

DIRECTOR'S OPINION NO. 08/1

THIS OPINION IS ISSUED BY THE DIRECTOR OF THE DEPARTMENT OF MANAGED HEALTH CARE PURSUANT TO HEALTH AND SAFETY CODE SECTION 1344 OF THE KNOX-KEENE HEALTH CARE SERVICE PLAN ACT OF 1975

XTRACARD Corporation, Inc.
c/o Gail Schubert, Esq.
400 Capitol Mall, Suite 1460
Sacramento, CA 95814

Dear Ms. Schubert:

Pursuant to California Health and Safety Code section 1344(b), the Director of the Department of Managed Health Care (Department) has the discretion to issue interpretive opinions regarding any provision of the Knox-Keene Health Care Service Plan Act of 1975, Health and Safety Code section 1340 *et seq.*, as amended (Knox-Keene Act),¹ or any regulation promulgated pursuant to the Knox-Keene Act, at title 28 of the California Code of Regulations.

The Director has considered the request for an interpretive opinion contained in your letter on behalf of XTRACARD Corporation, Inc. (XTRACARD) dated June 29, 2005, and the materials submitted with your request. Your request for an interpretive opinion (IO request) was submitted pursuant to section 1005 of the California Code of Regulations, title 28,² and satisfies the requirements of that section. Your request raises the issue of whether XTRACARD is a health care service plan and subject to licensure under the Knox-Keene Act. Based on the facts described in your IO request, the Director concludes that XTRACARD, which offers discount health care services and engages in the activities described below, is a health care service plan within the meaning of Section 1345(f) and is subject to the licensure requirements of the Knox-Keene Act.

FACTS

Your IO request describes business operations pursuant to which XTRACARD has contracted to lease networks of physicians, nurses, dentists, hospitals, and other health care providers who have agreed to provide health care services at discounted rates. XTRACARD has designed and developed a variety of discounted health care benefit products, and has contracted with marketing partners who sell XTRACARD's discounted health care service products to consumers. XTRACARD's discounted health care service products are marketed to individuals and groups, with individual benefit plans requiring an initial registration fee of \$99.95 to \$199.95 and subsequent monthly payments of \$39.95 to \$99.95. These fees entitle individuals to discounted health care services provided by XTRACARD's provider network.

¹ References herein to "Section" are to the sections of the Knox-Keene Act, unless otherwise specifically noted.

² Future references herein to "Rule" are to the regulations promulgated at title 28 of the California Code of Regulations, unless otherwise specifically noted.

In order to obtain appointments with physicians, it is necessary for XTRACARD members to first call an XTRACARD "Patient Advocacy" representative who will contact providers in the network to ensure that the providers understand the XTRACARD benefit and agree to accept the discount card. For some health care services delivered through the XTRACARD product, the member will be solely responsible for paying the provider. Other health care services (Doctor Online, 24/7 Nurse Hotline, and 24/7 Mental Health Counseling) are provided to XTRACARD members at no additional cost beyond the registration fee and monthly charge.

The discounted health care services that are offered by XTRACARD, and the representations made in its marketing materials (shown in italics) include:

1. Professional physician services, including access to specialist physicians and ancillary service providers, regarding which XTRACARD represents:
The program utilizes one of the largest PPO networks in the nation. This nationally recognized network "owns" its physician contracts so it cannot lose coverage due to cancellation of a lease agreement. The network maintains control of physician education and service levels. The Physician Network is effective and easy to use. Savings range from a low of 10 percent to a high of 45 percent with the norm averaging in the area of 30 percent.
2. Hospital services, regarding which XTRACARD represents:
The Hospital Referral Network is comprised of over 70 percent of the hospitals in the country, including some of the finest facilities in the U.S. Cardholders may save up to 25 percent or more on hospital stays at participating facilities. Providers have agreed to charge reduced fees for cardholders in exchange for new patients and "secure payment."
3. Doctor Online, regarding which XTRACARD represents:
Doctor Online, a confidential web-based preventive-medicine oriented program, provides cardholders direct access to licensed, board-certified physicians through e-mail. These physicians provide personal advice, suggest treatment alternatives, use links to websites, provide patient information from other sources, or assist cardholders with questions about other specialists. Responses are given within 24 hours, with most arriving within four hours. Highlights: online medical consultations; information about illnesses or symptoms; assessment of acute symptoms and overall health care; provision of a personalized health care plan; advice on treatment for minor illnesses (i.e. pink eye, poison ivy); links to other health care resources; and nutritional and fitness advice.
4. 24/7 Nurse Hotline, regarding which XTRACARD represents:
Nurse Hotline offers toll-free access to experienced registered nurses, 24 hours a day, 365 days a year. Hotline nurses are an immediate, reliable, and caring source of health information, education, and support. Call the toll-free number on your card, and our nurses will give you information based on physician-approved guidelines, including: general information on all types of health concerns; answers about medication usage and interaction; translation services for non-English speaking callers; and a bilingual tape library of medical information. Members may be prompted to call the Nurse Hotline when a cardholder or

family member is sick and in need of some expert medical advice without having to see a physician.

5. Air Ambulance/Travel Assistance, regarding which XTRACARD represents:
Cardholders have access to a global network of practicing physicians, travel assistance personnel, and emergency evacuation benefits, when traveling 100 miles from home and suffering a serious injury or illness. Some of these services include: emergency medical evacuation; repatriation of mortal remains; transportation to join a hospitalized cardholder; monitoring of treatment worldwide; medical and dental referrals; facilitation of hospital payment; transfer of insurance information to medical providers; and medication, vaccine, and blood transfers. Travel Assistance has a global network of over 40,000 international providers. The network contains hospitals, clinics, and physicians, as well as other providers geared uniquely to the travel insurance industry, such as air ambulances, house call physicians, and medical escorts. Travel Assistance has rigorous credentialing and recredentialing standards. In evaluating the local facilities, Travel Assistance considers such factors as the quality of the blood supply, medical technology and specialties available, use of sterile equipment, and the patient's medical requirements.
6. 24/7 Mental Health Counseling, regarding which XTRACARD represents:
Counselors work with a multitude of issues including: depression; anxiety or stress; conflicts at work or home; reliance on alcohol, drugs, tobacco, or food; sexual, physical, or emotional abuse; loss and grief; and change and transition. Cardholders receive free unlimited telephone counseling services 24 hours a day, seven days a week. For face-to-face counseling, cardholders may be referred to a network of approximately 27,000 providers who offer 20 to 35 percent off the normal billed charges. Cardholders get free telephone problem-solving services. Counselors follow up and monitor progress until the member is satisfied. If ongoing therapy is needed, the cardholder is given referrals to other professionals or reputable outside resources. Payment of a referred counselor is the cardholder's responsibility. However, insurance may cover a percentage of the cost.
7. Long Term Care/Eldercare Nurse Navigator, regarding which XTRACARD represents:
Our Long-Term/Eldercare Nurse Navigator program is designed to provide assistance and support to cardholders dealing with the aging of their parents and family members. Our trained and experienced elder care specialists help you and your family to understand the issues related to caring for an older person, and assist you in making the right choices for your family. Discount home health care and long-term network – cardholders can save up to 30 percent at approximately 5,500 providers when seeking home health agency or assisted living facilities. Discounted fee-for-service geriatric care management services – approximately 3,500 nurses and social workers provide telephonic and in-home evaluations (for an additional hourly or package fee) for all levels of care from basic to comprehensive.
8. Pharmacy services, including mail order, regarding which XTRACARD represents:
The neighborhood pharmacy program assures cardholders the lowest price on prescription drugs, saving up to 50 percent on most short-term, acute care prescriptions such as antibiotics and painkillers at over 40,000 chain and independent locations nationwide. For

mail order: accuracy is assured by requiring every order to pass seven quality checkpoints before shipping. Unlike competitive programs that restrict available medications to their "approved" lists, the Mail Order Prescription Plan is an "open formulary", so doctors may prescribe the most effective medication to treat the member's ailment or condition.

