

January 27, 2023

**SUBMITTED THROUGH FEDERAL E-RULEMAKING PORTAL**

Christi A. Grimm  
Inspector General  
Office of Inspector General  
U.S. Department of Health & Human Services  
330 Independence Avenue, SW  
Washington, DC 20201

Re: Solicitation of Proposals for New and Modified Safe Harbors and Special Fraud Alerts OIG-1122-N, 87 Fed. Reg. 72953 (Nov. 28, 2022) (“Annual Solicitation”)

Dear Inspector General Grimm:

The American Cancer Society Cancer Action Network (“ACS CAN”) appreciates the opportunity presented by the Annual Solicitation of the U.S. Department of Health and Human Services, Office of Inspector General (“OIG”) to propose a new regulatory safe harbor to the federal health care program anti-kickback statute, 42 U.S.C. § 1320a-7b(b) (“AKS”). ACS CAN is the American Cancer Society’s nonprofit, nonpartisan advocacy affiliate. Our mission is to make cancer a top priority for public officials at the federal, state, and local levels. We do this, in part, by advocating for evidence-based public policy change, including legislative and regulatory solutions that will reduce the cancer burden. ACS CAN is joined in this letter by the American Association of Cancer Institutes (AACI), American Association for Cancer Research (AACR), Association for Clinical Oncology (ASCO), American Society for Radiation Oncology (ASTRO), ECAN Esophageal Cancer Action Network, Fight Colorectal Cancer, Friends of Cancer Research, GO2 For Lung Cancer, Intercultural Cancer Council, International Myeloma Foundation, The Leukemia & Lymphoma Society (LLS), LUNGevity Foundation, Melanoma Research Alliance, National Cancer Registrars Association (NCRA), National Comprehensive Cancer Network (NCCN), National Minority Quality Forum, Oncology Nursing Society, Prevent Cancer Foundation, Society for Immunotherapy of Cancer (SITC), Susan G. Komen, Triage Cancer, and ZERO-The End of Prostate Cancer.

**I. Introduction**

Clinical trials are used to help determine the safety and effectiveness of drugs and other medical products that are intended for use in the prevention, diagnosis, and treatment of disease, including cancer and other life-threatening conditions. Over the past 25 years, there has been growing concern about the lack of diversity in clinical trials, including racial, ethnic, and socioeconomic diversity. As the Food and Drug Administration (“FDA”) noted last year, diverse individuals “frequently [are] underrepresented in biomedical research despite having a disproportionate disease burden for certain diseases relative to their proportional representation in the general population.”<sup>i</sup>

Ensuring diversity in clinical trials is critical for a host of medical, scientific, and ethical reasons. As the FDA emphasizes, “[e]nsuring people from diverse backgrounds join clinical trials is key to advancing health equity.”<sup>ii</sup> More specifically, the agency notes, clinical trial diversity (i) “support[s] early access to medical discoveries and innovations,” (ii) “improve[s] the generalizability of results across all patient populations,” (iii) “improve[s] our understanding of the disease and/or medical product under study,” and (iv) “inform[s] the safe and effective use of the medical product for all patients who are expected to use the medical product if approved.”<sup>iii</sup>

Although there are myriad reasons for the lack of diversity in clinical trials, one is straightforward: many diverse individuals simply cannot afford to participate in clinical trials. A clinical trial participant incurs two types of costs: direct medical costs (“direct costs”) and indirect ancillary costs (“indirect costs”).

- Direct costs, which are not the subject of this proposal, are the costs of care incurred by the participant in obtaining hospital, physician, laboratory, radiology and other health care items and services. An example of a direct cost of care that a clinical trial participant might incur would be the payment of any cost-sharing obligations, such as copayment and coinsurance amounts, attendant to receiving health care items and services from a provider, supplier, or practitioner that may be covered by commercial or government payers, such as Medicare.<sup>iv</sup>
- Indirect costs, which are the subject of this proposal, are non-medical costs that, but for participation in the clinical trial at issue, the participant would not incur. By way of example only, depending on the particular clinical trial and participant, indirect costs might include costs associated with travel, parking, lodging, child care, and lost wages that, but for enrolling in the clinical trial at issue, the participant would not have incurred.

