

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

Issued: September 29, 2000

Posted: October 6, 2000

[Names and Addresses Redacted]

Re: OIG Advisory Opinion No. 00-6

Dear [Names Redacted]:

We are writing in response to your request for an advisory opinion regarding Hospital X's proposed donation of its ownership interest in a portion of a medical office building to an agency of the State of [name redacted] (the "State") for use by the Medical School (the "Proposed Donation"). Specifically, the question raised by your request is whether the Proposed Donation would constitute grounds for sanctions under the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act"), in the circumstances presented.

You have certified that all of the information provided in your request, including all supplementary letters, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties. You have also certified that, upon our approval, you will undertake to effectuate the Proposed Donation.

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 Donation could potentially generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce referrals were present, but that the Office of Inspector General ("OIG") will not subject the Medical School or Hospital X (the "Requestors") 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 Proposed Donation, as described and certified in the request letter and supplemental submissions.

In accordance with our regulations at 42 C.F.R. Part 1008, your advisory opinion request disclosed a number of additional arrangements which directly or indirectly involve the Requestors, and about which no opinion is being sought. This opinion is limited to the Proposed Donation, and we express no opinion about any other agreements or arrangements disclosed or referenced in your request letter or supplemental submissions.

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

I. FACTUAL BACKGROUND

A. Parties

The *State Agency* is an agency of the State that oversees facilities, programs, and policies related to students, staff, and faculty at institutions within the State Agency. *University Y* is the division of the State Agency that operates the *Medical School* in [city redacted] (the "City"), State. University Y's faculty practice plan is operated by the *Faculty Practice Plan*, a tax-exempt, nonprofit corporation.

For purposes relevant to our analysis, we consider the State Agency, University Y, the Medical School, and the Faculty Practice Plan to be sufficiently related to be treated as a single entity. Therefore, for purposes of this advisory opinion, each of the foregoing, as well as all entities that are owned or controlled, in whole or in part, directly or indirectly, by any of the foregoing and related, directly or indirectly, to the operation of University Y

(including, without limitation, [names redacted]) will be referred to collectively as "*Entity Y*."⁽¹⁾ Physicians employed by, or affiliated with, University Y, the Medical School, the Faculty Practice Plan, or [names redacted] (including, without limitation, the Teaching Physicians, as hereinafter defined) will be referred to for purposes of this advisory opinion collectively as "*Entity Y Physicians*."

Entity Y's medical education programs include a clinical component and an academic component, both of which are administered by certain Entity Y Physicians. These physicians (the "*Teaching Physicians*") are employed by the Faculty Practice Plan for their clinical services, and, with a few minor exceptions, by the Medical School for their academic services. Entity Y pays its Teaching Physicians (i) a fixed annual salary for academic services provided on behalf of the Medical School, and (ii) a fixed annual salary, together with a productivity bonus, for clinical services provided through the Faculty Practice Plan. Teaching Physicians, as well as other Entity Y Physicians, refer patients to Hospital X and other area hospitals for the provision of various hospital and ancillary services, some of which are reimbursable by Federal health care programs. However, neither the fixed annual salaries nor the bonuses paid to Teaching Physicians are related to the volume or value of referrals to Hospital X or any other institution.

Much of the State is medically underserved, and many of the medically underserved areas are rural. The Medical School was created to alleviate the inadequate number of physicians available to provide services in underserved areas and to underserved populations. Thus, the Medical School provides medical education and residency training programs with an emphasis on primary care and rural health issues.

Hospital X is a tax-exempt, nonprofit, academic medical center located in City, State. Hospital X was originally organized as a public, city-county community hospital known as [Hospital X's predecessor]. In 1987, the City and [county redacted] county (the "County"), State, entered into a restructuring agreement pursuant to which they permitted the transfer of the hospital's assets and operations to the private, non-profit corporation currently known as Hospital X.

