



*[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:** July 14, 2011

**Posted:** July 21, 2011

[Name and address redacted]

**Re: OIG Advisory Opinion No. 11-09**

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding the use of a “preferred hospital” network as part of Medicare Supplemental Health Insurance (“Medigap”) policies, whereby [names redacted] would indirectly contract with hospitals for discounts on the otherwise applicable Medicare inpatient deductibles for their policyholders and in turn would provide a \$100 premium credit to policyholders who utilize a network hospital for an inpatient stay (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 supplementary letters, 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 civil monetary penalties under section 1128A(a)(5) of the Act, and, while 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 [names 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 letter or supplemental submissions.

This opinion may not be relied on by any persons other than [names redacted], the requestors of this opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

## **I. FACTUAL BACKGROUND**

[Names redacted], (the “Requestors”) are all part of [name redacted] holding company system, and each is a licensed offeror of Medigap policies. Under the Proposed Arrangement, the Requestors would participate in an arrangement with a preferred provider organization (“PPO”) that has contracts with hospitals throughout the Requestors’ service area, which comprise the PPO’s hospital network. Under these contracts, network hospitals agree to discount a portion of the otherwise applicable inpatient deductible for Medicare patients whose inpatient deductible is covered by plans that participate in the network. In the case of the Requestors’ Medigap enrollees, the network hospitals would provide discounts of up to 100 percent of the Medicare inpatient deductibles incurred, which would otherwise be covered by the Requestors under the terms of the applicable Medigap plan. The discounts would apply only to the Medicare Part A inpatient hospital deductibles covered by the Medigap plans and not to any other cost-sharing amounts. The hospitals would provide no other benefit to the Requestors or their policyholders as part of the arrangement. Each Requestor would pay the PPO a fee for administrative services each time it receives this discount from a network hospital. If a policyholder is admitted to a non-network hospital, the Requestors would pay the full Part A hospital deductible, as provided under the applicable Medigap plan. The Proposed Arrangement would not affect the liability of any Medigap policyholder for payments for covered services, whether provided by a participating hospital or any other hospital. The

PPO hospital network would be open to any accredited, Medicare-certified hospital that meets the requirements of applicable state laws.

The Requestors would return a portion of the savings resulting from this Proposed Arrangement directly to any policyholder who has an inpatient stay at a network hospital. Such individuals would receive a \$100 premium credit. This feature of the Requestors' Medigap plans would be announced in plan materials provided to policyholders. Plan materials provided to policyholders subsequent to enrollment would identify participating hospitals, and policy documents and membership cards would contain an icon indicating the participation of the plan in the PPO network.

Savings realized by the Requestors under the Proposed Arrangement would be reflected in their 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 Proposed Arrangement would 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. 1985), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. Conviction will also lead to automatic exclusion from federal health care programs, including Medicare and Medicaid. Where a party commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative 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 Proposed 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, the 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 Proposed Arrangement is a straightforward agreement by the PPO network hospitals to discount the Medicare inpatient deductible for the Requestors’ policyholders—an amount for which the Requestors 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 Requestors. See 42 C.F.R. § 1001.952(k)(1)(iii). In addition, the Requestors would pass back a part of their savings to the policyholder as a premium credit. 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 Proposed Arrangement. In combination with Medigap coverage, the discounts offered on inpatient deductibles by the network hospitals would present a low risk of fraud or abuse. First, the waivers would 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 would be 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 Proposed Arrangement should not unfairly affect competition among hospitals, because membership in the network would be open to any accredited, Medicare-certified hospital that meets the requirements of applicable state laws. Fourth, the Proposed Arrangement would not likely affect professional medical judgment, because the patient's physician or surgeon would receive no remuneration, and the patient would remain 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 would present a low risk of fraud or abuse. With respect to the anti-kickback statute, the factors stated in the preceding paragraph would apply equally to the premium credit. However, the premium credit would also implicate 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 would be 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). 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 would have substantially the same purpose and effect.

Finally, the Proposed Arrangement as a whole has the potential to lower Medigap costs for the Requestors' policyholders who select network hospitals (without increasing costs for those who do not). Moreover, because savings realized from the Proposed

Arrangement would be reported to state insurance rate-setting regulators, the Proposed 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 would not impose administrative sanctions on the Requestors under the anti-kickback statute or the prohibition on inducements to beneficiaries in connection with the Proposed 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 Proposed 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 Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act, and, while 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 [names 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 letter or supplemental submissions.

### **IV. LIMITATIONS**

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [names redacted], the requestors of this opinion. This advisory opinion has no application to, and cannot be relied upon by, any other individual or entity.
- This advisory opinion may not be introduced into evidence 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 Proposed 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 [names 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 [names redacted] 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