

POSTED: July 21, 1998

[Issued July 13, 1998]

[name and address redacted]

Re: Advisory Opinion No. 98-9

Dear [name redacted]:

We are writing in response to your request for an advisory opinion, in which you ask: (1) whether a compensation arrangement for registered nurses and certain other employees pursuant to a collective bargaining agreement with the nurses' union (the "Proposed Arrangement") constitutes prohibited remuneration under the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act");

(2) whether the Proposed Arrangement satisfies the criteria set forth in section 1128B(b)(3)(B) of the Act and 42 C.F.R. § 1001.952(i) (the employee exception and "safe harbor" regulation); and

(3) whether the Proposed Arrangement constitutes grounds for the imposition of sanctions under the anti-kickback statute, section 1128B(b) of the Act; the exclusion authority related to kickbacks, section 1128(b)(7) of the Act; the civil monetary penalty provision for kickbacks, section 1128A(a)(7) of the Act; or the civil monetary penalty provision for inducements to beneficiaries, section 1128A(a)(5) of the Act.

You have certified that all of the information you provided in your request, including all supplementary letters, is true and correct, and constitutes a complete description of the material facts regarding the Proposed Arrangement. In issuing this opinion, we have relied solely on the facts and information you presented to us. We have not undertaken any independent investigation of such information. This opinion is limited to the facts presented. If material facts have not been disclosed, this opinion is without force and effect.

Based on the information provided and circumstances described, we conclude that the Proposed Arrangement satisfies the criteria set forth in section 1128B(b)(3)(B) of the Act and 42 C.F.R. § 1001.952(i) (the employee exception and safe harbor regulation) and therefore does not constitute prohibited remuneration under the anti-kickback statute, section 1128B(b) of the Act. Accordingly, the Proposed Arrangement would not constitute grounds for the imposition of sanctions under section 1128B(b) of the Act, section 1128(b)(7) of the Act (as it relates to kickbacks), or section 1128A(a)(7) of the Act. Moreover, we conclude that the OIG would not impose a civil monetary penalty on the requestor in connection with the Proposed Arrangement under section 1128A(a)(5) of the Act. This opinion may not be relied on by any person other than the addressee and is further qualified as set out in Part III below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

A. The Parties

Hospital A, a Delaware corporation, owns and operates an inpatient hospital facility located in City X, State Y (the "Hospital").

Union B ("Union") is a labor organization, organized pursuant to the National Labor Relations Act. The Union currently is the collective bargaining representative for certain nurses and non-professional Hospital employees, including service employees, health care aides ("HCAs"), and patient care aides ("PCAs") (collectively the "Union Employees"). None of the Union Employees is a physician. The Union also represents skilled laborers and construction workers not employed by the Hospital, but who may work for contractors who provide services to the Hospital from time to time. The Hospitals' Union Employees constitute approximately one-third of the total Union membership. The Union does not

represent nurses, service workers, HCA, or PCAs who are employed by other hospitals in the area.

The Union is part of a coalition of six unions (the "Coalition"). The Coalition facilitates access to certain health plans for its unions' members and their dependents. Coalition union members and dependents who are covered by these health plans are "Covered Coalition Members" for purposes of this opinion. There are approximately 7,900 Covered Coalition Members, of which approximately nineteen percent, or 1,500, are also eligible for Medicare.

B. Proposed Compensation Adjustment Program

The Hospital and the Union are currently negotiating a collective bargaining agreement for registered nurses, HCAs, PCAs, and certain Hospital service workers. As part of the agreement, the Hospital proposes paying the nurses an additional amount as part of their hourly wage based on the number of Covered Coalition Members who are admitted as Hospital inpatients during defined six-month periods.

Specifically, the proposed compensation adjustment program would work as follows. The Hospital will track the total number of Hospital admissions of Covered Coalition Members. At six-month intervals, the Hospital will provide extra compensation to its Union Employees (and possibly to some non-union employees)⁽¹⁾ based on the previous six-months' inpatient admissions of Covered Coalition Members (the "Admissions Adjustment"). The collective bargaining agreement will include a fixed formula for calculation of the Admissions Adjustment based on the total number of admissions above a baseline of zero. The formula will provide for incremental additional compensation of one percent of the base wage rate for all Union Employees as certain threshold levels of increases in Hospital admissions of Covered Coalition Members are met over a six-month period, as follows: X% extra compensation for an increase of over X admissions, X% for an increase of over X admissions, X% for an increase of over X admissions, and X% for an increase of over X admissions. The amount of the Admissions Adjustment is capped at 4% of the base wage rate. At the end of every six-month period, the baseline for Hospital admissions for Covered Coalition Members will be reset at zero.

The Admissions Adjustment available to Union Employees is tied to aggregate admissions and not to specific admissions or services. No person in a position to refer patients to the Hospital will be eligible for the Admissions Adjustment.⁽²⁾ Based on the current average wage rate for Union Employees at the Hospital, the maximum additional compensation would be \$.X/hour for nurses, \$0.X/hour for service workers, and \$0.X/hour for HCA and PCAs.

II. LEGAL ANALYSIS

A. The Proposed Arrangement Satisfies the Criteria of the Statutory Exception and Regulatory Safe Harbor for Employee Compensation.

The anti-kickback statute makes it a criminal offense knowingly and willfully to offer, pay, solicit, or receive any remuneration to induce the referral of business for which payment may be made by a Federal health care program. Specifically, the statute provides that:

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.

