DEPARTMENT OF HEALTH & HUMAN SERVICES **Office of Inspector General**

Washington, D.C. 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: February 12, 2010

Posted: February 23, 2010

[Name and address redacted]

Re: OIG Advisory Opinion No. 10-03

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 a Medicare Supplemental Health Insurance ("Medigap") policy, whereby [name redacted] indirectly contracts with hospitals for discounts on the otherwise applicable Medicare inpatient deductibles for its policyholders and also shares a portion of that savings with its policyholders who utilize a network hospital for an inpatient stay in the form of a credit that may be redeemed against their next premium payment (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 the Arrangement does not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act, and, while 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 [name redacted] (the "Requestor"), 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. 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 letter or supplemental submissions.

This opinion may not be relied on by any persons other than 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

The Requestor is a licensed offeror of Medigap policies. The Requestor participates in an arrangement with [name redacted] (the "MCO"), a managed care organization that has contracts with hospitals throughout the country, which comprise the MCO's hospital network. Under these contracts, network hospitals provide discounts of up to 100 percent on Medicare inpatient deductibles incurred at network hospitals that would otherwise be covered by the Requestor under the terms of the applicable Medigap plan. The discounts apply only to the Medicare Part A inpatient hospital deductibles covered by the Medigap plan and not to any other cost-sharing amounts. The hospitals provide no other benefit to the Requestor or its policyholders as part of the Arrangement. The Requestor pays the MCO a fee for administrative services each time it receives this discount from a hospital. If a policyholder is admitted to a non-network hospital, the Requestor pays the Part A hospital deductible, as provided under the Medigap policy. The Arrangement does not affect the liability of any Medigap policyholder for payments for covered services, whether provided by a participating hospital or any other hospital. The MCO's hospital network is open to any accredited, Medicare-certified hospital that meets the requirements of applicable state laws.

The Requestor returns a portion of the savings resulting from this Arrangement directly to any policyholder who has an inpatient stay at one of the network hospitals. Such individuals receive a $100 credit, in the form of a certificate, toward the policyholder's next premium payment. If the policyholder pays premiums by automatic bank draft, $100 is

automatically deducted from the next premium statement. The premium credit feature of the Requestor's Medigap plans is announced in plan materials provided to insureds once they have enrolled in a Medigap plan offered by the Requestor. The Requestor's website provides a web link identifying participating hospitals, and policy documents and membership cards contain an icon indicating the participation of the plan in the MCO's network as well as a telephone number to call to identify participating hospitals.

Savings realized by the Requestor under the Arrangement are reflected in the Requestor's annual experience exhibits (which reflect loss ratios) filed with the state insurance departments that regulate the premium rates charged by Medigap insurers. Thus, the savings realized from the Arrangement will be 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 knowingly and willfully to 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. United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir.), 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 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 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. While offering no protection to the Arrangement, the safe harbor for waivers of beneficiary coinsurance and deductible amounts, 42 C.F.R. § 1001.952(k), which permits hospitals to waive the Medicare Part A inpatient deductible in certain circumstances, bears on the instant inquiry. In addition, there is a safe harbor for reduced premium amounts offered by health plans, 42 C.F.R. § 1001.952(l). However, that safe harbor requires that the reduced premium be offered to all enrollees, and because the discount is only offered to those enrollees who choose network hospitals, the safe harbor also offers no protection.

Section 1128A(a)(5) of the Act (the "CMP") provides for the imposition of civil monetary penalties against any person who gives something of value 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 network hospitals to discount the Medicare inpatient deductible for the Requestor's policyholders—an amount for which the Requestor would otherwise 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. The safe harbor regulation for waivers of inpatient deductibles specifically excludes such waivers when they are part of an agreement with an insurer, such as the Requestor. See 42 C.F.R. § 1001.952(k)(1)(iii). In addition, the Requestor passes back a part of its savings to the policyholder as a credit against the policyholder's next premium payment. The premium credit implicates not only the anti-kickback statute (as remuneration for selecting the network hospital), but also the civil monetary prohibition on inducements to beneficiaries. Accordingly, we must examine both prongs of the Arrangement.

In combination with Medigap coverage, the discounts offered on inpatient deductibles by the network hospitals present a low risk of fraud or abuse. First, the waivers do not increase or affect per service Medicare payments. Payments to hospitals under Part A for inpatient services are fixed and unaffected by beneficiary cost-sharing. Second, the discounts should

not increase utilization. In this case, the discounts effectively are invisible to patients because they only apply to that portion of the beneficiary's cost-sharing obligations that the beneficiary's supplemental insurance would otherwise already cover. In addition, we have long held that the waiver of fees for inpatient services is not likely to result in significant increases in utilization. See, e.g., Preamble to Final Rule: OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952, 35962 (July 29, 1991). Third, the Arrangement should not unfairly affect competition among hospitals because membership in the network is open to any accredited, Medicare-certified hospital that meets the requirements of applicable state laws. Fourth, the Arrangement would not likely affect professional medical judgment because the patient's physician or surgeon receives no remuneration, and the patient remains free to go to any hospital without incurring any additional out-of-pocket expense.

The premium credit for patients who have inpatient stays in network hospitals similarly presents a low risk of fraud or abuse. With respect to the anti-kickback statute, the factors stated in the preceding paragraph apply equally to the premium credit. However, the premium credit also implicates the prohibition on inducements to beneficiaries. Unlike inducements to enroll generally in an insurance plan, which do not implicate the prohibition, see 65 Fed. Reg. 24400, 24407 (April 26, 2000), the premium credit in this instance is premised on a patient choosing a particular provider from a broader group of eligible providers. Such inducements come within the prohibition. Id. However, there is a statutory exception for differentials in coinsurance and deductible amounts as part of a benefit plan design, if the differential has been properly disclosed to affected parties and otherwise meets any requirements of corresponding regulations. See section 1128A(a)(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. While the premium credit is not technically a differential in a coinsurance or deductible amount, it has substantially the same purpose and effect.

Finally, the Arrangement as a whole has the potential to lower Medigap costs for the Requestor's policyholders who select network hospitals (without increasing costs for 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 facts and circumstances, and given the low risk of fraud or abuse and the potential for significant savings for beneficiaries, we will not impose administrative sanctions on the Requestor 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 CMP. 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 the Arrangement does not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act, and, while 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 [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 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 [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 in any matter involving an entity or individual that is not a requestor of this opinion.

- 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.

- 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 the Requestor 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 the Requestor with respect to any action 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,

/Lewis Morris/

Lewis Morris
Chief Counsel to the Inspector General