9. Emergency Card, regarding which XTRACARD represents:

Medical Record Storage enables fast, secure telephone access to complete medical information, whenever needed, at no additional cost (\$85.00 value). Medical records and vital information are maintained, and released only with proper cardholder approval. There is 24-7 rapid, secure access to vital information, and the cardholder's wishes are followed, even in emergencies. The file includes: medical conditions, allergies, insurance data, immunizations, medications, physician information, x-rays, emergency contacts, advance directives, and more. In a medical emergency, time is of the essence. Unlike programs that require cardholders to carry an inscribed bracelet or card with cryptic, handwritten or microfiche information, Medical Record Storage has professionally trained specialists who work 24 hours a day to provide complete information instantaneously to authorized paramedics or emergency room doctors.

10. Dental services, regarding which XTRACARD represents:

Save on most routine dental services such as cleanings and fillings. Save on specialty care such as orthodontics and periodontics where available. Over 66,000 participating providers. Cardholders will always receive a discount that is a minimum of 20 percent off the usual and customary fee. For certain procedures, members will get as much as 60 percent off. (These savings stated in the FAQs)

11. Vision services, regarding which XTRACARD represents:

The Vision Program has contracted with over 12,500 eye care locations nationwide. Cardholders save on eyeglasses, contacts, non-prescription sunglasses, eye exams, and surgical procedures. The network provider panel is the most comprehensive in the U.S. and includes ophthalmologists, optometrists, independent optical centers and national chain locations. Savings of 20 to 60 percent on prescription eyewear...Savings up to 30 percent on eye exams, and most frames, lenses and specialty items such as tints, coatings and UV protection are available. Savings up to 30 percent on medical eye exams and surgical procedures, including refractive surgery (PRK and LASIK). We contract with ophthalmologists (M.D.s) in selected markets across the country. We contract with national chains of laser surgery centers to provide discounts on refractive laser surgery. In addition, we contract with independent ophthalmologists who also provide discounts on refractive surgery.

12. Chiropractic services, regarding which XTRACARD represents:

Cardholders save 30 to 50 percent at over 6,000 participating Doctors of Chiropractic nationwide; free initial consultation; 50 percent savings on diagnostic services and x-rays (if needed); 30 percent savings on other services; unlimited access to care with no limit on the number of visits; 24-hour access to provider referrals via the internet; and a toll-free automated telephone system.

13. Hearing Aid services, regarding which XTRACARD represents:

Hearing Planet (Retail) - Over 1,000 locations across the U.S. made up of credentialed audiologists and savings up to 50 percent off suggested retail prices on over 15 manufacturer brands, including Siemens, GNResound, Sonic Innovations, Starkey, Phonak, Oticon, and Widex (financing options also available). On-staff audiologists are ready to assist cardholders. All hearing aids receive a two-year warranty (\$99 value) and a one-year supply of batteries (\$75 value) at no charge. Our "low price guarantee" and "45-day Home Trial" on all hearing aid purchases assure cardholder satisfaction.

ANALYSIS

Section 1349 makes it unlawful for any health care service plan to engage in business in California without a license. Section 1345(f)(1) defines a health care service plan as any person who undertakes to arrange for the provision of health care services to enrollees, or to pay for or to reimburse any part of the cost for those services, in exchange for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees.

The marketing materials provided with your IO request demonstrate that XTRACARD imposes upon members a registration fee and monthly charges, which constitute "a prepaid or periodic charge" within the meaning of Section 1345(f)(1).

The information provided in your IO request also demonstrates that arrangements for the provision of health care services are not made solely by and between the enrollee and the individual provider rendering the health care services. Instead, XTRACARD has arranged, through contracts with one or more entities, for (1) the networks of providers through which healthcare services are provided to XTRACARD members, and (2) the terms and conditions upon which the discounted rates on professional and institutional health care services are provided to XTRACARD members. This type of activity falls directly within the scope of Section 1345(f)(1).

