

[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.]

[Posted: April 18, 2000]

[Issued: April 7, 2000]

[Name Redacted]

President

The Hospice of Martin & St. Lucie, Inc.

The Hospice Foundation of Martin & St. Lucie, Inc.

2030 S.E. Ocean Blvd.

Stuart, FL 34996

Re: OIG Advisory Opinion No. 00-3

Dear [Name Redacted]:

We are writing in response to your request for an advisory opinion concerning an arrangement to provide various services free of charge to patients with terminal illnesses who have a prognosis of one year or less to live (the "Program"). Specifically, you have inquired whether the Program constitutes grounds for sanctions under the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act"), or under section 1128A(a)(5) of the Act, which prohibits the offering of inducements to beneficiaries in order to influence their selection of a provider for Medicare or Medicaid covered services.

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: (i) the Program would potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce referrals were present, but that, based on the totality of the facts as described and certified in your request letter and supplemental submissions, the Office of Inspector General ("OIG") will not subject the Hospice of Martin & St. Lucie, Inc., and the Hospice Foundation of Martin & St. Lucie, Inc., (collectively referred to as the "Hospice") to sanctions for violations of the anti-kickback statute under sections 1128(b)(7) or 1128A(a)(7) of the Act in connection with the Program; and (ii) the OIG will not subject the Hospice to sanctions under section 1128A(a)(5) of the Act in connection with the Program as described and certified in your request letter and supplemental submissions.

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

I. FACTUAL BACKGROUND

A. The Parties

The Hospice Foundation of Martin & St. Lucie, Inc., is a Florida nonprofit organization that acts as the supporting foundation for the Hospice of Martin & St. Lucie, Inc., a nonprofit organization that provides various "end of life" services. The Hospice Foundation of Martin & St. Lucie, Inc., establishes and maintains programs to assist the Hospice of Martin & St. Lucie, Inc., in achieving its mission. For purposes of our analysis in this advisory opinion, we will consider the Hospice Foundation of Martin & St. Lucie, Inc., and the Hospice of Martin & St. Lucie, Inc., as a single entity in light of their close relationship, collectively referred to as the "Hospice".

The Hospice offers hospice services to patients and offers bereavement programs, community-wide support programs, and educational programs to the patients' families, friends, co-workers, caregivers, and the

community-at-large. The Hospice's eligibility requirements for hospice services are consistent with those for the Medicare hospice benefit: patients must be diagnosed with a terminal illness and a prognosis of no more than six months to live if the illness runs its normal course. The Hospice provides hospice care to eligible patients, regardless of their ability to pay; however, the hospice care services are funded largely through Medicare, Medicaid, and private insurance. Donations are the primary source of funding for the bereavement, community-wide support, and educational programs. The Hospice has certified that its contracts with nursing homes to provide hospice services to their patients contain provisions for payment that are consistent with fair market value in arms-length transactions.

B. The Program

The Program is a community service program sponsored by a non-profit hospice that uses unpaid volunteers to provide assistance, companionship, and other complimentary services (i.e., without charge) to the terminally ill who have a prognosis of one year or less to live, if the illness runs its normal course.⁽¹⁾ Most of the patients receiving the services are not eligible for the Hospice's hospice services (because they have a life expectancy of over six months) or, although eligible, have elected to continue curative treatment.

The Program's services vary depending on whether the patient lives in his or her private residence or in a nursing home. If a patient lives in his or her private residence, the Hospice sends a "home service volunteer," who offers the following services:

- (i) friendship and visitation;
- (ii) transportation;⁽²⁾
- (iii) assistance with writing and reading correspondence;
- (iv) running errands;
- (v) food preparation; and
- (vi) respite "breaks" for the family or caregiver.

If the patient lives in a nursing home, the Hospice sends a "nursing home volunteer" who offers a more limited range of services. The nursing home volunteer offers only the services listed in (i) through (iii) above.

Under the Program, the Hospice does not offer any services to nursing home patients that duplicate services the nursing homes are obligated to provide, such as food preparation and respite care or that are covered by the Florida Medicaid nursing facility per diem.⁽³⁾ Regardless of the setting, complimentary services do not include any nursing services, home health aide services, medical social work services, measuring and/or administering of medications, or rendering of professional care or advice.

Once a patient begins receiving services under the Program, the Hospice informs the patient of the various organizations in the community that provide continuing care services, which may include home health care or hospice care (including the Hospice). In addition, the Hospice will provide a similar list to the nursing homes in which it offers the Program's services.

