

[Issued: September 14, 1998]

[Posted on the OIG Web Site: September 21, 1998]

[Names and addresses redacted]

**Re: [Names redacted]**

**Advisory Opinion No. 98-11**

Dear Sirs:

We are writing in response to your request for an advisory opinion, in which you ask whether a proposed purchasing arrangement involving a trade association, its nursing home members, and an electrical utility consultant (the "Proposed Arrangement") constitutes prohibited remuneration under the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act"), and if so, whether the Proposed Arrangement constitutes grounds for the imposition of sanctions under the anti-kickback statute, section 1128B(b) of the Act; the civil monetary penalty provision for kickbacks, section 1128A(a)(7) of the Act; or the exclusion authority related to kickbacks, section 1128(b)(7) of the Act.

You have certified that all of the information you provided in your request 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.

**I. FACTUAL BACKGROUND**

**A. The Parties**

The Trade Association is a not-for-profit trade association representing nursing homes and assisted living facilities (the "Nursing Homes"). The Utility Consultant is an electricity consultant licensed by State X.<sup>(1)</sup> Many of the individual Nursing Homes are certified Medicare and Medicaid providers; the Trade Association and the Utility Consultant are not.

**B. The Proposed Arrangement**

In 1997, State X enacted legislation deregulating the electric utility industry. Effective March 1, 1998, certain reductions in electricity charges were mandated, including a "standard offer service" and a "default service", which are expected to reduce overall electricity charges for users. To help users obtain even greater savings, State X is licensing competitive power suppliers to sell electricity in the State. Consistent with the purposes of this competitive market, licensed brokers and others are permitted to seek out lower cost suppliers of electricity and to arrange for the sale of this lower cost electricity to customers.

To make such brokerage services available to its members at the best possible price, the Trade Association proposes to enter into a contract with the Utility Consultant, pursuant to which the Utility Consultant will agree to provide electricity brokerage and consulting services to Trade Association members for a fee equal to seventeen percent of the cost savings achieved by the Utility Consultant for each Nursing Home.<sup>(2)</sup> Cost savings will be measured by comparing a Nursing Home's actual cost of electricity, as negotiated by the Utility Consultant, with the amount that the Nursing Home would have paid for "standard offer service," if available, or the "default service". Pursuant to the contract, the Trade Association will make its member list available to the

Utility Consultant and will permit the Utility Consultant to use the Trade Association's name for marketing purposes. The Trade Association will receive a fee equal to eleven percent of the fees the Utility Consultant receives from the Nursing Homes.

Each Nursing Home that elects to use the Utility Consultant's consulting and brokerage services will enter into a separate contract with the Utility Consultant. No Nursing Home will be obligated to use the Utility Consultant's services. Nursing Homes will have an opportunity to compare electricity prices with other consultants or utility providers before accepting the price negotiated by the Utility Consultant. Each contract between the Utility Consultant and an individual Nursing Home will have a term of three years, but if no reduction in electricity costs is obtained, the Nursing Home will be permitted to cancel the contract after one year.

Pursuant to a letter agreement between the Trade Association and each Nursing Home, the Nursing Home will authorize the Trade Association to act as its purchasing agent for electricity brokerage services, and the Trade Association will disclose the amount of its fee from the Utility Consultant. The Trade Association will also report to each Nursing Home annually, and to the Department of Health and Human Services ("HHS") upon request, the share of the Trade Association's fee attributable to each Nursing Home.

## II. LEGAL ANALYSIS

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 covered 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 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.<sup>(3)</sup>

A number of statutory and regulatory "safe harbors" protect certain arrangements that might otherwise technically violate the anti-kickback statute from prosecution. See section 1128B(b)(3) of the Act; 42 C.F.R. § 1001.952. Safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the safe harbor. The relevant safe harbor here is the group purchasing organizations ("GPO") safe harbor. See 42 C.F.R. § 1001.952(j).

The GPO safe harbor provides protection for payments by a vendor of goods or services to a GPO (the "GPO fee"). For purposes of this safe harbor, a GPO is defined as an entity authorized to act as a purchasing agent for a group of individuals or entities who (i) are furnishing services for which payment may be made in whole or in part under Medicare or a State health care program and (ii) are neither wholly owned by the GPO nor subsidiaries of a parent corporation that wholly owns the GPO (either directly or through another wholly-owned

entity). The GPO fee must be paid as part of an agreement to furnish goods or services to the group of individuals or entities for which the GPO is the authorized agent.