In many cases, these indirect costs are not *de minimis*. According to a recent study, participants in cancer clinical trials incurred an average of \$600 per month—or \$7,200 per year—in indirect costs.<sup>v</sup> Not surprisingly, then, indirect costs pose a far greater barrier to clinical trial participation by those with lower socioeconomic status (or “SES”) than those with higher SES.<sup>vi</sup> Two recent studies, for example, found that persons with annual household incomes below \$50,000 were 30 percent less likely to participate in clinical trials than those with annual household incomes above \$50,000.<sup>vii</sup> Another study found that almost 80% of cancer patients indicated they would be more likely to enroll in a clinical trial if sponsors supported them financially to offset non-medical costs.<sup>viii</sup> For its part, the OIG has flagged this particular issue on multiple occasions over the past 25 years.<sup>ix</sup>

Given the importance of diversity in clinical trials and the direct correlation between SES and clinical trial participation, both the FDA and the larger stakeholder community support arrangements pursuant to which clinical trial sponsors cover the indirect costs of clinical trial participants. In 2022, for example, the FDA published draft guidance entitled *Diversity Plans to Improve Enrollment of Participants from Underrepresented Racial and Ethnic Populations in*

*Clinical Trials Guidance for Industry*. The document notes that the FDA has issued several sets of recommendations over the years aimed at improving clinical trial diversity, including but not limited to “offering financial reimbursement for expenses incurred by participation” in a clinical trial.

In support of its position in the draft guidance, the FDA references its 2018 guidance document for Institutional Review Boards (“IRBs”) and clinical investigators, “Payment and Reimbursement to Research Subjects.” In that document, the FDA makes two important points. First, the agency again emphasizes that it “does not consider reimbursement for travel expenses to and from the clinical trial site and associated costs”—including but not limited to airfare, parking, and lodging—“to raise issues regarding undue influence.” Second, the guidance provides that with respect to all other remuneration, the IRB should review the amount, method and timing of such payments or reimbursement “to assure that neither are coercive or present undue influence.”

To summarize, then, all relevant stakeholders, including the FDA, view the representation of diverse populations in clinical trials as a high priority. Indeed, last April, FDA Commissioner Robert M. Califf, M.D. stated that “ensuring meaningful representation of racial and ethnic minorities in clinical trials for regulated medical products is fundamental to public health,” and “[g]oing forward, achieving greater diversity will be a key focus throughout the FDA to facilitate the development of better treatments and better ways to fight diseases that often disproportionately impact diverse communities.”<sup>x</sup> These same public and private sector stakeholders (i) have concluded that indirect costs create significant barriers to achieving clinical trial diversity and (ii) support the removal of these barriers.

## **II. Proposed Safe Harbor**

Notwithstanding the above consensus, many clinical trial sponsors are reluctant to cover indirect costs incurred by clinical trial participants. A principal reason for this reluctance is that offering such coverage to Medicare, Medicaid, and other federal health care program beneficiaries may implicate the AKS and/or the federal beneficiary inducement civil monetary law, 42 U.S.C. § 1320a-7a(a)(5) (“Beneficiary Inducement CMP”). In order to address this barrier to clinical trial diversity, ACS CAN proposes the creation of a new regulatory safe harbor that, subject to a host of safeguards and limitations, would permit sponsors of clinical trials targeting cancer or other life-threatening diseases or conditions to cover certain indirect costs incurred by clinical trial participants without violating the AKS or Beneficiary Inducement CMP.

