



[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: June 27, 2008

Posted: July 7, 2008

[Name and address redacted]

Re: OIG Advisory Opinion No. 08-07

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding a proposal for a health care system to provide \$10 gift cards to patients whose service expectations were not met (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for 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 (i) the Proposed Arrangement would not constitute prohibited remuneration within the meaning of section 1128A(a)(5) of the Act; and (ii) 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 [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] (the “Requestor”) is an integrated health delivery system located in [state redacted]. It provides a variety of health care services through its three hospitals, twenty-two clinics, one skilled nursing facility, and one health plan.

The Requestor wishes to put in place a program to manage and resolve patient complaints regarding service shortfalls. The Requestor cites, as examples of issues addressed in such complaints, excessive wait times, cancelled appointments, delayed meals, excess noise, housekeeping or dietary concerns, equipment problems (e.g. television set not working), or loss of personal items.

As one component of its program to resolve patient complaints, the Requestor proposes to offer patients who have experienced service shortfalls \$10 gift cards through a gift certificate service. A gift card might be offered to a patient who has experienced, for example, at least a 30 minute delay in service. Gift cards would be offered for certain local vendors, such as restaurant and theater chains, with specific vendors identified by the gift certificate service. These gift cards would not be redeemable for cash or for items or services provided by the Requestor. The gift cards would not be redeemable at vendors of health care items and services, such as pharmacies or durable medical equipment suppliers. The Requestor would put in place a system to track the issuance of gift cards to patients, for the purpose of ensuring that multiple cards aggregating in excess of \$50 in value are not issued to the same patient in one year. The tracking system would also enable managers to know when, where, and how often service shortfalls leading to the issuance of gift cards occur, thus allowing the managers to address the underlying cause of the shortfalls. This gift card program would not be advertised.

II. LEGAL ANALYSIS

A. Law

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. See, also, 42 C.F.R. § 1003.102(b)(13). 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." The OIG has previously taken the position that "if an incentive is nominal in value, then the individual providing the incentive would not and should not know that the incentive is likely to induce a beneficiary to use a particular provider, practitioner or supplier. Accordingly, . . . incentives that are only nominal in value are not prohibited by the statute." 65 F.R. 24400, 24410 (April 26, 2000) (preamble to the final rule on the CMP). For enforcement purposes, we have interpreted nominal value to be no more than \$10 per item, or \$50 in the aggregate on an annual basis. Such inexpensive gifts cannot be in the form of cash or cash equivalents. Special Advisory Bulletin: Offering Gifts and Other Inducements to Beneficiaries, August 2002. <http://oig.hhs.gov/fraud/docs/alertsandbulletins/SABGiftsandInducements.pdf>

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.

B. Analysis

The Proposed Arrangement, by which the Requestor would provide \$10 gift cards to patients who experience service shortfalls, potentially implicates both the CMP prohibiting

beneficiary inducements and the anti-kickback statute. Here, however, the individual cards will have a value not exceeding \$10. They will be redeemable at specific vendors that do not sell items or services paid for by Federal health care programs. They will not be redeemable for cash or for items or services provided by the Requestor. The Requestor will implement a system for tracking the issuance of the cards, for the purpose of ensuring that individual beneficiaries do not receive multiple cards having an aggregate value in excess of \$50 in one year. In these circumstances, we conclude that the gift cards in the Proposed Arrangement will be nominal in value and will not constitute cash or cash equivalents for purposes of our enforcement policy under the CMP. Accordingly, we would not impose sanctions on the Requestor under the CMP in connection with the Proposed Arrangement.

For the same reasons set forth above, we also conclude that we would not impose on the Requestor administrative sanctions under the anti-kickback statute, 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 (i) the Proposed Arrangement would not constitute prohibited remuneration within the meaning of section 1128A(a)(5) of the Act; and (ii) 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 [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.

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 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 the 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 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,

/s/

Lewis Morris
Chief Counsel to the Inspector General