Section 1128B(b) of the Act. In other words, the statute prohibits payments made purposefully to induce referrals of business payable by a Federal health care program. The statute ascribes liability to both sides of an impermissible "kickback" transaction. 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).

"Remuneration" for purposes of the anti-kickback statute includes the transfer of anything of value, in cash or in kind, directly or indirectly, covertly or overtly.

Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment for up to five years or both. Conviction will also lead to automatic exclusion from Federal health care programs, including Medicare and Medicaid. This Office may also initiate administrative proceedings to exclude persons from the 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.⁽³⁾

The anti-kickback statute excepts from its reach "any amount paid by an employer to an employee (who has a *bona fide* employment relationship with such employer) for employment in the provision of covered items or services." Section 1128B(b)(3)(B) of the Act. The OIG safe harbor regulations provide that the term "remuneration", as used in the anti-kickback statute, does not include:

[A]ny amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare or a State health care program. For purposes of paragraph (i) of this section, the term *employee* has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).

42 C.F.R. § 1001.952(i).

Whether an employee is a *bona fide* employee for purposes of the employee exception to the anti-kickback statute is a matter that is outside the scope of the advisory opinion process. See section 1128D(b)(3)(B) of the Act. Thus, for purposes of rendering this advisory opinion, we assume that the Hospital's Union Employees who will receive the Admissions Adjustment under the Proposed Arrangement are *bona fide* employees in accordance with the Internal Revenue Service's ("IRS's") definition of the term set forth at 26 U.S.C. § 3121(d)(2) and IRS interpretations of that provision as codified in its regulations and other interpretive sources. If the Union Employees are not *bona fide* employees under the IRS definition, this advisory opinion is without force and effect.

Based on the facts presented, including, but not limited to, the fact that the Union Employees must perform nursing and other health care related services to be eligible for the Admissions Adjustment, and our assumption that the employees are *bona fide* employees, we conclude that the Proposed Arrangement falls within the plain language of the statutory exception and regulatory safe harbor for employee compensation. The Admissions Adjustment is paid to the Union Employees pursuant to a collective bargaining agreement as compensation for their employment in the furnishing of services payable by a Federal health care program.

Accordingly, the adjusted compensation under the Proposed Arrangement does not constitute prohibited remuneration under the anti-kickback statute, section 1128B(b) of the Act.

B. The Proposed Arrangement Does Not Violate Section 1128A(a)(5) 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 any individual eligible for benefits under [Federal health care programs (including Medicare or Medicaid)] that such person knows or should know is likely to influence such individual to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, [by a Federal health care program].

Section 1128A(i)(6) defines "remuneration" for purposes of section 1128A(a)(5) of the Act as including "the waiver of coinsurance and deductible amounts (or any part thereof), and transfers of items or services for free or for other than fair market value." Unlike the anti-kickback statute, section 1128A(a)(5) is solely concerned with remuneration offered or transferred to Federal health care program beneficiaries.

The Admissions Adjustment may be paid to some Union Employees who are Medicare beneficiaries and who

themselves may become inpatients at the Hospital. Thus, the Hospital has inquired whether the adjusted compensation runs afoul of section 1128A(a)(5) of the Act.

We think that section 1128A(a)(5) was not intended to apply to the Proposed Arrangement. The gravamen of section 1128A(a)(5) is a prohibition on offering remuneration to beneficiaries that is likely to induce such beneficiaries to select a particular health care provider. However, Congress did not intend for the penalty to apply to remuneration of nominal value. See, e.g., 63 Fed. Reg. 14393, 14395-96 (March 25, 1998) (discussion of Congressional intent in preamble to proposed civil monetary penalties rule). Because payment of an Admissions Adjustment is contingent on significant factors beyond any individual employee's control, such payment is so speculative as to be, at best, nominal remuneration not subject to the statutory proscription.

Accordingly, the OIG will not impose sanctions on the Hospital under section 1128A(a)(5) of the Act in connection with the Admissions Adjustment in the Proposed Arrangement, based on the certified facts submitted by the Hospital in connection with this advisory opinion.

III. LIMITATIONS

The limitations applicable to this opinion include the following:

This advisory opinion is issued only to Hospital A, doing business as Hospital A Center, which is the Requestor of this opinion. This advisory opinion has no application, 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 to this opinion.

This advisory opinion is applicable only to the statutory provisions specifically noted in the first paragraph of this advisory opinion. 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 Arrangement.

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.

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 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, 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 where such action was promptly discontinued upon notification of the modification or termination of this advisory opinion.

Sincerely,

/s/

D. McCarty Thornton

Chief Counsel to the Inspector General

1. Payments to non-union employees are not the subject of this advisory opinion, and we express no opinion with respect to any such payments.

2. As part of the collective bargaining agreement, the Union and the Union Employees will agree to comply with certain guidelines that restrain Union Employees from providing remuneration to Covered Coalition Members to induce them to select the Hospital for inpatient services and that promote the dissemination of full and truthful information to Covered Coalition Members. The proposed guidelines may help reduce the risk that Union Employees will improperly influence Covered Coalition Members to select the Hospital for inpatient services by providing the Covered Coalition Members with improper remunerative inducements or false or misleading information.

Accordingly, the guidelines may describe prudent business practices. However, they are not sufficient in and of themselves to safeguard against fraud and abuse.

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