### **A. Text**

Under the proposed safe harbor, 42 C.F.R. § 1001.952 would be amended to add a new section 1001.952(II), which would provide as follows:

#### **(II) Coverage of Indirect Clinical Trial Costs.**

- (1) As used in section 1128B of the Act, “remuneration” does not include indirect cost payments or indirect cost stipends offered by the sponsor of an approved clinical trial to a human subject participating in that approved clinical trial if the conditions in paragraphs II(1)(i) through (iv) of this section are met.
  - (i) The indirect cost payment or indirect cost stipend is provided pursuant to a written protocol that has been reviewed and approved in advance by the Institutional Review Board responsible for the approved clinical trial;
  - (ii) In the case of remuneration in the form of indirect cost payments:
    - (a) the written protocol specifies:
      - (i) each category of indirect costs for which payment will be made (e.g., travel, lodging, parking, etc.),
      - (ii) with respect to each category, whether the payment will be made to the human subject (in the form of reimbursement) or directly to the vendor providing the item or service to the human subject, and
      - (iii) any monetary caps or other limitations that will apply to such payments; and
    - (b) the purpose, amount, date, and method of payments made to or on behalf of each human subject is contemporaneously documented by the sponsor;
  - (iii) In the case of remuneration in the form of an indirect cost stipend:
    - (a) the written protocol specifies:
      - (a) the amount of the stipend,

- (b) the period (e.g., one month) or activity (e.g., one visit) the stipend covers,
  - (c) the indirect cost categories the stipend covers (e.g., travel and lodging), and
  - (d) the methodology used to calculate the stipend; and
- (b) the payment, amount, and date of each stipend provided to each human subject is contemporaneously documented by the sponsor;
- (iv) The documentation required by paragraph II(1) is made available to the Secretary upon request.
- (2) For purposes of paragraph (II) of this section:
  - (i) *Approved clinical trial* has the meaning set forth in section 2709(d) of the Public Health Service Act.<sup>xi</sup>
  - (ii) *Human subject* has the meaning set forth in 21 C.F.R. § 56.102(e).<sup>xii</sup>
  - (iii) *Indirect cost payment* means a payment that is made directly to a human subject, or to a vendor on behalf of a human subject, that covers the actual, additional, non-medical costs incurred by a human subject relating exclusively to their participation in an approved clinical trial.
  - (iv) *Indirect cost stipend* means a flat, pre-determined dollar amount that is intended to cover, for a designated period of time (e.g., one month) or in connection with a specified activity (e.g., one visit), the actual, additional, non-medical costs incurred by a human subject relating exclusively to their participation in an approved clinical trial.
  - (iv) *Institutional Review Board (IRB)* has the meaning set forth in 21 C.F.R. § 56.102(g).<sup>xiii</sup>

- (v) *Life-threatening disease or condition* has the meaning set forth in section 2709(e) of the Public Health Service Act.<sup>xiv</sup>
- (vi) *Sponsor* has the meaning set forth in 21 C.F.R. § 56.102(j).<sup>xv</sup>

## B. Explanation

Before turning to how the proposed safe harbor fares with respect to the various factors enumerated in the Annual Solicitation, we would like to highlight the safeguards built into the proposed safe harbor.

- First, the proposed safe harbor would not apply to all clinical trials. The safe harbor would apply only to “approved clinical trials” as defined in section 2709(d) of the Public Health Service Act (“PHSA”). Among other limitations, that definition only includes clinical trials that are conducted in relation “to the prevention, detection, or treatment of cancer or other life-threatening disease or condition” and, pursuant to section 2709(e) of the PHSA, a disease or condition only qualifies as “life-threatening” if “the likelihood of death is probable unless the course of the disease or condition is interrupted.” Simply put, the universe of clinical trials to which the proposed safe harbor would apply would be limited.
- Second, the proposed safe harbor would protect only a narrow category of remuneration. Specifically, the safe harbor is designed to protect only the reimbursement of those actual, additional, non-medical costs incurred by a human subject that relate exclusively to their participation in an approved clinical trial.
  - Thus, the proposed safe harbor would not protect any remuneration that might incentivize a patient to purchase or order any health care item or service. For example, the proposed safe harbor would not protect remuneration in the form of a waiver of a patient’s cost-sharing obligations.
  - Further, the proposed safe harbor would not protect the coverage of all non-medical costs. For example, costs associated with traveling to a clinical trial site that is far from the participant’s residence (such as lodging, fuel, and parking) might be covered by the safe harbor. However, many other costs (such as toiletries, clothing, and entertainment) would not be covered.
- Third, every approved clinical trial (as defined in the proposed safe harbor) is subject to the oversight of an IRB, and every IRB has a preexisting legal obligation to ensure that the study in question has the safeguards necessary to protect participants from either “coercion or undue influence.”<sup>xvi</sup> As an added safeguard, in order to receive

protection under the proposed safe harbor, indirect cost payments and indirect cost stipends must be provided pursuant to a detailed written protocol that had been reviewed and approved in advance by the relevant IRB.

