DEPARTMENT OF HEALTH AND 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: March 27, 2007

Posted: April 3, 2007

[name and address redacted]

Re: OIG Advisory Opinion No. 07-03

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding the use of rewards from credit card issuers for the benefit of a residential health care facility and its employees (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (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.

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 generate prohibited remuneration under the anti-kickback statute. Accordingly, 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 entity licensed by the [state redacted] State Department of Health to operate [name redacted] (the "Nursing Home"). The Requestor proposes to use credit cards issued in its name to purchase goods and services for the Nursing Home. The Nursing Home may seek reimbursement from Medicare and Medicaid for the costs associated with goods and services purchased with the Requestor's credit cards.

The credit card issuers provide rewards (e.g., airline mileage, cash rebates, and points toward purchases of specified items[1]) for the use of the credit cards. Neither the credit card issuers nor their sponsors (or affiliates) will be health care entities or affiliated with the health care industry. They will not be in a position to receive or influence referrals of items or services covered under a Federal health care program. The Requestor intends to use the rewards for the benefit of the Nursing Home by: (i) purchasing additional goods and services for the Nursing Home[2] or (ii) giving the rewards to employees of the Requestor as performance-based compensation.

Employees may only receive rewards as performance-based compensation for furnishing items or services for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs. The types of employees eligible to receive rewards include physicians, nurses, administrators, clerical workers, kitchen staff, and other

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[1]The specified items offered through the credit card issuers' rewards programs may be obtained from a variety of vendors. To the best of Requestor's knowledge, there will be no arrangements between any credit card issuer and any vendor to provide free or discounted items or services in connection with purchases by the Requestor or the Nursing Home. We have not been asked about, and we express no opinion regarding, any arrangements between any vendors and any credit card issuers.

[2]The Requestor has certified that the Requestor and the Nursing Home will appropriately reflect items and services obtained through rewards under the Proposed Arrangement on cost reports and claims submitted to any Federal health care program.

employees. The Requestor has certified that employees will receive rewards based solely on the manner in which they perform these job duties on behalf of the Nursing Home. The Requestor has further certified that it will not grant or calculate the employee rewards based directly or indirectly on referrals or the generation of any business payable by any Federal health care program.

The Requestor has certified that all employees who receive credit card rewards under the Proposed Arrangement will be *bona fide* employees as defined for purposes of 26 U.S.C. § 3121(d)(2) and Internal Revenue Service ("IRS") interpretations of that provision, as codified in the IRS' regulations and other interpretive sources and that the rewards will be characterized as part of an employee's compensation for income tax purposes. Further, the Requestor has certified that the rewards will not be given to any of the Nursing Home's patients or contractors. Patients might benefit from the rewards indirectly if the Requestor uses the rewards to purchase additional goods and services for the Nursing Home.

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 anti-kickback statute excepts from its reach "any amount paid by an employer to an employee (who has a *bona fide* employment relationship with such employer) for employment in the provision of covered items or services." Section 1128B(b)(3)(B) of the Act. Further, the Department of Health and Human Services has promulgated safe harbor regulations for this exception. These regulations provide that the term "remuneration," as used in the anti-kickback statute, does not include "any amount paid by an employer to an employee, who has a *bona fide* employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs." 42 C.F.R. § 1001.952(i). For purposes of this safe harbor, the term "employee" has the same meaning as it does for purposes of 26 U.S.C. § 3121(d)(2). See id.

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. The safe harbor for employees, 42 C.F.R. § 1001.952(i), potentially applies to the Proposed Arrangement.

B. Analysis

Under the Proposed Arrangement, there will be two potential benefits conferred through the credit card rewards: (i) the benefit to the Requestor and the Nursing Home, which may acquire additional items and services for use in their operations; and (ii) the benefit to Requestor's employees, who may be in a position to generate Federal health care program business.

1. Rewards to the Requestor and Nursing Home

It is axiomatic that there can be no violation of the anti-kickback statute absent potential referrals of Federal health care program business. On the facts presented, there will be no such referrals between the credit card issuers (or any affiliates) and the Requestor or its Nursing Home. Therefore, neither the transfer of rewards by the credit card issuers to the Requestor, nor the subsequent use of some rewards to purchase items or services for the Nursing Home, would give rise to sanctions for acts described in the anti-kickback statute pursuant to sections 1128(b)(7) or 1128A(a)(7) of the Act.

We note that the use of the rewards to obtain covered items and services might raise issues regarding proper reporting of such items and services for reimbursement purposes, such as on a cost report. The Requestor and the Nursing Home have certified that they will

appropriately reflect items and services obtained through these rewards on cost reports and claims submitted to any Federal health care program.[3]

2. Rewards to Employees

For the reasons stated below, we conclude that the portion of the Proposed Arrangement involving rewards given by the Requestor to its employees comes within the statutory exception and regulatory safe harbor for employee compensation.[4]

Only Requestor's *bona fide* employees will be eligible to receive the credit card rewards under the Proposed Arrangement.[5] As we have previously observed, the risk of fraud and abuse is typically reduced with *bona fide* employer-employee relationships, in part because the employer is generally fully liable for the actions of its employees and is thus more motivated to supervise and control them. See 56 Fed. Reg. 35952, 35961 (July 29, 1991).

Additionally, the rewards will be granted only to Requestor's employees for furnishing items or services for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs as performance-based compensation for fulfilling these job duties. Further, the Requestor has certified that the rewards will be characterized as part of an employee's compensation for income tax purposes. For these reasons, we conclude that the Proposed Arrangement would satisfy the criteria set forth in section 1128B(b)(3)(B) of the Act and 42 C.F.R. § 1001.952(i) and therefore, would not constitute prohibited remuneration under the anti-kickback statute, section 1128B(B) of the Act.

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 generate prohibited remuneration under the anti-kickback statute. Accordingly, the OIG would not impose

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[3]No opinion is expressed or implied in this opinion regarding the liability of any party under the False Claims Act or other legal authorities for any improper billing, claims submission, cost reporting, or conduct directly or indirectly related to the Proposed Arrangement.

[4]See supra note 3.

[5]Whether an individual is a *bona fide* employee is a matter that is outside the scope of the advisory opinion process. See section 1128D(b)(3)(B) of the Act. If the recipients of the rewards are not *bona fide* employees under the IRS definition, this advisory opinion is without force and effect.

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 [name 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 [name 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,

/s/

Lewis Morris
Chief Counsel to the Inspector General