[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: September 28, 2001

Posted: October 5, 2001

[name and address redacted]

Re: OIG Advisory Opinion No. 01-16

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding the employment of Dr. X (the "Employment") by [name of plan redacted] ("the Plan"). Dr. X is an individual excluded from participation in Medicare, Medicaid, and other Federal health care programs. You have asked whether the Employment would constitute grounds for the imposition of sanctions against the Plan under Section 1128A(a)(6) of the Social Security Act (the "Act"), 42 U.S.C. §1320a-7a(a)(6).[1]

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 while the Employment could constitute grounds for the imposition of administrative sanctions against the Plan under section 1128A(a)(6) of the

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[1]Your request asks whether employment of Dr. X by the Plan "is a prohibited act under Medicare+Choice Final Rules and Regulations, Part 422, Subpart O, §422.752(a)(8)." This provision prohibits similar conduct subject to sanction by the OIG under §1128A(a)(6) of the Act. Since the Office of Inspector General is authorized to issue advisory opinions related to §1128A but not on regulations issued by the Centers for Medicare and Medicaid Services ("CMS", formerly the Health Care Financing Administration), such as the one you cite, we have chosen to treat this as a request for an advisory opinion on the applicability of §1128A(a)(6) instead of 42 C.F.R. §422.752(a)(8).

Act, the Office of Inspector General ("OIG") would not impose such sanction in connection with the Employment.

This opinion may not be relied on by any person other than [name of plan redacted], the requestor of this advisory opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

On or about September 8, 1996, Dr. X's license to practice as a psychologist in the [name of State redacted] was revoked. Based on that revocation, Dr. X was excluded by the OIG from participation in Medicare and other Federal health care programs effective [date redacted].

Dr. X is currently employed by the Plan as a Senior Program Developer. The Plan is a not-for-profit corporation, licensed in [name of State redacted] as a health maintenance organization under Article 44 of the [name of State redacted] Public Health Law. The Plan has approximately 350,000 members and employs over 700 people. It offers multiple health care products, including a health maintenance organization, a point of service plan, a Medicaid plan, and a Medicare+Choice plan.

Dr. X's current employment responsibilities at the Plan include: (i) leadership development; (ii) performance improvement consulting; (iii) diversity training; and (iv) non-professional course development. His services focus exclusively on the personal growth and attributes of employees, not their medical or administrative skills. He is not involved in any manner in providing or developing any training, education, or consulting related to clinical or administrative matters (including, but not limited to, compliance, billing, or reimbursement matters). Dr. X has no contact with the Plan's membership. He is supervised by the Human Resources Department and reports to the Assistant Director for Training. Dr. X is not involved, directly or indirectly, in the delivery of health care services or the claims filing for, or billing of, health care services. He does not work in the area of utilization review or medical social work, nor is he part of the administration of health care, utilization review, or medical social work.

II. LAW

The basis for Dr. X's exclusion is §1128(b)(4) of the Act, 42 U.S.C. §1320(b)(4). The following legal authorities are applicable in light of this exclusion.

• Pursuant to 42 C.F.R. § 1001.1901, no payment may be made by Medicare, Medicaid, or any other Federal health care program for any item or service furnished by an excluded individual or entity during the period of exclusion. The Medicare payment

prohibition is contained in Section 1862(e) of the Act. The parallel Medicaid provision is found in Section 1902(a)(39) of the Act, which requires states that receive payment for medical assistance to exclude from the Medicaid program any individual or entity excluded by the Secretary.

• Section 1902(p)(2)(c) of the Act requires a state that receives payment for medical assistance to exclude from Medicaid participation any managed care organization that "employs or contracts with any individual or entity that is excluded from participation under this title under section 1128 or 1128A for the provision of health care, utilization review, medical social work, or administrative services or employs or contracts with any entity for the provision (directly or indirectly) through such an excluded individual or entity of such services."

• Section 1128A(a)(6) of the Act authorizes the imposition of civil monetary penalties ("CMPs") against health care providers and entities that employ, or enter into contracts with, excluded individuals or entities to provide items or services that are covered (or payable) by a Federal health care program, if the provider or entity knows or should know that the person was excluded. Under the CMP authority, a provider or entity may be subject to penalties of up to $10,000 for each item or service provided by the excluded individual or entity, as well as an assessment of up to three times the amount claimed.

Pursuant to these authorities, the Federal health care programs do not pay for any items or services furnished by an excluded individual or entity, even if the payment is made to a provider that is not excluded. Moreover, a person or entity may not employ or contract with an excluded individual or entity to provide items or services payable in whole or in part, directly or indirectly, by any Federal health care program. These prohibitions extend to administrative and management services that are not directly related to patient care, but that are a component of providing items and services to Federal health care program beneficiaries. The prohibitions apply even if the excluded individual or entity providing the Federally payable items or services is paid with non-Federal funds, is paid by an unrelated third party, or provides items or services on an unpaid basis. In no event may Federal program funds be used to cover an excluded individual's salary, expenses, or fringe benefits. See generally, Special Advisory Bulletin: The Effect of Exclusion from Participation in Federal Health Care Programs, 64 F.R. 52791 (Sept. 30, 1999).

III. ANALYSIS

A provider or entity that receives Federal health care program funding may only employ an excluded individual in limited situations. Those situations would include instances where the provider pays the individual's salary, expenses, and benefits exclusively from

private funds or from other non-Federal funding sources, and where the services furnished by the excluded individual relate solely to non-Federal programs or patients.

The issue raised by this request is whether the items and services furnished by the excluded individual are attenuated sufficiently from the medical, administrative, or operational aspects of providing care to Federal health care program beneficiaries that it would be reasonable to view the cost of furnishing such services as outside the scope of the operating expenses that Federal program payment is intended to cover.

Dr. X's current employment responsibilities with the Plan are limited to non-medical training of employees. Dr. X provides leadership development and diversity training, performance improvement counseling, and non-professional course development. The focus of his services is exclusively on the personal growth and attributes of employees, not their medical or administrative skills. Under the applicable regulations set forth in 42 C.F.R. Part 422, Medicare+Choice organizations are not specifically required to provide training of this type, which is not part of any quality assurance program and which bears little, if any, relationship to the treatment of Medicare or Medicaid beneficiaries or the furnishing of, or billing for, any items or service covered by the Medicare or Medicaid programs.

Nevertheless, employee training is an integral component of the operation of a Medicare+Choice organization. In the absence of financial records indicating otherwise, we must presume that the services furnished by Dr. X associated with his "in-house" training of employees are factored into the Plan's administrative costs as reported to CMS via its Adjusted Community Rate (ACR). Thus, Dr. X's continued employment by the Plan could potentially subject the Plan to a sanction under §1128A(a)(6) of the Act, to the extent that his administrative services are, in part, reimbursed through the capitation payments made by Medicare and Medicaid.

However, given that Dr. X's duties are so far removed from the actual provision of items and services to program beneficiaries or the medical or administrative operation of the Plan, and that the services he provides are not an ordinary or necessary component of providing items and services to beneficiaries and are not the subject of any identifiable Federal funding or regulatory mandates, we conclude that the Employment (as described and certified in the request for an advisory opinion and supplemental submission) poses minimal risk to Federal health care programs or patients and will not subject the Plan to an administrative sanction under section 1128A(a)(6) of the Act.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name of Plan 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 section 1128A(a)(6) of the Act. 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 Employment.

- 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 that 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 Employment 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 Employment 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 the Employment in practice comport with the information provided 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/

D. McCarty Thornton
Chief Counsel to the Inspector General