- Fourth, in addition to the written protocol approved by the IRB, the safe harbor requires documentation relating to both indirect cost payments and indirect cost stipends. These documentation requirements ensure that the government is in a position to confirm that all payments meet the definition of “indirect cost payments” or “indirect cost stipends,” as applicable, and that the arrangement otherwise meets the conditions of the safe harbor.

### **C. Discussion**

As set forth in the Annual Solicitation, the OIG considers a number of factors in reviewing proposals for additional safe harbors, including the extent to which the proposals may result in an increase or decrease in (i) overutilization of health care services, (ii) costs to Federal health care programs resulting from such overutilization, (iii) patient freedom of choice among health care providers, (iv) competition among health care providers, (v) access to health care services, (vi) the quality of health care services, and (vii) the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations. OIG also considers “the existence (or nonexistence) of any potential financial benefit to health care professionals or providers that may influence their decision whether to” (i) “order a health care item or service” or (ii) “arrange for a referral of health care items or services to a particular practitioner or provider.”

#### **1. Overutilization; Program Costs**

The proposed safe harbor will not result in overutilization—that is, the ordering of items or services that are not medically necessary. As a threshold matter, whether participating in a clinical trial or not, patients who have cancer or another life-threatening condition typically will receive routine care, and both Medicare and Medicaid cover the costs associated with such routine care whether they are incurred in or outside a clinical trial. Further, the proposed safe harbor does not protect any remuneration that is provided to any physician or other provider, supplier, or practitioner who is in a position to order health care items or services. To the contrary, the only person who will receive remuneration under the proposed safe harbor is the human subject participating in the clinical trial at issue, and that individual is not in a position to order health care items or services. Simply put, and like the proposed arrangement in OIG Advisory Opinion 98-6, the purpose of the proposed safe harbor here is “to induce participation in a scientific study, not to induce utilization of Medicare covered services.”<sup>xvii</sup>

Because the proposed safe harbor will not result in overutilization, it cannot (by definition) result in any inappropriate increase in federal health care program costs. It is true, of course, that a drug or device that is the subject of a clinical trial may, depending on a host of factors, ultimately be approved by the FDA and covered and reimbursed by Medicare, Medicaid and/or other government health care programs. But any increase in program costs as a result of

these approval, coverage, and reimbursement decisions would neither be the result of overutilization (again, the ordering of medically unnecessary items or services) nor attributable to the remuneration permitted by the proposed safe harbor (i.e., the coverage of indirect costs incurred by clinical trial participants suffering from life-threatening conditions).

## 2. Patient Freedom of Choice

With respect to patient freedom of choice, the government's principal concern is the steering of patients to particular providers not because the providers are the most convenient for the patient or offer the highest quality items or services, but because the provider is paying the referring individual or entity a kickback. For example, where Lab A offers a physician \$25 for each referral of a Medicare or Medicaid beneficiary, the physician may steer patients to Lab A, even though Lab B and Lab C are more convenient for the patient and offer higher quality services than Lab A. The proposed safe harbor will not result in improper patient steering for several reasons.

