[We redact certain identifying information and certain potentially privileged, confidential, or proprietary information associated with the individual or entity, unless otherwise approved by the requester.]

Date Issued: December 19, 2000

Date Posted: December 28, 2000

[Name and Address redacted]

Re: OIG Advisory Opinion No. 00-11

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding a proposed charitable donation of up to $5,000 from Association A (the "Requester") to EMS Service B ("EMS Service B"), a tax-exempt entity, to be used for the purchase of equipment and payment of paramedic training expenses (the "Proposed Donation"). Specifically, the question raised by your request is whether the Proposed Donation would constitute grounds for the imposition of sanctions under the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act"), in the circumstances presented.

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 provided, we conclude that the Proposed Donation might constitute prohibited remuneration under the anti-kickback statute, if the requisite intent to induce referrals of Federal health care program business were present, but that the Office of Inspector General ("OIG") would not subject the Requester to sanctions arising under the anti-kickback statute in connection with the Proposed Donation. We express no opinion with respect to additional payments the Requester may make in the future.

This opinion may not be relied on by any persons other than the Requester, and is further qualified as set out in Part V below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

The Requester operates Hospital C (the "Hospital"), a 113-bed acute care facility in City D, State E. In 1963, voters in City D, Township E, and Township F (which includes the City of G) created the [name redacted] Joint Township District to construct the Hospital to replace City D Municipal Hospital. The Hospital's Board of Trustees consists of five members appointed by the participating governments, six members elected from the Association A membership, which is open to any adult residing within the Hospital's district, and three physicians from the Hospital's medical staff. The Hospital is tax-exempt under Federal and state law. The Hospital maintains a Level III emergency department.

EMS Service B is an all-volunteer, tax-supported emergency medical services entity serving City G, approximately five miles from the Hospital. In 1999, EMS Service B brought approximately 73% of its transports to the Hospital.

The city manager of City G has asked the Hospital to provide financial assistance to EMS Service B. The Requester proposes to provide EMS Service B with up to $5,000, depending on the availability of Hospital funds, in a one-time payment to assist EMS Service B with equipment purchases, paramedic training, or other educational expenses. The Requester has not previously donated funds to EMS Service B. The Requester has certified that neither its decision to make the donation, nor the amount of the donation, would be influenced by, or conditioned on, the number or type of patients taken by EMS Service B to the Hospital or by any other business between the parties.[1]

II. THE ANTI-KICKBACK STATUTE

The anti-kickback statute makes it a criminal offense knowingly and willfully to offer, pay, solicit, or receive any remuneration to induce referrals of items or services reimbursable by any Federal health care program. See section 1128B(b) of the Act. Specifically, the statute provides that:

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[1]The Requester has indicated in its request letter that it will consider making additional contributions to EMS Service B of up to $5,000 annually. We are unable to opine at this time about the propriety of possible future donations; such possible donations and the facts and circumstances surrounding them are hypothetical and not a proper subject for an advisory opinion. See 42 C.F.R. § 1008.15(b).

> Whoever knowingly and willfully offers or pays [or solicits or receives] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person -- to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony.

Id. Thus, where remuneration is paid purposefully to induce referrals of items or services for which payment may be made 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, in cash or in kind, directly or indirectly, covertly or overtly.

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. The OIG may also initiate administrative proceedings to exclude persons from Federal and State health care programs or to impose civil monetary penalties for fraud, kickbacks, and other prohibited activities under sections 1128(b)(7) and 1128A(a)(7) of the Act.[2]

This Office's concern with the provision of free goods and services to actual or potential referral sources is longstanding and clear: such arrangements are suspect and may violate the anti-kickback statute if one purpose is to induce or reward referrals of Federal health care program business. Those concerns necessarily extend to donations of goods, services, or money to actual or potential referral sources.

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[2]Because both the criminal and administrative sanctions related to the anti-kickback implications of the Proposed Donation are based on violations of the anti-kickback statute, the analysis for purposes of this advisory opinion is the same under both.

III. ANALYSIS

A monetary donation by a hospital to a local ambulance company fits within the meaning of remuneration for purposes of the anti-kickback statute, if an intent to induce referrals of services or other business for which payment may be made under a Federal health care program is present. Stated another way, a monetary donation by a hospital to a local ambulance company is permissible if the parties have no intention to induce Federal health care program referrals or to generate Federal health care program business.

We believe that the majority of donors who make contributions to tax-exempt organizations, including donors with ongoing business relationships with the donees, are motivated by *bona fide* charitable purposes and a desire to help their communities. Substantial numbers of health care providers are not-for-profit organizations, many of which are religious or public charities, and depend on tax-deductible charitable donations to fund all or part of their operations. We recognize that soliciting donations is vital to these providers' viability and that the potential donor pool will include many persons and entities in the local community with which the soliciting entity has past, present, or potential business relationships. Invariably, some of the persons or entities solicited will be in a position to influence referrals to, or otherwise generate business for, the soliciting provider; other solicited parties will be in a position to receive referrals or business from the soliciting provider. Such business relationships do not make a tax-deductible donation automatically suspect under the anti-kickback statute.

Notwithstanding our favorable predisposition towards *bona fide* charitable donations, we caution that the substance of an arrangement – and not its characterization – ultimately determines its propriety under the anti-kickback statute. Unfortunately, in some circumstances, payments characterized as "donations" or "grants" are nothing more than disguised kickbacks intended in part to induce or reward referrals, directly or indirectly. However, in order to avoid chilling *bona fide* charitable activities, the OIG recognizes the need for us to exercise caution in undertaking any enforcement action in this area.

In the present case, the Proposed Donation presents a minimal risk of Federal health care program abuse, while providing significant benefits to the community. First, the Proposed Donation presents little risk of overutilization or increased costs to any Federal health care program. Simply put, the number of patients requiring emergency transport is unrelated to the Proposed Donation. Second, the Proposed Donation will be a relatively modest, one-time payment, and the aggregate amount will be fixed at the time it is made and will not be conditioned or vary in any way based on the volume or value of referrals. Third, the parties to the Proposed Donation are both charitable entities that share a common mission in promoting effective, efficient, high quality emergency medical services in their community. The uses to which the donated sum will be put -- EMS

equipment, paramedic training, education -- clearly further this mission. In sum, based on the totality of the facts and circumstances, the Proposed Donation appears to be a *bona fide* charitable donation.

IV. CONCLUSION

Based on the facts certified in the request for an advisory opinion and supplemental submissions, we conclude that the Proposed Donation might constitute prohibited remuneration under the anti-kickback statute, if the requisite intent to induce referrals of Federal health care program business were present, but that the OIG would not subject the Requester to sanctions arising under the anti-kickback statute under sections 1128(b)(7) or 1128A(a)(7) in connection with the Proposed Donation. We express no opinion with respect to additional payments the Requester may make in the future.

V. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to Association A, the requester 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 requester to this opinion.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is herein expressed or implied 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 Donation.
- 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 Requester with respect to any action that is part of the Proposed Donation 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 Donation 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, rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against the Requester 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,

/s/

D. McCarty Thornton
Chief Counsel to the Inspector General