certain promotions valued at $10 or less. However, other than the inherent functionality of the Marketplace and the convenience inherent to using the Marketplace, it does not, and would not, offer Federal health care program beneficiaries anything of value. Requestor charges fees to all Providers listed in Marketplace Results and separate, additional fees to Providers who purchase advertising on the Marketplace or on third-party websites, as described below. Requestor's website notifies users that Providers pay fees to be listed in Marketplace Results.

The fees Providers pay to be listed in Marketplace Results currently vary by location. In most states, Requestor charges Providers flat, monthly subscription fees that historically have been about $3,000 per year for each Provider ("Original Marketplace Fees"), and in certain states where Requestor operates pilot programs, Requestor charges Providers lower annual subscription fees of approximately $300 per year per practice (or more depending on practice size)[3] plus per-booking fees for each appointment booked through the Marketplace where the user identifies himself or herself as a new patient of the Provider ("Per-Booking Marketplace Fees"). The per-booking component of the Per-Booking Marketplace Fees does not apply when a user indicates that he or she previously has seen the Provider or when a user books an appointment other than through the Marketplace (e.g., through the Provider's website); follow-up appointments are included in the annual component of the Per-Booking Marketplace Fees. Requestor requires Providers to pay the per-booking component of the Per-Booking Marketplace Fees even if a user or the Provider cancels the appointment, except when a user cancels the appointment within 24 hours of booking. In addition to these fee structures, in certain states, Requestor plans to charge lower annual subscription fees of around $300 per year

[3] Requestor plans to charge a higher annual subscription fee to practices with more than five Providers, where the additional amount of such fee would be proportionate to the $300 fee charged to practices of up to five Providers.

per practice (or more depending on practice size)[4] plus a per-click fee for each time a patient clicks on a Provider's Marketplace Result ("Per-Click Marketplace Fees"). Marketplace Results are visible to users who indicate they are Federal health care program beneficiaries only in states where Providers pay Original Marketplace Fees. Under the Proposed Arrangement, Requestor seeks to make Marketplace Results visible to users who indicate that they are Federal health care program beneficiaries in states where it charges, or would charge, either Per-Booking Marketplace Fees or Per-Click Marketplace Fees. Requestor certified that it would discontinue Original Marketplace Fees in all states over time and would charge all Providers either Per-Booking Marketplace Fees or Per-Click Marketplace Fees, depending on the state.

Requestor sets the annual subscription fees and the fees for each new-patient appointment booking, and would set the fees for each click, in advance based on valuations by an independent, third-party valuation firm (the "Valuation Firm"). While the fee per new-patient appointment booking varies, and the fee per click would vary, by Providers' medical specialty, geographic location, and in certain circumstances, other relevant factors that affect fair market value,[5] the Per-Booking Marketplace Fees are, and the Per-Click Marketplace Fees would be, agnostic regarding users' insurance status (i.e., whether the user identifies as self-insured, uninsured, commercially insured, or federally insured). Further, Requestor certified that the aggregate fees for Providers to be listed in Marketplace Results do not, and any updates to such fees would not, exceed fair market value.[6]

In addition to Marketplace Results, Providers also may purchase banner advertisements from Requestor ("Sponsored Results"). Specifically, Providers have the option to purchase Sponsored Results that are displayed at the top, or on the side, of Marketplace Results and would have the option to purchase Sponsored Results that are displayed on third-party websites. Sponsored Results advertise Providers but do not, and would not, promote any particular item or service. Sponsored Results on the Marketplace currently are visible only to users who do not indicate they are Federal health care program

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[4] See footnote 3.

[5] According to Requestor, the Valuation Firm, in its discretion, may take additional factors into account when determining fair market value fees in circumstances where the data points available are insufficient to support its valuation. For example, if the number of healthcare professionals practicing a medical specialty in a geographic area does not allow for a statistically valid sample size, the Valuation Firm may factor in data for healthcare professionals from surrounding geographic areas or use other relevant data points to value specific fees.

[6] We are precluded by statute from opining on whether fair market value shall be or was paid for goods, services, or property. See section 1128D(b)(3)(A) of the Act.

beneficiaries. As part of the Proposed Arrangement, Requestor seeks to: (i) make the Sponsored Results on the Marketplace visible to users who indicate that they are Federal health care program beneficiaries; and (ii) display Sponsored Results on third-party websites, which would be visible to anyone viewing the websites, including Federal health care program beneficiaries. Requestor would advertise Providers to Federal health care program beneficiaries only on the Marketplace and third-party websites, and Requestor's advertising activities, including the display of Sponsored Results and general advertisements for Requestor, do not, and would not, specifically target Federal health care program beneficiaries.