- As a threshold matter, the proposed safe harbor will not protect incentives offered to patients by providers, suppliers or practitioners to obtain medical care. For example, were a hospital or physician to offer to waive the cost-sharing obligations of a Medicare beneficiary participating in an approved clinical trial, this remuneration would be not protected under the proposed safe harbor.
- Further, defining the terms "indirect cost payments" and "indirect cost stipends" to cover only "actual, additional, non-medical costs incurred by a human subject relating exclusively to their participation in an approved clinical trial," the safe harbor effectively ensures that the remuneration provided to a given patient will do nothing more than put that patient in precisely the same economic position they would have been in had they decided not to participate in the clinical trial. Put somewhat differently, while the safe harbor might incentivize a patient to participate in an approved clinical trial by removing any economic disincentive to do so, the safe harbor will not incentivize a patient to seek care that is not medically necessary or to seek medically necessary care from any particular provider, supplier, or practitioner.
- Finally, as an added safeguard, all indirect cost payments and indirect cost stipends must be documented and provided consistent with the terms and conditions of a written protocol that has been reviewed and approved in advance by the relevant IRB, which (as noted above) has a preexisting legal obligation to ensure that the study in question has the safeguards necessary to protect participants from either "coercion or undue influence."



### **3. Provider Competition**

With respect to unfair competition, the government's principal concern is that where referrals are controlled by those (e.g., physicians) receiving remuneration from a provider (e.g., Lab A), the medical marketplace suffers because new competitors (e.g., Labs B and C) may no longer be in a position to win business with superior quality, service, or price. For precisely the same reasons the proposed safe harbor will not result in any improper patient steering, it also will not result in any unfair competition. Simply put, the safe harbor does not provide any economic incentive to any patient to obtain health care items or services from any particular provider, supplier, or practitioner. As such, the proposed safe harbor will have no impact on the ability of providers, suppliers or practitioners to compete against one another on the basis of quality, service, or price (much less an impact that could be characterized as unfair).

### **4. Health Care Access and Quality; Underserved Areas and Populations**

For all of the reasons set forth in Section I above, promulgation of the proposed safe harbor should (i) increase access to health care services, (ii) increase the quality of health care services, and (iii) increase the ability of health care facilities to provide services in medically underserved areas or to medically underserved populations. Again, the objective of the proposed safe harbor is to remove a significant economic barrier to achieving clinical trial diversity, which, as the FDA has emphasized, supports early access to medical discoveries, improves the generalizability of results across patient populations, improves our understanding of the diseases and medical products being studied, and informs the safe and effective use of medical products for all patients. Indeed, with respect to cancer patients living in rural areas specifically, studies have shown that while such patients traditionally have had poorer treatment outcomes when compared to their urban counterparts, this disparity is erased when rural patients are enrolled in clinical trials.<sup>xviii</sup>

### **5. Provider Influence**

Finally, as to "the existence (or nonexistence) of any potential financial benefit to health care professionals or providers that may influence their decision whether to" (i) "order a health care item or service" or (ii) "arrange for a referral of health care items or services to a particular practitioner or provider," the proposed safe harbor would not protect any financial benefit that is provided to any health care provider, supplier, or practitioner. Again, the safe harbor would only protect a narrow category of remuneration ("indirect cost payments" and "indirect cost stipends") provided to a narrow category of individuals ("human subjects") under a narrow category of circumstances ("approved clinical trials").

## **III. Conclusion**

As the OIG notes in the Annual Solicitation, the agency "seeks to identify and develop safe harbors that protect beneficial and innocuous arrangements and safeguard Federal health

care programs and their beneficiaries from the harms caused by fraud and abuse.” ASC CAN believes that the narrowly tailored safe harbor it proposes squarely meets this test:

- for all of the reasons set forth in Section I, by effectively eliminating a significant economic barrier to the participation of diverse patients in clinical trials, the safe harbor will help achieve a priority of the federal government—ensuring that the makeup of participants in clinical trials is representative of the makeup of the U.S. population as a whole; and
- for all of the reasons set forth in Section II, this objective can be achieved without causing overutilization, a concomitant increase in program costs, improper patient steering, unfair competition, or any of the other types of fraud or abuse that the AKS is intended to prevent.

