

[We have redacted specific information regarding the requestor and certain potentially privileged, confidential, or financial information associated with the individual or entity, unless otherwise specified by the requestor.]

[Posted April 8, 1999]

[Issued March 31, 1999]

[Name and address redacted]

Re: Advisory Opinion No. 99-4

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion, in which you ask whether a proposed agreement (the "Proposed Agreement"), pursuant to which Hospital District No.1 ("District One" or the "Requestor") would locate a medical clinic within the geographic boundaries of Hospital District No. 2 ("District Two"), would constitute grounds for sanctions under the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act"), the exclusion authority for kickbacks, section 1128(b)(7) of the Act, or the civil monetary penalty provisions for kickbacks, section 1128A(a)(7) of the Act.

You have certified that all of the information you provided in your request, including all supplementary information, is true and correct, and constitutes a complete description of the material facts regarding the Proposed Agreement. 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.

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Office of Inspector General ("OIG") will not subject the Requestor to sanctions arising under the anti-kickback statute pursuant to sections 1128(b)(7) or 1128A(a)(7) of the Act in connection with the Proposed Agreement between District One and District Two.

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

I. FACTUAL BACKGROUND

Under State A law, hospital districts may be organized within a county boundary to provide health care services to the general public. See State A Code § []. District One and District Two are hospital districts located in County B, State A. District One owns and operates a public hospital and clinic in City C, State A. District Two owns and previously operated a hospital and clinic located in City D and City E, State A. District Two ceased operation of its health care facilities on September 30, 1998. District Two does not currently operate any health care facilities or provide any health care services.⁽¹⁾

District One and District Two propose entering the Proposed Agreement (entitled "Mutual Interagency Agreement For Physician Services") whereby District One will locate a medical clinic (the "District One Clinic") within District Two's hospital district.⁽²⁾ The Proposed Agreement is subject to revocation at any time, with or without cause, on one year's notice from District Two. District One will obtain office space for and staff the District One Clinic without any financial support or participation from District Two. District Two will not exercise operational control over the District One Clinic, nor will District Two be entitled to any revenues from the District One Clinic. Under the Proposed Agreement, no payments or other remuneration will be made or exchanged between District One and District Two (other than District Two authorizing District One to locate a clinic in District Two's hospital district). District One has represented that there are no oral or other collateral agreements or understandings between District One and District Two.

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 referrals of items or services reimbursable by any Federal health care program. See section 1128B(b) of the Act.

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. This Office 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.

By granting District One an opportunity to locate its clinic in District Two's district, District Two may be bestowing on District One something of value, that is, an opportunity to generate business in District Two. Notwithstanding, it is axiomatic that there can be no violation of the anti-kickback statute absent a prohibited referral. On the facts stated, District One cannot refer any health care business to District Two, because District Two does not operate any health care facilities or provide any health care services.

Based on the facts certified in the request for an advisory opinion and supplemental submissions, we conclude that the OIG will not subject the Requestor to sanctions arising under the anti-kickback statute pursuant to sections 1128(b)(7) or 1128A(a)(7) of the Act in connection with the Proposed Agreement between District One and Two.⁽³⁾

III. LIMITATIONS

The limitations applicable to this opinion include the following:

- o This advisory opinion is issued only to Hospital District No.1, the Requestor of this opinion. This advisory opinion has no application, and cannot be relied upon, by any other individual or entity.
- 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 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 Agreement. We express no opinion with respect to State A law.
- o This advisory opinion is limited in scope to the specific arrangements described in this letter and has no applicability to other arrangements, even those which appear similar in nature or scope.
- o 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 Proposed Agreement 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 Agreement 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 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. 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. This opinion is premised on the facts that District Two does not operate any health care facilities and District Two does not provide any health care services. If either of these facts change, this opinion is without force and effect.
2. Under State A law, a public agency may contract with another public agency to perform services the first public agency is authorized by law to perform. See State A Code § [].
3. This advisory opinion only relates to the agreement to locate the District One Clinic within District Two's hospital district. We express no opinion with regard to any relationship between District One and its employees or independent contractors.