



*[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:** May 19, 2010

**Posted:** May 27, 2010

[Name and address redacted]

**Re: OIG Advisory Opinion No. 10-05**

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding a proposed rewards program for referrals of prospective residents to your continuing care retirement communities by current residents and 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, 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 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 is limited to the Proposed 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.

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”) operates [number redacted] continuing care retirement communities (“CCRCs”), which provide housing and services, including as-needed care, to the elderly.<sup>1</sup> The Requestor typically offers three levels of care: independent living, assisted living, and skilled nursing. Continuing care residents have the contractual right to move to higher levels of care as their needs increase. For all of the Requestor’s facilities except one (which operates on a fee-for-service basis), continuing care residents pay an entrance fee and a set monthly fee.<sup>2</sup> Continuing care residents who later move to an increased level of care continue to pay the same monthly fee that they would be paying at the lowest level of care, plus charges for extra meals and ancillary items.

Independent living residences comprise the large majority of the care venues at the Requestor’s CCRCs. The Requestor has certified that there are [number redacted] independent living residences and [number redacted] skilled nursing beds in total among its [number redacted] CCRCs. The approximate ratio of independent living residents to nursing unit residents is 10:1. A substantial portion of the residents at the skilled nursing venues are not continuing care residents; they are directly admitted from outside the CCRC and do not have continuing care contracts. According to a 2005 actuarial study conducted by the Requestor, two-thirds of continuing care residents who enter the independent living portion of a CCRC are not expected to become residents of the community’s skilled nursing unit. For those who do enter a community’s skilled nursing level of care, this typically occurs after several years of residence at the independent living level. The average length

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<sup>1</sup> [Number redacted] currently under construction.

<sup>2</sup> CCRC entry fees typically range from [range redacted]. Monthly fees start at approximately [amount redacted] and up, and vary by unit size and geographical location. Monthly fees may be adjusted by the Requestor upon thirty-days’ written notice.

of occupancy in the independent living sections of the Requestor's CCRCs is predicted to be eight years.

The Proposed Arrangement, known as the [program name redacted], consists of two parts:

- (1) Gift Cards for CCRC Tours: Current residents and employees of the Requestor's CCRCs who recommend their community to a prospective resident will receive a [amount redacted] gift card, if they submit the name and contact information of the prospective resident to the CCRC; the CCRC determines that the individual is eligible to enter into a continuing care contract; and the individual tours the community within 90 days. The resident or employee is not required or asked to provide any other promotional services.
- (2) Credits/Rewards for Independent Living Referrals: If the prospective resident moves into independent living at the CCRC within 12 months after the tour, the current resident who made the referral will receive a one-time credit of [amount redacted] toward his or her monthly CCRC fee. If the referral was made by an employee, the employee will receive a [amount redacted] check as part of his or her employment compensation.

No payments will be made under either part of the Proposed Arrangement for residents who move into the assisted living or skilled nursing care venues at the CCRC. The Proposed Arrangement focuses on attracting prospective community members who do not need assisted or skilled care. Independent living is the point of entry for all who become part of the CCRC through the [program name redacted].

The prospective residents will derive from an elderly population that includes Federal health care program beneficiaries. Services provided at the skilled nursing level (and, in some limited instances, at the assisted living level) of the CCRCs may be reimbursed in whole or in part by Federal health care programs.<sup>3</sup> At the independent living level, however, the Requestor does not provide health care services nor does it participate in Federal health care

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<sup>3</sup> The Requestor has certified that only 30% of the nursing days provided in the CCRCs are covered by the Medicare program, and that percentage includes the often substantial number of nursing unit residents without continuing care contracts who are directly admitted into the skilled nursing facility from outside the CCRC. The Requestor has further certified that the odds of an independent living CCRC resident receiving a Medicare-reimbursed nursing day are at most one-in-ten. Only one of the Requestor's [number redacted] current CCRCs is enrolled in the Medicaid program, and that facility has only [number redacted] Medicaid beds.

programs. The Requestor does not provide physician services; ancillary services, such as therapy, hospice, medical equipment; or other Medicare or Medicaid-reimbursable services or goods to residents in the independent living areas of its CCRCs. When residents at the independent living level of care need health services or items, they access them independently from outside providers or suppliers.