\* \* \*

In closing, the undersigned organizations would like to thank the OIG again for this opportunity to propose a new AKS safe harbor. Please feel free to contact us at any time at [Mark.Fleury@cancer.org](mailto:Mark.Fleury@cancer.org) if we can answer any questions the agency might have or provide any additional information the agency might need relating to our proposed safe harbor. Finally, if you would be kind enough to confirm the agency’s receipt of this request and identify the individual who will serve as the OIG’s point-of-contact with respect thereto, it would be greatly appreciated.

Sincerely,

American Cancer Society Cancer Action Network	American Association of Cancer Institutes
American Association for Cancer Research	Association for Clinical Oncology
American Society for Radiation Oncology	ECAN Esophageal Cancer Action Network
Fight Colorectal Cancer	Friends of Cancer Research
GO2 For Lung Cancer	Intercultural Cancer Council
International Myeloma Foundation	The Leukemia & Lymphoma Society
LUNGeivity Foundation	Melanoma Research Alliance
National Cancer Registrars Association	National Comprehensive Cancer Network
National Minority Quality Forum	Oncology Nursing Society
Prevent Cancer Foundation	Society for Immunotherapy of Cancer
Susan G. Komen	Triage Cancer
ZERO-The End of Prostate Cancer	

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- <sup>i</sup> Diversity Plans to Improve Enrollment of Participants from Underrepresented Racial and Ethnic Populations in Clinical Trials Guidance for Industry, Food and Drug Administration (April 2022) (“2022 Draft Industry Guidance”), at 1. *See also*, “Clinical Trial Diversity,” FDA Fact Sheet, at 1 (“Participants in clinical trials should represent the patients that will use the medical products. This is often not the case—people from racial and ethnic minority and other diverse groups are underrepresented in clinical research.”).
- <sup>ii</sup> FDA Clinical Trial Diversity homepage, <https://www.fda.gov/consumers/minority-health-and-health-equity/clinical-trial-diversity> (accessed January 17, 2023).
- <sup>iii</sup> 2022 Draft Industry Guidance at 5. *See also*, Clinical Trial Diversity, FDA Fact Sheet, at 1 (The lack of diversity in clinical trials is “a concern because people of different ages, races, and ethnicities may react differently to medical products. To achieve health equity so all can benefit from clinical trials, we are committed to taking steps to change this.”); FDA Drug Trials Snapshot Summary Report 2021 (April 2022), at 14 (“FDA is committed to working with sponsors to better achieve our objective towards improving patient diversity in clinical trials.”).
- <sup>iv</sup> Medicare National Coverage Decisions Manual, Ch. 1, Part 4, §310.1.
- <sup>v</sup> Nipp RD, Powell E, Chabner B, Moy B. Recognizing the Financial Burden of Cancer Patients in Clinical Trials. *Oncologist*. 2015;20(6):572-575. doi:10.1634/theoncologist.2015-0068.
- <sup>vi</sup> *See, e.g.*, Sateren WB, Trimble EL, Abrams J, et al. How sociodemographics, presence of oncology specialists, and hospital cancer programs affect accrual to cancer treatment trials. *J Clin Oncol*. 2002;20:2109–2117; and Baquet CR, Ellison GL, Mishra SI. Analysis of Maryland cancer patient participation in National Cancer Institute-supported cancer treatment clinical trials. *J Clin Oncol*. 2008;26:3380–3386. *See also*:
- Syed ST, Gerber BS, Sharp LK. Traveling towards disease: transportation barriers to health care access. *J Community Health*. 2013 Oct;38(5):976-93. doi: 10.1007/s10900-013-9681-1. PMID: 23543372; PMCID: PMC4265215;
  - Etminani-Ghasrodashti, R., Kan, C., & Mozaffarian, L. (2021). Investigating the Role of Transportation Barriers in Cancer Patients’ Decision Making Regarding the Treatment Process. *Transportation Research Record*, 2675(6), 175–187. <https://doi.org/10.1177/0361198121991497>; and
  - Evan M Graboyes, MD, MPH, FACS, Krisda H Chaiyachati, MD, MPH, MSHP, Jennifer Sisto Gall, MPH, Wenora Johnson, BSBM, Jerry A Krishnan, MD, PhD, Sapna S McManus, MD, MHA, Letitia Thompson, MPA, Lawrence N Shulman, MD, K Robin Yabroff, PhD, Addressing Transportation Insecurity Among Patients With Cancer, *JNCI: Journal of the National Cancer Institute*, Volume 114, Issue 12, December 2022, Pages 1593–1600, <https://doi.org/10.1093/jnci/djac134>.
  - King CJ, Chen J, Dagher RK, Holt CL, Thomas SB. Decomposing differences in medical care access among cancer survivors by race and ethnicity. *Am J Med Qual*. 2015 Sep-Oct;30(5):459-69. doi: 10.1177/1062860614537676. Epub 2014 Jun 5. PMID: 24904178; PMCID: PMC4257897.
- <sup>vii</sup> Unger JM, Hershman DL, Albain KS, et al. Patient Income Level and Cancer Clinical Trial Participation. *J Clin Oncol*. 2013;31(5):536-542. doi:10.1200/JCO.2012.45.4553; Unger JM, Cook E, Tai E, Bleyer A. The Role of Clinical Trial Participation in Cancer Research: Barriers, Evidence, and Strategies. *Am Soc Clin Oncol Educ B*. 2016;36:185-198.
- <sup>viii</sup> Adams DV, Long S, Fleury ME. Association of Remote Technology Use and Other Decentralization Tools With Patient Likelihood to Enroll in Cancer Clinical Trials. *JAMA Netw Open*. 2022;5(7):e2220053. doi:10.1001/jamanetworkopen.2022.20053. *See also* Takvorian SU, Cuerra CE, Schepero W. A Hidden Opportunity – Medicaid’s Role in Supporting Equitable Access to Clinical Trials, *N Engl J Med* 2021; 384:1975-1978, doi: 10.1056/NEJMp2101627, (noting than “racial and ethnic minority groups may be especially likely to