In addition, XTRACARD provides its members with the "24/7 Nurse Hotline," the "24/7 Counseling" line, and the "Doctor Online" services on an unlimited basis and with no additional fee-for-service charge. These health care services include consultations, medical assessments, medical diagnoses, medical treatment plans, medical advice, home health care measures, mental health counseling, and referrals to other health professionals, including specialists. These activities involve the provision of basic health care services within the meaning of:

1. Section 1345(b)(1) regarding basic physician services, including consultation and referral, as clarified by Rule 1300.67(a)(1), with respect to inclusion of consultation and referral by other health professionals who are defined as nurses, clinical psychologists, social workers, pharmacists, and other professionals engaged in the delivery of health care services;
2. Section 1345(b)(4) regarding home health services as clarified by Rule 1300.67(e) with respect to the inclusion of diagnostic services provided in the home; and

3. Section 1345(b)(5) regarding preventive health services, as clarified by Rule 1300.67(f), including services for the detection of asymptomatic diseases, and health education services.

XTRACARD's representations in marketing materials describing its discounted health care services products include statements regarding the accessibility and availability of its network of health care services providers, the timeliness of services, and the quality of care delivered by its network providers. XTRACARD promises coordination of care, continuity of care, and utilization and case management services. It represents that it, and its contracting networks, have the administrative capacity to provide these services, as well as translation services, patient advocacy services, and other general customer services; and it ensures customer satisfaction with these services. XTRACARD represents in various contexts that:

1. XTRACARD has contracted with the largest networks, the most comprehensive provider panel in the U.S., the best facilities, and the best providers;
2. XTRACARD's networks deliver the best care, unlimited access to care, and the highest quality health care services;
3. XTRACARD's provider networks undergo stringent and periodic accreditations; and
4. XTRACARD's members receive the lowest prices, the biggest discounts and savings, and similar extreme comparative advantages.

Based on the facts above and the materials submitted with your IO request, the Director has concluded that XTRACARD is a health care service plan within the meaning of the Knox-Keene Act. Specifically, XTRACARD receives a "prepaid or periodic charge" that is paid by its members in exchange for XTRACARD's arranging for the provision of health care services with physicians, nurses, radiologists, dentists, optometrists, hospitals, and other health care providers.

This conclusion is consistent with Section 1399.5, in which the Legislature declared:

It is the intent of the Legislature that the provisions of this chapter shall be applicable to any private or public entity or political subdivision which, in return for a prepaid or periodic charge paid by or on behalf of a subscriber or enrollee, *provides, administers or otherwise arranges* for the provision of health care services, as defined in this chapter, unless such entity is exempted from the provisions of this chapter by, or pursuant to, Section 1343. [Emphasis added.]

The use of the disjunctive phrase "provides, administers or otherwise arranges" in Section 1399.5 evidences the broad applicability that the Legislature intended in enacting the Knox-Keene Act, particularly Section 1345(f). This phrase unambiguously expresses the Legislature's intent to make the provisions of the Knox-Keene Act applicable to all entities that are either

primarily or secondarily obligated to exercise discretion in securing health care services.³ This phrase includes a party that arranges for discounts in connection with another person's obligation to provide or arrange for the provision of health care services, as long as it is done in return for a prepaid or periodic charge. Therefore, XTRACARD's activity of exercising discretion through the leasing of provider networks for its members to access is within the scope of Section 1399.5.

Further, the Department's determination that XTRACARD is a health care service plan is consistent with earlier decisions of the Department. There exists a longstanding line of authority in which entities seeking to offer similar discount services and benefits to their members were found to be undertaking to arrange for the provision of health care services within the meaning of Section 1345(f). For example, in Comm. Op. 3175H (1977), American Prescription Plan, Inc., which proposed selling prescription drugs and other pharmaceutical products to members of its plan at wholesale prices for an annual fee of \$25 per person, was found to be providing a health care service in return for a periodic charge, and was therefore subject to the licensure requirement of Section 1349 of the Knox-Keene Act.

Similarly, in Comm. Op. 3253H (1977), an entity which contracted with dentists to provide certain dental services to its members free of charge and to make other services available to them at stated rates in exchange for an annual membership fee, was found to be arranging for the provision of health care services to subscribers or enrollees in return for a prepaid or periodic charge. Accordingly, it was considered a health care service plan within the meaning of Section 1345(f) and was subject to the licensure requirement of Section 1349.

