

*[The following OIG letter concerns hospital-physician incentive plans for Medicare and Medicaid beneficiaries enrolled in managed care plans.]*

[Dated August 19, 1999]

[Name and Address Redacted]

Re: Social Security Act sections 1128A(b)(1) and (2) and hospital-physician incentive plans for Medicare or Medicaid Beneficiaries enrolled in managed care plans

Dear [Name Redacted]:

I am writing in response to your letter dated July 22, 1999, regarding the application of the civil monetary penalty law at sections 1128A(b)(1) and (2) of the Social Security Act (the "CMP") to hospital-physician incentive plans limited to Medicare or Medicaid beneficiaries enrolled in risk-based managed care programs subject to regulation pursuant to sections 1876(i)(8), 1903(m)(2)(A)(x), or 1852(j)(4) of the Social Security Act (the "Act"). We agree that such hospital-physician incentive plans are not subject to the CMP.

Our view is based on the legislative history of sections 1128A(b)(1) and (2). As initially enacted by Congress, sections 1128A(b)(1) and (2) of the Act prohibited payments by both hospitals and Medicare or Medicaid managed care plans to induce physicians to reduce clinical services. Omnibus Budget Reconciliation Act of 1986, § 9313(c) (P.L. 99-509). Sections 1128A(b)(1) and (2) of the Act were subsequently amended to delete the reference to Medicare or Medicaid managed care plans and to add new subsections to sections 1876 and 1903 of the Act that permitted Medicare and Medicaid managed care plans to implement physician incentive plans, provided the managed care plans did not induce the reduction of medically necessary care to individual patients and did not place the physician at substantial financial risk for services not provided by the physician. Omnibus Budget Reconciliation Act of 1990, §§ 4204(a), 4731 (P.L. 101-508) (codified at sections 1876(i)(8) and 1903(m)(2)(A)(x) of the Act).

We think that Congress intended that physician incentive arrangements related to Medicare risk-based managed care contracts and similar Medicaid contracts be subject to regulation by the Secretary pursuant to sections 1876(i)(8) and 1903(m)(2)(A)(x) of the Act, in lieu of being subject to sections 1128A(b)(1) and (2). We note that the physician incentive plan rules apply to physician incentive plans by Medicare risk-based managed care plans that directly contract with the Health Care Financing Administration and to physician incentive plans related to subcontracting arrangements between such managed care plans and physician groups or other intermediate entities. See 42 C.F.R. § 417.479(i); 61 Fed. Reg. 13430, 13439 (Mar. 27, 1996); see also 42 C.F.R. § 434.70 (comparable regulations for physician incentive plans associated with Medicaid managed care organizations).

We think the same result holds for physician incentive plans operated by Medicare + Choice managed care plans. Congress enacted statutory language almost identical to that of section 1876(i)(8) in permitting the Secretary to regulate Medicare + Choice physician incentive plans. See Social Security Act § 1852(j)(4). The Health Care Financing Administration has issued an interim final rule for Medicare + Choice plans that creates a regulatory framework similar to that for existing Medicare and Medicaid managed care risk-based physician incentive plans. See 63 Fed. Reg. 34968, 35002 (June 26, 1998).

I hope this information is useful in clarifying the scope of sections 1128A(b)(1) and (2) of the Act.

Sincerely,

/s/ Lewis Morris

Assistant Inspector General for Legal Affairs

Office of Counsel to the Inspector General