The GPO must have a written agreement with each individual or entity that will purchase items or services from the vendor. The agreement must accurately reflect the amount of the GPO fee by satisfying one of the following two conditions. First, the agreement may state that the GPO fee will be three percent or less of the purchase price of the goods or services sold by the vendor to the individual or entity. Second, if the GPO fee is greater than three percent, the agreement must state the specific amount of the fee, expressed either as a fixed sum or as a fixed percentage of the value of the purchases made from the vendor by the members of the group under the contract between the vendor and the GPO. If the amount of the GPO fee is not known at the time the agreement is signed, the agreement must state the maximum amount to be paid to the GPO by the vendor. In addition, where the entity that receives the goods or services from the vendor is a health care provider of services, the GPO must disclose in writing to the entity at least annually, and to the Secretary upon request, the amount received from each vendor with respect to purchases made by or on behalf of the entity. See 42 C.F.R. §1001.952(j).

In the circumstances presented here, the fee paid by the Utility Consultant to the Trade Association will fit squarely within the GPO safe harbor. The Utility Consultant is a vendor of electricity brokerage services. The Trade Association will be authorized by its Nursing Home members pursuant to the letter agreements to act as a purchasing agent for electricity brokerage services. The Trade Association will negotiate the terms upon which the Nursing Homes will enter into contracts with the Utility Consultant for its services, including payment terms. Each Nursing Home's payment will be based on its cost savings. The Nursing Homes furnish items and services that are reimbursable by the Federal health care programs and will appropriately reflect the cost savings on their cost reports. The Trade Association will accept as payment from the Utility Consultant a quarterly sum equal to eleven percent of the Utility Consultant's fee from the Nursing Homes and will disclose this fee to the Nursing Homes. The Trade Association will also provide an annual report to each Nursing Home disclosing that Nursing Home's proportionate share of the Trade Association's fee from the Utility Consultant. None of the Nursing Homes are wholly owned by the Trade Association nor are they subsidiaries of a parent corporation that wholly owns the Trade Association.

The GPO safe harbor protects only the fee from the vendor to the GPO. Potential remuneration between the vendor and the GPO members must be separately analyzed. Here, there is minimal risk of fraud or abuse between the Nursing Homes and the Utility Consultant. First, neither party is likely to be a referral source for the other. Moreover, the Utility Consultant's fee is based solely on electricity cost savings recognized by the Nursing Homes through arrangements fostered by the Utility Consultant. The net cost of electricity used by the Nursing Homes will be accurately reflected on the Nursing Homes' cost reports, and thus any cost savings achieved through the Proposed Arrangement will benefit the Federal health care programs.

### **III. CONCLUSION**

Based on the facts presented, we conclude that the fee to be paid by the Utility Consultant to the Trade Association falls within the plain language of the GPO safe harbor. We further conclude, based on the certified facts in the Requestors' request for an advisory opinion (including the fact that the Nursing Homes will accurately reflect electricity costs on their cost reports), that the Requestors will not be subject to OIG sanctions under sections 1128(b)(7)(as it relates to kickbacks) or 1128A(a)(7) of the Act for payment of the Utility Consultant's fee by the Nursing Homes.

### **IV. LIMITATIONS**

The limitations applicable to this opinion include the following:

- o This advisory opinion is issued only to the Requestors of this opinion. This advisory opinion has no application, and cannot be relied upon, by any other individual or entity.

- o 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.
- o 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.
- o This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.
- o 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 requestors 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, rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against the requestors 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

## FOOTNOTES

1. The Trade Association and the Utility Consultant are joint "Requestors" of this advisory opinion.
2. The Requestors have represented that the payment terms between the Nursing Homes and the Utility Consultant may be modified in the future by agreement of the parties. We express no opinion about any different compensation terms. This opinion is limited to the compensation terms described here.
3. Because both the criminal and administrative sanctions related to the anti-kickback implications of the Proposed Arrangement are based on violations of the anti-kickback statute, the analysis for purposes of this advisory opinion is the same under both.