Finally, in Comm. Op. 4614H (1983), the Commissioner, responding to an inquiry from the National Benefit Association (NBA), held that undertaking to seek and contract with health care providers willing to offer a discount to NBA members and providing members with a list of such providers in exchange for an annual membership fee, constituted arranging for the provision of health care services to enrollees in return for a periodic charge within the scope of Section 1345(f)(1).

Based on the legal analysis and facts regarding XTRACARD's business operations, as outlined in your letter dated June 29, 2005, and as evidenced by the marketing materials submitted with your request, the Director concludes that XTRACARD is a health care service plan under the Knox-Keene Act, and therefore XTRACARD is subject to the licensure requirements of the Knox Keene Act. Accordingly, XTRACARD must obtain a Knox-Keene license before

³ See Comm. Op. 4730H (1983), Comm. Op. 4664H (1983), and Comm. Op. 4614H (1983). Prior decisions of the Department were issued by the Commissioner of the Department of Corporations, but are nonetheless opinions of the Department. Pursuant to Section 1341.14(a), any regulation, order, or other action adopted by the Department of Corporations in the performance of a duty transferred to the Department by Section 1341.9 shall remain in effect and shall be deemed a regulation, order, or action of the Department. Citations to the decisions issued by the Commissioner of the Department of Corporations will be cited in the format of Comm. Op. [file number] (year).

commencing operations in California. If XTRACARD has already commenced operations in California, it is operating without a license in violation of the Knox-Keene Act.⁴

Interpretive opinions are often issued for the principal purpose of providing a procedure by which members of the public can protect themselves against liability for acts done or omitted in good faith in reliance upon the administrative determination made in the opinion. However, there can be no such reliance where the Director asserts jurisdiction with respect to a particular situation or determines that a legal requirement is applicable.

Dated: February 8, 2008
Sacramento, California

By order of
LUCINDA A. EHNES
Director
Department of Managed Health Care

ORIGINAL SIGNED

⁴ In addition to determining the jurisdictional questions regarding the need to obtain Knox-Keene licensure, the Department's review of the marketing materials on the DP.C website identified concerns regarding DP.C's compliance with the requirements of the Knox-Keene Act. Examples of the identified non-compliance concerns are listed below to assist DP.C's anticipated efforts to bring its operations into compliance through the Department's licensure process.

- a. Advertisements that do not clearly describe the services to which discounts apply, the amount or percentage of such discounts, or the basis from which the discount is taken;
- b. Use of inexact advertising of the discounts, such as "discounts as much as 60%" and "saving ...averaging in the area of 30%";
- c. Use of prohibited terms in price advertising, such as "lowest" and "up to";
- d. Promises of premiums, gifts, baits, bonuses, and gratuities such as "two year warranty (\$99 value) and a one year supply of batteries (\$75 value) at no charge"; "Medical Record Storage...at no additional cost (\$85 value)"; and membership in two "national associations," which membership includes an Accidental Death and Dismemberment Policy providing "\$10,000...coverage per occurrence" and a Medical Accident Policy providing "up to \$5,000 of payments for medical expenses," without disclosure of any exclusions, limitations, restrictions, exceptions, waiting/affiliation period, or other terms and conditions regarding these two policies;
- e. Offering insurance products, such as Accidental Death and Dismemberment, a Medical Accident Policy, and an Air Ambulance policy, and/or the use of insurance terms, such as "benefit" or "no pre-existing conditions excluded," making it appear as though the discount card product is insurance;
- f. Advertisements that do not fairly and clearly disclose, given the overall context of the advertisements, that the product is not insurance and that members must pay providers in full at time of service;
- g. Requiring prospective enrollees to join before providing membership materials, and more specifically, requiring prospective enrollees to join before disclosing a complete list of exclusions, limitations, exceptions, restrictions, and other material terms and conditions; and
- h. Requiring prospective enrollees to join before disclosing the provider network.