Sponsored Results on the Marketplace appear when Providers match users' search criteria. Requestor certified that Sponsored Results are clearly labeled as such and are readily distinguishable from the Marketplace Results. With respect to third-party websites, Requestor plans to purchase online advertising on both healthcare- and non-healthcare-related websites that it believes would provide increased exposure for Providers who purchase Sponsored Results. Requestor certified that the Sponsored Results on these sites also would be clearly labeled as advertisements. According to a third-party expert hired by Requestor, the vast majority of Medicare beneficiaries would understand that the Sponsored Results are paid advertising. To enhance the ability of Medicare beneficiaries to determine that the Sponsored Results are paid advertising, Requestor certified that, when it determines a user is a Federal health care program beneficiary, Sponsored Results on the Marketplace would include more pronounced lettering and conspicuous coloration.

Requestor currently charges Providers a per-impression advertising fee for Sponsored Results (the "Per-Impression Advertising Fee"). An "impression" is the display of an advertisement that is viewed by a user. When a user views a page on the Marketplace, that viewing constitutes an "impression" for each advertisement that is displayed on the page. As an alternative to the Per-Impression Advertising Fee, Requestor would charge Providers in certain states a per-click advertising fee each time a user clicks on a Provider's Sponsored Result (the "Per-Click Advertising Fee"). Requestor certified that the Per-Impression Advertising Fee does not, and the Per-Click Advertising Fee would not: (i) exceed fair market value; (ii) depend on a user's insurance status or whether a user books an appointment or becomes a patient of a Provider; or (iii) vary with the volume or value of items or services any Provider furnishes to users. Additionally, the Per-Impression Advertising Fee is, and the Per-Click Advertising Fee would be, agnostic regarding users' insurance status.

Requestor determines the amount it charges per impression, and would determine the amount it charges per click, through a bidding process. Requestor's current bidding process allows Providers to bid in an advertisement auction for user searches for which the Provider is relevant. Requestor sets a minimum bid amount as part of this process. For example, a chiropractor would enter the bidding process for users searching both for

"chiropractor" and "back pain" because, in each instance, chiropractors may be relevant to users' searches. As an alternative to this bidding process, Requestor also would offer keyword advertising, whereby Providers could bid different amounts for different search terms for which the Providers want to display ads. For example, a chiropractor bidding for keyword advertising could bid one amount for the search term "chiropractor" and a different amount for the search term "back pain." Requestor would offer both the current bidding process and keyword advertising to Providers.

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 $100,000, imprisonment up to ten 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.

The safe harbor for referral services, 42 C.F.R. § 1001.952(f), provides that, for purposes of the anti-kickback statute, the term "remuneration" does not include payments or exchanges of anything of value between a referral service and a participant in the service, provided certain conditions are met. Among those conditions are requirements that referral fees be assessed uniformly against all participants and based only on the cost of operating the referral service and that certain disclosures be made to each person seeking a referral. The Proposed Arrangement would not qualify for protection under this safe

harbor because, among other reasons, the fees Requestor charges would not be based only on the cost of operating the referral service.

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 also may 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) of the Act as including "transfers of items or services for free or for other than fair market value."

B. Analysis

Under the Proposed Arrangement, Federal health care program beneficiaries could search and book appointments with Providers who pay Original Marketplace Fees, Per-Booking Marketplace Fees, or Per-Click Marketplace Fees to Requestor to be listed in Marketplace Results. Federal health care program beneficiaries also could view Sponsored Results on the Marketplace and on third-party websites, where the Providers purchasing those Sponsored Results pay Per-Impression Advertising Fees, or would pay Per-Click Advertising Fees, for the advertising.

The Proposed Arrangement does not implicate section 1128A(a)(5) of the Act because the remuneration Requestor would provide to Federal health care program beneficiaries—the functionality of the Marketplace and the convenience inherent to using the Marketplace—likely would not influence a beneficiary to select a particular provider, practitioner, or supplier. Although the Marketplace would present one convenient way for Federal health care program beneficiaries to view Providers' available appointment times and book medical appointments with Providers, many factors influence someone's decision to seek items and services from a healthcare professional, including existing relationships and previous experiences with healthcare professionals; healthcare professionals' reputations in their communities; and healthcare professionals' accessibility in terms of geographic distance, appointment availability, and insurance coverage. We do not believe access to the Marketplace, alone, would be likely to influence a beneficiary to receive items or services from a particular Provider on the Marketplace as compared with the broader group of all available providers, practitioners, and suppliers.

The Proposed Arrangement implicates the anti-kickback statute, however. Through its scheduling services, Requestor would be arranging for the furnishing of federally reimbursable items and services in exchange for the Provider fees listed above.

Additionally, Requestor's display of both the Marketplace Results and the Sponsored Results constitutes advertising activities meant to induce the use of an item or service, and where any of the advertised items or services are reimbursable, in whole or in part, by a Federal health care program, the anti-kickback statute is implicated. In evaluating marketing or advertising, we consider a number of factors, such as: the amount and structure of the compensation; the identity of the party engaged in the marketing activity and the party's relationship with its target audience; the nature of the marketing activity; the item or service being marketed; the target population; and any safeguards to prevent fraud and abuse.[7] For the combination of the following reasons, we conclude that the Proposed Arrangement would present a low risk of fraud and abuse under the anti-kickback statute.