In structuring the transfer, Hospital X's continued support for the Medical School and medical training was a matter of significant concern to both the City and the County. The transfer was subject, in part, to the general condition that Hospital X "continue the training and educational programs for health care personnel similar to those heretofore conducted by [Hospital X's predecessor]." Moreover, Hospital X and its predecessor concluded that "the facilities presently housing the office practices of its medical staff physicians . . . [were] inadequate to meet the needs of such physicians and fail[ed] to respond to the requirements of the Medical School relating to the provision of ambulatory care." Therefore, the transfer was subject to Hospital X making a [amount redacted] grant to Entity Y (the "Grant") designated for the purpose of "acquiring, by purchase, lease or otherwise, constructing, furnishing, and equipping a medical diagnostic clinic and office practice center for physician employees and staff members of [the Medical School]." Pursuant to the Grant, the location of the building was to be "within [the City] at such location as may be selected by the President of [University Y] with the concurrence of the [University Y] Advisory Board."

B. The Medical Center

The *Medical Center* is a six story building consisting of clearly defined areas devoted solely to clinical endeavors (the "Clinical Areas") and clearly defined areas devoted solely to academic endeavors (the "Academic Areas"). The Academic Areas are owned in undivided interests by Hospital X ([n%]) and Entity Y ([((100-n)%]). As a result of Entity Y's recent and partial exercise of its purchase option (as more fully described below), Entity Y is currently the sole owner of the Clinical Areas.

The Academic Areas are located in the outer rim of all six floors of the Medical Center, and the Clinical Areas are located within the inner portions of each floor. The Academic Areas are not designed for the performance of any clinical activity, and are used for faculty office space, medical school classrooms, and other medical education purposes related to the graduate and postgraduate medical education programs that Entity Y operates in cooperation with Hospital X. The Clinical Areas are used for the provision of clinical services.

In 1992, Entity Y selected Hospital X's campus as the location for the Medical Center and, together with Hospital X, undertook construction of the Medical Center. The Requestors have certified that, at the time of site selection and at the commencement of construction, there was a common understanding that each party would bear its respective share of the financial burden. Upon completion of construction in 1998, both the Academic Areas and the Clinical Areas of the Medical Center were owned in undivided interests as follows: [n%] by Hospital X and [(100-n)%] by Entity Y.

Entity Y's participation in the construction was based, in part, on initial pre-construction analyses conducted in 1995. As initially conceived (the "Original Model"), the building was to house two distinct components: (i) a provider-based outpatient clinic that would have been wholly-owned by Hospital X and staffed by Teaching Physicians, and (ii) academic office space for the Medical School's faculty members (i.e., the Teaching Physicians) that would have been wholly-owned by Entity Y. Because Hospital X and Entity Y would have owned their respective portions of the building, neither would have incurred rental charges under the Original Model.

Subsequent regulatory and statutory developments substantially altered the assumptions upon which the initial financing projections were based, and the design of the Original Model was changed significantly. In particular, under the revised model (the "Revised Model"), the clinical space was changed from a provider-based outpatient clinic to free-standing physician offices. Moreover, it was determined that Entity Y and Hospital X would be given their respective percentage ownership interests as undivided interests in the whole building. Notwithstanding the design change, the end result (i.e., creation of a modern facility in which Teaching Physicians would provide both academic and clinical services) remained the same.

Once the Medical Center was ready for occupancy, Hospital X and Entity Y, as owners and lessors of both the Academic Areas and Clinical Areas of the Medical Center, entered into two written leases with Entity Y, as lessee: one for the Academic Areas and one for the Clinical Areas. The lease for the Academic Areas permits Entity Y, in its capacity as lessee, to defer rental payments until September 30, 2000, and Entity Y has elected deferment.⁽²⁾ In addition, the lease for the Academic Areas granted Entity Y an option (the "Option") to purchase Hospital X's ownership interest in the Medical Center. Recently, Entity Y exercised its Option with respect to the Clinical Areas only.⁽³⁾ As a result, Entity Y is currently the sole owner of the Clinical Areas.⁽⁴⁾ Entity Y did not exercise its Option with respect to the Academic Areas. Therefore, Hospital X still owns [n%] of the Academic Areas and Entity Y still owns the remaining [(100-n)%] of the Academic Areas.

