



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 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: April 24, 2012

Posted: May 1, 2012

[Name and address redacted]

Re: OIG Advisory Opinion No. 12-05

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding a rewards program under which consumers would earn gasoline discounts based on the amount spent on purchases in retail stores and pharmacies, including cost-sharing amounts paid in connection with items covered by Federal health care programs (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 (the “CMP”), 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: (i) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) although 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] or its affiliates¹ (collectively, 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 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 the Requestor and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

The Requestor operates [name redacted] supermarkets, many of which have in-store pharmacies. The Requestor also operates four [name redacted] pharmacies, which are retail pharmacies that are not located in supermarkets.

The Requestor offers all customers a free loyalty card (the “Loyalty Card”), which the customer may obtain at the customer service desk at any [name redacted] store. A customer holding a Loyalty Card (a “Customer”) is entitled to various benefits, including, but not limited to, in-store discounts, check-cashing services, and online services (such as access to recipes and a shopping list tool). The particular benefit associated with the Loyalty Card at issue here is a program that allows Customers to earn discounts on gasoline purchases at participating [gas station name redacted] gas stations. For every \$50 that a Customer spends in the stores on “allowable purchases,”² the Customer is entitled to a discount of 10 cents per gallon on a single purchase of gasoline, up to a maximum of 20 gallons, at participating [gas station name redacted] locations.³ Thus, if a Customer had spent \$150 on

¹ The affiliated entities are: [names redacted].

² For purposes of this advisory opinion, the term “allowable purchases” includes any items or services that can be purchased at the Requestor’s stores, except for those listed in the “Purchase Restrictions” paragraph in the Loyalty Card program materials.

³ The terms of the program limit the Customer to one 20-gallon fill-up of gasoline. Thus, the maximum savings a Customer may receive under the program is 4% of the Customer’s

allowable purchases, that Customer would earn a discount of 30 cents per gallon of gasoline at participating stations. The gasoline discounts expire two months after the discount is earned.

Currently, co-payments for prescriptions covered under Federal health care programs are among the Purchase Restrictions. Under the Proposed Arrangement, the Purchase Restrictions paragraph would be revised such that these out-of-pocket costs (including deductibles and co-payments on Federally reimbursable prescription items) would be eligible to earn gasoline discounts in exactly the same manner as any other allowable purchase in the Requestor's stores. No additional bonus or other reward would accrue for transferring prescriptions, nor would dollars spent on prescription drug cost-sharing generate higher or different rewards than dollars spent on general grocery items. The Purchase Restrictions paragraph would continue to list Medicare, Medicaid, and private insurers' portions of prescription costs as being excluded from the calculation of a discount earned by a Customer.

II. LEGAL ANALYSIS

A. Law

The anti-kickback statute makes it a criminal offense to knowingly and willfully 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. See, e.g., United States v. Borrasi, 639 F.3d 774 (7th Cir. 2011); United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000); United States v. Davis, 132 F.3d 1092 (5th Cir.

total allowable purchases. For example, if a Customer spends \$50, earns a 10 cent discount, and purchases the maximum 20 gallons of gasoline, then the Customer's savings would be \$2, or 4% of the \$50 of allowable purchases in the store. If the Customer purchases less than 20 gallons, then the discount would be less than 4% of the Customer's allowable purchases. If the discount would exceed the price of gasoline, the remainder of the earned discounts would carry over for the Customer's future use.

1998); 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.

Section 1128A(a)(5) of the Act provides for the imposition of civil monetary penalties against any person who offers or transfers remuneration 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." The OIG has previously taken the position that "incentives that are only nominal in value are not prohibited by the statute," and has interpreted "nominal in value" to mean "no more than \$10 per item, or \$50 in the aggregate on an annual basis." 65 Fed. Reg. 24,400, 24,410-11 (Apr. 26, 2000) (preamble to the final rule on Civil Money Penalties).

Section 6402(d)(2)(B) of the Patient Protection and Affordable Care Act (P.L. 111–148, 124 Stat. 119), as amended by the Health Care and Education Reconciliation Act of 2010 (P.L. 111–152, 124 Stat. 1029) (collectively, the "ACA"), amends the Act's statutory definition of "remuneration" applicable to section 1128A(a)(5) by adding a new exception as subsection (G) for rewards offered by retailers that meet certain criteria.

B. Analysis

The Proposed Arrangement, under which Customers would earn rewards in the form of gasoline discounts based on the amount they spend in retail stores and pharmacies, including any cost-sharing amounts paid in connection with items covered by Federal health care programs, would implicate both the CMP and the anti-kickback statute. However, the Proposed Arrangement would satisfy the terms of the exception to the definition of remuneration in the CMP related to retailer rewards and, for the combination of the reasons described below, would pose a low risk of fraud and abuse under the anti-kickback statute.