First, while the fee per new-patient appointment booking varies, and the fee per click would vary, by medical specialty, geographic location, and in certain circumstances, other relevant factors affecting fair market value, Requestor sets the per-booking fee amounts, and would set the per-click fee amounts, in advance, and none of the aggregate fees for Providers to be listed in Marketplace Results would exceed fair market value. Moreover, the Per-Click Marketplace Fees would not take into account the volume or value of any business generated for Providers through the Marketplace, and the Per-Booking Marketplace Fees do not, and would not, vary directly based on the volume or value of Federal health care program business generated by the Marketplace. In particular, the Per-Booking Marketplace Fees apply: (i) only when a user who identifies himself or herself as a new patient books an appointment; (ii) regardless of the user's insurance status; and (iii) except in limited circumstances, regardless of whether the user cancels the appointment. Further, Providers' listings in Marketplace Results depend only on user-centric criteria, so the fees Providers pay, or would pay, Requestor would not affect the frequency with which Providers appear, or their placement, in Marketplace Results. In other words, while more clicks or new-patient bookings, as applicable, would result in Providers paying higher fees to Requestor, higher fee payments would not result in more frequent appearances, or favorable placements, in Marketplace Results.

With respect to the advertising fees, the Per-Impression Advertising Fees do not, and the Per-Click Advertising Fees would not, exceed fair market value. Additionally, the Per-Impression Advertising Fees vary, and the Per-Click Advertising Fees would vary, by the amounts Providers bid for advertising, but none of the advertising fees would take into account users' insurance status or the volume or value of any business generated for Providers through the Marketplace or on third-party websites.

Second, Requestor is not a provider or supplier, so its relationship with the target population under the Proposed Arrangement is distinguishable from potentially

[7] See OIG Compliance Program Guidance for Pharmaceutical Manufacturers, 68 Fed. Reg. 23,731, 23,739 (May 5, 2003).

problematic arrangements involving marketing by healthcare providers and suppliers. In particular, "white coat" marketing by healthcare professionals, such as physicians, is subject to closer scrutiny, since healthcare providers and suppliers are in a position of trust and may exert undue influence when recommending healthcare-related items or services, especially to their own patients. Because Requestor is not a provider or supplier, is not affiliated with any Provider listed on the Marketplace, and does not recommend any particular Provider to users, this same concern is not present in the Proposed Arrangement.

Third, Requestor's advertising activities, including the display of Sponsored Results and general advertisements for Requestor, do not, and would not, specifically target Federal health care program beneficiaries. The advertising activity under the Proposed Arrangement is essentially passive in nature because any contact with Requestor must be initiated by a Federal health care program beneficiary. Unlike more direct forms of advertising, such as emails, mailings, or text messages, Requestor's advertisements for Providers would be visible to Federal health care program beneficiaries only if they visit the Marketplace or a third-party website where Sponsored Results are displayed. Further, the Sponsored Results are, and would be, clearly marked as paid advertising, and as an additional safeguard, Sponsored Results on the Marketplace would include more pronounced lettering and conspicuous coloration when Requestor determines that a user is a Federal health care program beneficiary.

Fourth, the marketing activity under the Proposed Arrangement would not relate to any specific items or services users may obtain from Providers as a result of appointments booked through the Marketplace. The Sponsored Results advertise particular Providers but do not, and would not, promote any particular item or service. The Marketplace generates a list of up to 200 Marketplace Results using an algorithm that filters and prioritizes Providers according to criteria specified by users and other user-centric information, such as Providers' cancellation rates. Importantly, the Marketplace does not prioritize Providers listed in Marketplace Results based on the amount Providers pay Requestor or any other non-user-centric criteria. Additionally, Requestor's website notifies users that Providers pay a fee to be listed in Marketplace Results, which reduces the chance that users would think the Marketplace reflects the full scope of healthcare professionals available to them.

Fifth, under the Proposed Arrangement, Requestor's potential user base is the general public, meaning any individual, regardless of insurance status, can access the Marketplace and view Marketplace Results and Sponsored Results. Although Requestor collects insurance information from users, Requestor would not use this information to target Federal health care program beneficiaries or otherwise influence their decision-making. Requestor uses this information to match users with Providers who accept their insurance and to allow users to store medical and insurance information in advance of medical appointments with the goal of reducing the time users spend in Providers' offices

completing forms and the possibility of transcription errors by Providers' staffs.

Lastly, in addition to the safeguards listed above, Requestor does not, and would not, provide anything of value to Federal health care program beneficiaries (other than the inherent functionality of the Marketplace and the convenience inherent to using the Marketplace) to induce them to use the Marketplace or that otherwise might serve to influence their selection of a healthcare professional or other healthcare choices. Although Requestor offers certain promotions to users other than Federal health care program beneficiaries, it certified that it does not, and would not, offer these promotions or anything else of value to beneficiaries.

For the combination of the foregoing reasons, we conclude that the Proposed Arrangement would present a low risk of fraud and abuse under the anti-kickback statute.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that: (i) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) although the Proposed 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 would 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 Proposed Arrangement. This opinion is limited to the Proposed 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 [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 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.

- 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 [name redacted] 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 [name redacted] 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