The Hospice has been operating the Program since August 1999. The costs of employing a manager of the Program, training the volunteers, and other expenses related to the Program are funded by the Hospice from charitable donations. At present, the Hospice has seven patients enrolled under the Program, all of whom are home-based. Although the Hospice currently does not have any nursing home-based patients who receive services under the Program, the Hospice anticipates that in the future some of the Program's patients will live in nursing homes. The Hospice disseminates information about the Program by communicating not only with nursing homes, but also with physicians, discharge planners, churches, synagogues, and aging and disability advocacy groups. The Hospice provides the Program services only to patients in the state of Florida.

C. Federal Health Care Program Reimbursement

Medicare's hospice benefit provides palliative care to individuals who are terminally ill. Palliative care focuses on pain control, symptom management, and counseling for both the patient and family. In order to elect the hospice benefit, a Medicare beneficiary must be entitled to Medicare Part A services and certified as terminally ill, which is defined (for Medicare purposes) as a medical prognosis of six months or less to live, if the illness runs its normal course. A beneficiary who elects to enroll in a hospice program waives all his or her rights to Medicare payments for curative care related to his or her terminal illness during the period of election of hospice care. However, Medicare will continue to pay for services furnished by the patient's non-hospice attending physician and for the treatment of conditions unrelated to the terminal illness.

Because hospice services are typically provided to patients in their homes, the routine home care hospice rate does not include any payment for room or board. For services provided to patients in nursing homes, Medicare pays hospices the Medicare routine home care rate, which is a fixed amount per day for the services provided by the hospice, regardless of the volume or intensity of the services provided. Accordingly, if the hospice patient resides in a nursing home, the patient remains responsible for payment of the nursing home's room and board charges.

If, however, a patient receiving Medicare hospice benefits in a nursing home is also eligible for Medicaid, Medicaid will pay the hospice at least 95 percent of the state's daily nursing home rate, and the hospice is then responsible for paying the nursing home for the beneficiary's room and board. The specific services included in the daily rate payment are determined by a state's Medicaid program and may vary from state to state. In addition to the room and board payment, a hospice may contract with the nursing home for the nursing home to provide non-core hospice services (i.e., those services the hospice is not required by law to provide itself) to its hospice patients.

II. LEGAL ANALYSIS

The provision of free services to potential hospice patients may implicate two statutes: (i) the civil monetary penalty prohibiting the offer or transfer of remuneration to beneficiaries as inducements to use a particular provider, practitioner or supplier, section 1128A(a)(5) of the Act; and (ii) the anti-kickback statute, section 1128B(b) of the Act. Moreover, the provision of these free services to patients of nursing homes raises the possibility of illegal kickbacks in the Program between the Hospice and the nursing homes.

A. Law

Section 1128A(a)(5) of the Act prohibits a person from offering or transferring remuneration to a beneficiary that such person knows or should know is likely to influence the beneficiary to order items or services from a particular provider, practitioner, or supplier for which payment may be made by Medicare or a State health care program. For purposes of section 1128A(a)(5), "remuneration" includes transfers of items or services for free or for other than fair market value. See section 1128A(i)(6) of the Act.

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 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.⁽⁴⁾

We have issued a special fraud alert detailing problematic arrangements between nursing homes and hospices. See Special Fraud Alert, "Fraud and Abuse in Nursing Home Programs with Hospices," 63 Fed. Reg. 20415 (Apr. 24, 1998). Among the arrangements identified as suspect in the special fraud alert were: a hospice's offer of free care to nursing home patients for whom the nursing home is receiving Medicare payment under the skilled nursing facility benefit, with the expectation that after the patient exhausts the skilled nursing facility benefit, the patient will receive hospice services from that hospice; and a hospice's payments to the nursing home for "additional" services that the State's Medicaid program considers to be included in its room and board payment to the hospice. Id.

B. Analysis

The Program raises three principal issues under the two statutes discussed above: (i) whether the Hospice knows or should know that its provision of free services to potential hospice patients will be likely to influence the patients' choice of hospice provider; (ii) whether one purpose of the Hospice's provision of complimentary services to the patients under the Program is to induce them to use the Hospice's hospice services; and (iii) whether the provision of services to the patients who live in nursing homes may be remuneration to the nursing homes for permitting the Hospice access to their patients.