1. The CMP

Under the Proposed Arrangement, out-of-pocket costs paid by Federal health care program beneficiaries would be included in the allowable purchases used to calculate gasoline discount rewards. Given the cumulative nature of the rewards program, it is likely that many beneficiaries could exceed the \$10 per item, or \$50 annual limit, in gasoline discounts, thus making the rewards more than nominal in value. However, the ACA added a new exception specific to retailer rewards. Pursuant to the ACA, retailer rewards do not constitute “remuneration” under the CMP if: (1) the rewards consist of coupons, rebates, or other rewards from a retailer; (2) the rewards are offered or transferred on equal terms available to the general public, regardless of health insurance status; and (3) the offer or transfer of the rewards is not tied to the provision of other items or services reimbursed in whole or in part by the Medicare or Medicaid programs. The gasoline rewards under the Proposed Arrangement would meet all of these criteria.

First, the Requestor operates supermarkets and pharmacies that sell items directly to the public. On the basis of such sales, the Requestor allows Customers to earn discounts on gasoline as a reward for their allowable purchases in the stores. Thus, the rewards consist of coupons, rebates, or other rewards from a retailer, as required by the first prong of the exception.

Second, under the Proposed Arrangement, the Loyalty Card program would be offered on equal terms to all customers at the Requestor’s supermarkets and pharmacies.

Third, the offer or transfer of the rewards under the Proposed Arrangement would not be tied to the provision of other items or services reimbursed in whole or in part by the Medicare or Medicaid programs. Customers could redeem rewards only on their purchase of gasoline, which is not an item or service for which a beneficiary could be reimbursed in whole or in part by the Medicare or Medicaid programs; thus, there would be no tie to Federally reimbursable items on the “redeeming” side of the transaction. Furthermore, we find no tie to the provision of other items or services reimbursed in whole or in part by the Medicare or Medicaid programs on the “earning” side of the rewards transaction. Although the Proposed Arrangement would allow Medicare and Medicaid beneficiaries the opportunity to include their out-of-pocket prescription costs together with the rest of their in-store allowable purchases to earn rewards, prescription purchases would not be required. Nor would they be treated differently than any other purchase in the Requestor’s stores for purposes of earning the rewards.

2. Anti-kickback Statute

Although the Proposed Arrangement would meet an exception to the definition of “remuneration” under the CMP, no parallel exception exists under the anti-kickback statute. However, for the following reasons, in combination with the factors set forth above, we conclude that the Proposed Arrangement would pose a minimal risk of fraud and abuse under the anti-kickback statute and, therefore, we would not impose administrative sanctions on the Requestor in connection with the Proposed Arrangement.

First, the risk that the Proposed Arrangement would steer beneficiaries to the Requestor’s supermarkets or pharmacies to purchase Federally reimbursable items or services is low. The majority of the Requestor’s stores are general supermarkets, selling a broad range of groceries and other non-prescription items. Customers would not be required to purchase any prescription items to earn rewards, and there would be no specific incentive (i.e., no “bonus” rewards) for transferring prescriptions to the Requestor’s pharmacies. The Proposed Arrangement simply would allow a Federal health care program beneficiary’s out-of-pocket expenditures, including cost-sharing on prescription drugs, to be counted equally towards earning the rewards.

Second, the Proposed Arrangement would be unlikely to result in overutilization or otherwise increase costs to Federal health care programs. Any cost-sharing amounts counting towards a Customer’s rewards would result from prescription drugs already prescribed. Moreover, the Proposed Arrangement would not involve a waiver or reduction in any cost-sharing amounts; only the amount actually paid out-of-pocket by a Customer would count towards earning rewards. The Customer would redeem the modest rewards in the form of discounts on purchases outside of the Requestor’s stores on gasoline—an item for which the Customer could not be reimbursed by Federal health care programs.

For the foregoing reasons, we conclude that the Proposed Arrangement would pose a minimal risk of fraud and abuse under the anti-kickback statute and would meet an exception to the definition of remuneration under the CMP, and thus, we would not impose administrative sanctions on the Requestor under those statutes 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 grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) although 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 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 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.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to the Requestor. 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 by a person or entity other than the Requestor to prove that the person or entity did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.
- 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 (or that provision's application to the Medicaid program at section 1903(s) 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 that is part of the Proposed Arrangement 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,

/Gregory E. Demske/

Gregory E. Demske
Chief Counsel to the Inspector General