CCRC employees would typically be friends or acquaintances of the prospective community residents who they would refer to the CCRC under the Proposed Arrangement. They are not physicians or other health care professionals in a position to make direct recommendations about health services or to influence medical decision-making.

A CCRC is a life-long housing and services program that may include future nursing care for those who need it. Accordingly, the decision to enter a CCRC is not simply a decision about health care services; it is an overall lifestyle decision. A prospective resident might typically consider, for example, the quality of the residential accommodations; dining, social, cultural, and recreational programs; location in relation to shopping centers and other businesses; the presence and potential companionship of friends already at the community; and the cost of non-health care facilities and services.

## 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.

## **B. Analysis**

The key question raised by the Proposed Arrangement is straightforward: would the residents and employees who receive incentives be “arranging for” or “recommending” the purchase or order of items or services payable by a Federal health care program? For the reasons described below, we conclude they would not. Accordingly, on the facts presented, the Proposed Arrangement does not implicate the anti-kickback statute.<sup>4</sup>

Under the Proposed Arrangement, the current residents and employees will be paid: (1) if the referred prospective resident takes a tour of the community within 90 days and (2) if the prospective resident moves into the independent living area of the community within a year of the tour. No payments will be made under either part of the Proposed Arrangement for residents who move into the assisted living or skilled nursing care venues at the CCRC.

While certain assisted living services and skilled nursing services provided by the Requestor are reimbursable by Federal health care programs, services provided at the independent living level are not. Continuing care residents have future access to services provided by the Requestor that may be reimbursed in whole or in part by Federal health care programs, but they may never need them. The facts here show that most will not, and if they do need them, it may be years in the future. Whether an individual resident referred by a current resident or employee will actually end up needing these services at some point in the future is substantially speculative and outside the control of the current resident or employee.

When a current resident or employee recommends the CCRC under the Proposed Arrangement, he or she is acting as a friend or acquaintance making a general recommendation about an overall lifestyle decision. Many prospects will simply tour the CCRC. Others may move in. While the availability of future assisted living and skilled

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<sup>4</sup> In accordance with the statutory exception and regulatory safe harbor for employee compensation, the anti-kickback statute does not prohibit payments made by employers to their bona fide employees, for employment in the furnishing of items or services for which payment may be made under Medicare, Medicaid, or other Federal health care programs. See 1128B(b)(3)(B) of the Act and 42 C.F.R. § 1001.952(i). Because we find that the set of facts presented here does not implicate the anti-kickback statute, we do not reach the issue of whether the Proposed Arrangement meets the criteria set forth in section 1128B(b)(3)(B) of the Act and 42 C.F.R. § 1001.952(i), with respect to the Requestor’s employees.

nursing services could be a factor in the prospect's decision, numerous other aspects of the CCRC unrelated to future health care needs would also be influential.

Lastly, these recommendations are readily distinguishable from problematic payments to marketers who are in an exceptional position of trust and may exert undue influence when recommending health care-related items or services. See, e.g., 56 Fed. Reg. 35974. CCRC employees are not physicians or other health care professionals in a position to make direct recommendations about health services or to influence medical decision-making. Rather, they—like the current residents—would typically be friends or acquaintances of prospective community members. Thus, the Proposed Arrangement would have no impact on any health care professional's decision to order a health care item or service or to refer a patient to a particular practitioner, provider, or supplier.

### **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 and, therefore, the Proposed Arrangement would not constitute grounds for the OIG to 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). 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 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 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,

/Lewis Morris/

Lewis Morris  
Chief Counsel to the Inspector General