With respect to the first two issues, we think that at least some of the services being provided may have value and constitute remuneration within the meaning of both statutes. Moreover, we think it likely that the benefits are provided at least in part to induce the patients to obtain hospice care from the Hospice at the appropriate time. Notwithstanding, we would not subject the Program to sanction under section 1128A(a)(5) of the Act and the anti-kickback statute for the following reasons in combination:

- First, the services are provided by unpaid volunteers;
- Second, the benefits of the Program are primarily intangible and psychic in the sense that the services are designed to help the patients adjust to their illnesses by helping them and their friends and families to cope with the day to day burdens of life;
- Third, the Program provides a substantial benefit to a vulnerable patient group; and
- Fourth, there are substantial barriers to a beneficiary's election of hospice care, including the requirement that he or she renounce coverage for curative medical treatment for the terminal condition.

In these circumstances, we would not subject the Hospice to sanction under sections 1128A(a)(5), 1128(b)(7), or 1128A(a)(7) of the Act in connection with the Program in the absence of other inculpatory activity. In particular, our recognition that there are substantial barriers to a beneficiary's election of hospice care does not mean that hospice providers can offer inducements to patients to elect hospice. We mean only that in the particular circumstances here, i.e., services of relatively small monetary value provided by unpaid volunteers, the requirement that hospice patients forgo curative care for their underlying terminal illnesses provides a safeguard against the overutilization often associated with such inducements.

We have additional concerns, however, with the provision of these services to patients in nursing homes. In particular, we are concerned that the services provided by the Hospice could substitute for services the nursing

home would otherwise have to provide, thereby resulting in the Hospice providing free services to the nursing home. As we stated in the special fraud alert, there is a substantial overlap in hospice and nursing home services and the substitution of hospice services for nursing home services may be disguised remuneration from the hospice for access to the nursing home's patients. In this case, the complimentary services provided pursuant to the Program have been carefully delineated and, pursuant to the Hospice's certification, do not duplicate any nursing home services. Moreover, the fact that the services are provided by unpaid volunteers, most of whom are not health care professionals or workers, makes it unlikely that the services being provided will substitute for services required to be provided by the nursing homes.

We continue to have serious concerns regarding the provision of free or below market value goods to actual or potential referral sources. Such practices may constitute violations of the anti-kickback statute, depending on the circumstances. However, with respect to this Program, where the free services (i) are provided by unpaid volunteers, (ii) result in benefits that are primarily intangible and psychic, and (iii) support a vulnerable patient population, we would not impose sanctions arising under the anti-kickback statute. Nothing in this opinion should be taken to permit or protect any other relationships between the Hospice and any nursing facilities.

For these reasons, we would not impose sanctions on the Hospice arising under either the anti-kickback statute, section 1128B(b), or under section 1128A(a)(5) of the Act in connection with the Program.

III. CONCLUSION

Based on the information provided, we conclude (i) that the Program would potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce referrals were present, but that, based on the totality of the facts present in the Program as described and certified in the request letter and supplemental submissions, the OIG will not subject the Hospice to sanctions for violations of the anti-kickback statute under sections 1128(b)(7) or 1128A(a)(7) of the Act in connection with the Program; and (ii) that the OIG will not subject the Hospice to sanctions under section 1128A(a)(5) of the Act in connection with the Program as described and certified in the request letter and supplemental submissions.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to the Hospice of Martin & St. Lucie, Inc., and the Hospice Foundation of Martin & St. Lucie, Inc., the requestors 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 Program.
- 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 requestors with respect to any action that is part of the Program 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 Program 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

1. Transitions Prehospice, Inc. ("TPI"), a consulting organization that trains hospices and other organizations in how to establish programs for patients diagnosed as terminally ill with a life expectancy of one year or less, assisted the Hospice in setting up the Program. Under the contract between TPI and the Hospice, TPI provided the Hospice: (i) a training manual; (ii) two days of on-site training; (iii) the right to use TPI's trademarked name, subject to certain limitations; and (iv) eight hours of follow-up consultation. We express no opinion regarding the contract between the Hospice and TPI.
2. The transportation services for both at-home and nursing home patients may include driving a patient to medical appointments and driving a patient's relatives to visit the patient. All transportation under the Program is provided in the volunteers' private automobiles.
3. If a nursing home were required to provide Program services as a condition of participation in a Federal health care program, such a requirement would constitute a material change in fact that would render this advisory opinion without force and effect as to the operation of the Program in that nursing home.
4. Because both the criminal and administrative sanctions related to the anti-kickback implications of the Program are based on violations of the anti-kickback statute, the analysis for purposes of this advisory opinion is the same under both.