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 6, 2019

Posted: September 11, 2019

[Name and address redacted]

Re: OIG Advisory Opinion No. 19-05

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding a proposed purchase of real estate from a limited liability company owned and managed, in part, by an excluded individual (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for the imposition of sanctions against [name redacted] under the civil monetary penalty provision at section 1128A(a)(6) of the Social Security Act (the "Act").

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 the Proposed Arrangement would not constitute grounds for the imposition of sanctions against [name redacted] under section 1128A(a)(6) of the Act. 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.

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") is a community health center that receives Federal grant funding from the Health Resources and Services Administration ("HRSA") through the HRSA Bureau of Primary Health Care's Health Center Program ("HRSA Health Center Program") pursuant to section 330 of the Public Health Service Act ("PHSA"). Requestor owns and operates eight community health center sites located in [State redacted]. Each site is enrolled in the Medicare program as a Federally Qualified Health Center ("FQHC").

Under the Proposed Arrangement, Requestor would purchase the real estate located at [address redacted] (the "Site"), from [name redacted] (the "Company"). Requestor certified that the Site includes a medical clinic, which Requestor operates as one of its eight community health centers, and the surrounding real property. [Name redacted] and his wife, [name redacted], own and manage the Company. [Name redacted] (the "Excluded Person") was excluded from participation in all Federal health care programs[1] by the Office of Inspector General (the "OIG") of the Department of Health and Human Services, effective [date redacted].

Under the Proposed Arrangement, Requestor and the Company would obtain an independent appraisal of the Site and use the appraised value as the purchase price for the Site. Requestor certified it would not submit any claims to, or otherwise request payment from, any Federal health care program for the purchase of the Site from the Company. Specifically, Requestor certified that the purchase of the Site would not be: listed in an itemized claim for Federal health care program payment or a request for payment; included in any Federal or State health care program reimbursement method, such as a prospective payment system or managed care system; included in any claim based on costs; or required to be entered in a cost report, books of account, or other documents supporting a claim based on costs (whether or not actually entered). Requestor also certified that it would not

[1] The term "Federal health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the Federal Employees Health Benefits Program under 5 U.S.C. § 89 et seq.). Section 1128B(f) of the Act; see also 42 C.F.R. § 1000.10.

use any HRSA Health Center Program grant funds to purchase the Site or receive any financing from the Company or the Excluded Person for the purchase of the Site. Requestor further certified that neither the Company nor the Excluded Person would have any ongoing relationship—financial, ownership, control, management, or otherwise—with Requestor after Requestor's purchase of the Site from the Company. After purchasing the Site, Requestor would be the sole titleholder of the Site.

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.

For purposes of section 1128A of the Act, the term "items or services" includes "without limitation, any item, device, drug, biological, supply, or service (including management or administrative services), including, but not limited to, those that are listed in an itemized claim for program payment or a request for payment; for which payment is included in any Federal or State health care program reimbursement method, such as a prospective payment system or managed care system; or that are, in the case of a claim based on costs, required to be entered in a cost report, books of account, or other documents supporting the claim (whether or not actually entered)." 42 C.F.R. § 1003.110. The term "claim" means "an application for payment for an item or service under a Federal health care program." Id. The term "request for payment" means "an application submitted by a person to any person for payment for an item or service." Id.

B. Analysis

Under the Proposed Arrangement, Requestor would purchase the Site from the Company, which is owned and managed, in part, by the Excluded Person. However, the Proposed Arrangement would not involve the provision of an item or service for which payment may be made under any Federal health care program.

For purposes of section 1128A of the Act, the term "items or services" includes "without limitation, any item . . . , including, but not limited to, those that are listed in an itemized claim for program payment or a request for payment; for which payment is included in any Federal or State health care program reimbursement method, such as a prospective payment system or managed care system; or that are, in the case of a claim based on costs, required to be entered in a cost report, books of account, or other documents supporting the claim

(whether or not actually entered)." 42 C.F.R. § 1003.110. While the Site could be an "item" under section 1128A of the Act if Requestor were to submit any claims to, or otherwise request payment from, any Federal health care program for the purchase of the Site from the Company, Requestor certified that it would not submit any such claim or request any such payment. Specifically, Requestor certified that the purchase of the Site would not be: listed in an itemized claim for Federal health care program payment or a request for payment; included in any Federal or State health care program reimbursement method, such as a prospective payment system or managed care system; included in any claim based on costs; or required to be entered in a cost report, books of account, or other documents supporting a claim based on costs (whether or not actually entered).

Additionally, Requestor receives Federal grant funding from HRSA through the HRSA Health Center Program (a Federal health care program) pursuant to section 330 of the PHSA, and the Site is enrolled in the Medicare program as an FQHC. However, Requestor would not use any HRSA Health Center Program grant funds to purchase the Site or receive any financing from the Company or the Excluded Person for the purchase of the Site. Requestor also certified that neither the Company nor the Excluded Person would have any ongoing relationship—financial, ownership, control, management, or otherwise—with Requestor after Requestor's purchase of the Site. Thus, the Excluded Person would not—after Requestor's purchase of the Site—provide any items or services to Requestor that may be paid for by any Federal health care program.

Based on the foregoing analysis, we conclude that the Proposed Arrangement would not involve the provision of items or services for which payment may be made under any Federal health care program, and we would not subject Requestor to administrative sanctions under section 1128A(a)(6) of the Act in connection with the Proposed Arrangement.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement would not constitute grounds for the imposition of sanctions against [name redacted] under section 1128A(a)(6) of the Act. 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 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