be affected by financial barriers to study participation, which include the costs associated with more frequent clinic visits, time away from work, and travel-related expenses.”)

[https://www.nejm.org/doi/10.1056/NEJMp2101627?url\\_ver=Z39.88-](https://www.nejm.org/doi/10.1056/NEJMp2101627?url_ver=Z39.88-)

[2003&rfr\\_id=ori:rid:crossref.org&rfr\\_dat=cr\\_pub%20%20pubmed.](https://www.nejm.org/doi/10.1056/NEJMp2101627?url_ver=Z39.88-2003&rfr_id=ori:rid:crossref.org&rfr_dat=cr_pub%20%20pubmed)

- <sup>ix</sup> See, e.g., OIG Advisory Opinion 98-6 (May 1, 1998) (permitting the remuneration at issue will “ensure that economically disadvantaged patients are not precluded from the study”); OIG Advisory Opinion 00-05 (Jun. 30, 2000), at 5 (same); OIG Advisory Opinion 06-05 (Apr. 26, 2006), at 3 (clinical trials “can impose substantial financial, logistical, and other burdens on patients and their families”); OIG Advisory Opinion 08-11 (Sep. 17, 2008), at 8 (permitting the remuneration at issue will “ensure that economically disadvantaged patients are not precluded from the study”); OIG Advisory Opinion 21-13 (Sep. 29, 2021), at 7 (the “Study is specifically designed to collect and analyze data on underrepresented minorities” and the remuneration at issue “appear[s] to be a reasonable means to facilitate enrollment of a diverse set of subjects by removing a potential financial barrier to participation in the Study”); OIG Advisory Opinion 22-05 (Mar. 11, 2022), at 7 (“[a]ccording to Requestor, the out-of-pocket costs to participate in the Study would be cost prohibitive for many Medicare beneficiaries who otherwise would participate in the Study, and Requestor’s cost-sharing subsidy” would be “a reasonable means to facilitate enrollment of a socioeconomically diverse set of subjects by removing a potential financial barrier to participation in the Study”).
- <sup>x</sup> FDA Press Release, FDA Takes Important Steps to Increase Racial and Ethnic Diversity in Clinical Trials (April 13, 2022). <https://www.fda.gov/news-events/press-announcements/fda-takes-important-steps-increase-racial-and-ethnic-diversity-clinical-trials>
- <sup>xi</sup> Section 2709(d) of the Public Health Service Act provides as follows:

*(d) Approved clinical trial defined*

*(1) In general*

*In this section, the term "approved clinical trial" means a phase I, phase II, phase III, or phase IV clinical trial that is conducted in relation to the prevention, detection, or treatment of cancer or other life-threatening disease or condition and is described in any of the following subparagraphs:*

*(A) Federally funded trials. The study or investigation is approved or funded (which may include funding through in-kind contributions) by one or more of the following:*

- (i) The National Institutes of Health.*
- (ii) The Centers for Disease Control and Prevention.*
- (iii) The Agency for Health Care Research and Quality.*
- (iv) The Centers for Medicare & Medicaid Services.*
- (v) cooperative group or center of any of the entities described in clauses (i) through (iv) or the Department of Defense or the Department of Veterans Affairs.*
- (vi) A qualified non-governmental research entity identified in the guidelines issued by the National Institutes of Health for center support grants.*
- (vii) Any of the following if the conditions described in paragraph (2) are met:*
  - (I) The Department of Veterans Affairs.*
  - (II) The Department of Defense.*

(III) *The Department of Energy.*

(B) *The study or investigation is conducted under an investigational new drug application reviewed by the Food and Drug Administration.*

(C) *The study or investigation is a drug trial that is exempt from having such an investigational new drug application.*

(2) *Conditions for departments*

*The conditions described in this paragraph, for a study or investigation conducted by a Department, are that the study or investigation has been reviewed and approved through a system of peer review that the Secretary determines-*

(A) *to be comparable to the system of peer review of studies and investigations used by the National Institutes of Health, and*

(B) *assures unbiased review of the highest scientific standards by qualified individuals who have no interest in the outcome of the review.*

- xii 21 C.F.R. § 56.102(e) provides as follows: “*Human subject* means an individual who is or becomes a participant in research, either as a recipient of the test article or as a control. A subject may be either a healthy individual or a patient.”
- xiii 21 C.F.R. § 56.102(g) provides as follows: “*Institutional Review Board (IRB)* means any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects. The primary purpose of such review is to assure the protection of the rights and welfare of the human subjects. The term has the same meaning as the phrase institutional review committee as used in section 520(g) of the act.”
- xiv Section 2709(e) of the Public Health Service Act provides as follows:
- (e) *Life-threatening condition defined*
- In this section, the term "life-threatening condition" means any disease or condition from which the likelihood of death is probable unless the course of the disease or condition is interrupted.*
- xv 21 C.F.R. § 56.102(j) provides as follows: “*Sponsor* means a person or other entity that initiates a clinical investigation, but that does not actually conduct the investigation, i.e., the test article is administered or dispensed to, or used involving, a subject under the immediate direction of another individual. A person other than an individual (e.g., a corporation or agency) that uses one or more of its own employees to conduct an investigation that it has initiated is considered to be a sponsor (not a sponsor-investigator), and the employees are considered to be investigators.”
- xvi See 21 C.F.R. § 56.111(b) (“When some or all of the subjects, such as children, prisoners, pregnant women, handicapped, or mentally disabled persons, or economically or educationally disadvantaged persons, are likely to be vulnerable to coercion or undue influence additional safeguards have been included in the study to protect the rights and welfare of these subjects.”).
- xvii OIG Advisory Opinion 98-6 (May 1, 1998), at 8. See also OIG Advisory Opinion 00-05 (Jun. 30, 2000), at 4 (the purpose of the remuneration at issue “is to induce participation in a HCFA-sponsored scientific study, not to induce utilization of Medicare covered services.”).
- xviii Unger JM, Moseley A, Symington B, Chavez-MacGregor M, Ramsey SD, Hershman DL. Geographic Distribution and Survival Outcomes for Rural Patients With Cancer Treated in Clinical Trials. *JAMA Netw Open*. 2018;1(4):e181235. doi:10.1001/jamanetworkopen.2018.1235.