

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

Issued: April 4, 2000

Posted: April 18, 2000

[name and address redacted]

Re: OIG Advisory Opinion No. 00-02

Dear [name redacted]:

We are writing in response to your request for an advisory opinion about a proposed cost-savings program pursuant to which [name of hospital redacted] (the "Hospital") would reward its non-physician employees for submitting cost-savings suggestions that the Hospital elects to implement (the "Proposed Arrangement"). Specifically, the question raised by your request is whether the Proposed Arrangement would constitute grounds for sanctions under the civil monetary penalty for financial incentives to reduce or limit items or services, section 1128A(b)(1) of the Social Security Act (the "Act"), or under the anti-kickback statute, section 1128B(b) of the Act, in the circumstances presented.

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 information provided, we conclude that the Proposed Arrangement, as described and certified in your request letter and supplemental submissions: (i) would not constitute a prohibited inducement to reduce or limit items or services under section 1128A(b)(1) of the Act, and (ii) could potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce referrals were present, but that the OIG will not subject the Hospital 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 establishment of the Proposed Arrangement itself; provided, however, that our conclusion does not apply to specific payments made by the Hospital for specific suggestions.

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

I. FACTUAL BACKGROUND

The Hospital, a State X not-for-profit corporation, operates an acute care hospital that has a high percentage of Medicare and Medicaid patients. The Hospital would like to implement an employee cost-savings program.

Participation in the program will be limited to non-physician employees of the Hospital,⁽¹⁾ although some of the participating employees may be in a position to make referrals for, or arrange for the referral or provision of, items or services reimbursable by Federal health care programs.

Under the Proposed Arrangement, non-physician employees will be permitted to submit written cost-savings suggestions to the Human Resource Department of the Hospital. If the Hospital determines that a suggestion has merit and is feasible, it will pay the employee a percentage of the cost savings generated by the suggestion. For suggestions resulting in quantifiable and measurable financial savings, the Hospital will pay the employee an amount equal to [Y] percent of the cost savings derived during the first year the suggestion is implemented. For cost-savings suggestions that cannot be measured or quantified, the Hospital will estimate its savings and pay the employee an amount based upon a predetermined, sliding scale, subject to a maximum reward of [amount redacted].⁽²⁾

The Hospital has certified that:

- no payments will be made directly or indirectly to physicians under the Proposed Arrangement;
- the Proposed Arrangement will not reward or implement suggestions that would reduce or limit health care services provided to its patients or impair the quality of care delivered to its patients;
- the Proposed Arrangement will not reward suggestions that identify specific vendors, directly or indirectly; and
- the Proposed Arrangement will not reward or implement suggestions that shift costs to any Federal health care program.

II. SECTION 1128A(b)(1) OF THE ACT

Our first inquiry is whether the Proposed Arrangement would violate section 1128A(b)(1) of the Act, which prohibits a hospital from making a payment, directly or indirectly, to induce a physician to reduce or limit services to Federal health care beneficiaries under the physician's direct care. A hospital that makes, and any physician who accepts, such payments is subject to civil money penalties of up to \$2,000 for each patient covered by the improper payments. See sections 1128A(b)(1) & (2) of the Act.

Section 1128A(b)(1) only applies to arrangements between hospitals and physicians. Since physicians are prohibited from participating, directly or indirectly, in the Proposed Arrangement, the Proposed Arrangement does not implicate section 1128A(b)(1) of the Act.

III. THE ANTI-KICKBACK STATUTE

A. Law

A further question arises as to whether the Proposed Arrangement would violate 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:

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 Office of Inspector General ("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.⁽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 individual 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 rely on the Hospital's certification that individuals who will receive payments 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 individuals are not *bona fide* employees, this opinion is without force and effect.

B. Analysis

Based upon the facts presented, we believe that most of the suggestions and payments that would be made pursuant to the Proposed Arrangement are unlikely to implicate the anti-kickback statute.⁽⁴⁾ *First*, even if a proposed suggestion involves the purchase or use of a particular item or service that is ultimately reimbursable in whole or in part, directly or indirectly, by a Federal health care program, in most cases, the non-physician employee who would receive the payment under the Proposed Arrangement would not have the decision-making authority necessary to implement the suggestion. *Second*, the Proposed Arrangement will not reward suggestions that specify, directly or indirectly, a particular vendor. Therefore, although some non-physician employees could be in a position to make referrals for, or recommend, items or services within the meaning of the statute, the Proposed Arrangement does not create an inducement for such non-physician employees to steer patients to one provider over another. *Third*, the risk that a proposed suggestion could result in increased costs for, or overutilization of items or services reimbursable by, Federal health care programs is minimized because the Proposed Arrangement (a) will only reward suggestions that increase efficiency or reduce costs, and (b) will not reward or implement suggestions that shift costs to any Federal health care program.

Notwithstanding, we are not in a position to pre-approve every possible payment under the Proposed Arrangement. We do not know the amount of the potential payment, the person to whom the payment will be made, or the action or activity that will be proposed. Simply put, a blanket determination as to the propriety of all payments that might be made under the Proposed Arrangement is hypothetical and not a proper subject for an advisory opinion. See, 42 C.F.R. § 1008.15(b).

Nevertheless, we conclude that, although some payments that would be made under the Proposed Arrangement might implicate the anti-kickback statute if the requisite intent to induce referrals were present, the OIG will not subject the Hospital 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 establishment of the Proposed Arrangement itself. We caution, however, that our conclusion applies only to the establishment of the Proposed Arrangement, not to specific payments for specific suggestions.

IV. CONCLUSION

Based on the facts of the Proposed Arrangement (as described and certified in the request letter and supplemental submissions), we conclude that the Proposed Arrangement: (i) would not violate section 1128A(b)(1) of the Act, which prohibits financial incentives to reduce or limit items or services, and (ii) could potentially generate

prohibited remuneration under the anti-kickback statute, if the requisite intent to induce referrals were present, but that the OIG will not subject the Hospital 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 establishment of the Proposed Arrangement itself; provided, however, that our conclusion does not apply to specific payments made by the Hospital for specific suggestions.

V. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to the Hospital, the requestor 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 requestor 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 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 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 requestor 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, all individuals who will receive payments 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, and the Proposed Arrangement in practice comports with the information provided. Notwithstanding, this advisory opinion is limited in scope to the establishment of the Proposed Arrangement, and no opinion is expressed herein regarding the application of the anti-kickback statute or any other Federal, state, or local statute, rule, regulation, ordinance, or other law to a specific payment made by the Hospital under the Proposed Arrangement for a specific suggestion. 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

1. Eligible non-physician employees include, but are not limited to, nurses, nurses' aides, pharmacists, phlebotomists, respiratory technicians, x-ray technicians, physical therapists, maintenance workers, cafeteria workers, secretaries, medical records personnel, and custodians.

2. In special circumstances, the Hospital's Board of Directors may authorize a payment in excess of the stated maximum reward, if the suggestion has significantly improved Hospital operations and increased patient, employee, or physician satisfaction.

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.

4. However, even if the anti-kickback statute were implicated, payments made to Hospital employees under the Proposed Arrangement may fit within the employee exception, depending on the specific suggestion.