Under the Revised Model, Entity Y incurs rental charges, and will make rental payments, for the same academic space that it would have had access to, under the Original Model, without incurring any rental charges. The Requestors have certified that payment of these rental charges would severely strain Entity Y's financial resources and jeopardize other services.

C. The Proposed Donation

Hospital X proposes to donate its existing [n%] interest in the Academic Areas of the Medical Center to Entity Y. The Proposed Donation would be retroactive to Entity Y's initial occupancy of the Academic Areas, and the only condition would be that the Academic Areas must be used for medical academic purposes. After the Proposed Donation, the Academic Areas would continue to be used by Entity Y just as they are currently.

The Proposed Donation would not be subject to any explicit or implicit requirements as to the use of the Clinical Areas or referrals to Hospital X. In addition, Entity Y has certified as follows:

- Entity Y will not require or encourage Entity Y Physicians to refer patients to Hospital X or any other institution.⁽⁵⁾
- Entity Y will not track referrals made by Entity Y Physicians to Hospital X or any other institution.⁽⁶⁾

- Compensation paid to Entity Y Physicians (including, without limitation, base salaries paid for Teaching Physicians' clinical or academic services and variable bonuses paid for their clinical services) will not be related to the volume or value of referrals by such physicians to Hospital X or any other institution. Such compensation will be consistent with fair market value in arm's-length transactions.
- On an annual basis, Entity Y will provide written notice of the limitations described in each of the three foregoing paragraphs to all Entity Y Physicians.

Hospital X has certified that it has not, and will not, provide to Entity Y any free or below market value goods or services that are directly or indirectly related to the Academic Areas, including, without limitation, all utilities (e.g., sewer charges, water, gas, electricity, telephone and every other service supplied to Entity Y or used upon, or in connection with, the Academic Areas), expenses, real estate taxes and all other taxes associated with or assessed against the Academic Areas.

II. 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 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.⁽⁷⁾

III. ANALYSIS

The OIG's position on the provision of free or below market value goods or services to referral sources is longstanding and clear: such arrangements are suspect. That is, the provision of free goods or services to any referral source may violate the anti-kickback statute if one purpose of the gift is to induce or reward referrals of Federal program business. In general, such arrangements give rise to an inference that one purpose of the gift is to induce referrals.

The Proposed Donation is as straightforward as it is problematic: a substantial one-time donation by a hospital to a major referral source. (Since Entity Y employs, and is affiliated with, physicians who make referrals to Hospital X, Entity Y is a referral source for Hospital X.) Accordingly, the Proposed Donation implicates the Federal anti-kickback statute.

However, for the following reasons, we would not impose sanctions in connection with the Proposed Donation. First, the transaction is between components of an academic medical center that historically have shared both a common mission in training physicians for, and providing quality medical care to, the people of the State and a common heritage as public institutions. We recognize that the relationships among components of academic medical centers are often organizationally and financially complex. The Requestors have certified that, at the time of site selection and at the commencement of construction, there was a common understanding that each party would bear its respective share of the financial burden. Given the Requestors' shared history, mission, and public provenance, the Proposed Donation appears to be a reasonable accommodation to changed financial circumstances and consistent with the Requestors' shared charitable mission.

Second, Entity Y has certified that it will take a number of steps to insulate physician judgment and income from pressure to refer to Hospital X, including the following:

- Entity Y will not require or encourage Entity Y Physicians to refer patients to Hospital X or any other institution.⁽⁸⁾
- Entity Y will not track referrals made by Entity Y Physicians to Hospital X or any other institution.⁽⁹⁾
- Compensation paid to Entity Y Physicians (including, without limitation, base salaries paid for Teaching Physicians' clinical or academic services and variable bonuses paid for their clinical services) will not be related to the volume or value of referrals by such physicians to Hospital X or any other institution. Such compensation will be consistent with fair market value in arm's-length transactions.
- On an annual basis, Entity Y will provide written notice of the limitations described in each of the three foregoing paragraphs to all Entity Y Physicians.

Thus, Entity Y's ability to direct the referrals of Entity Y Physicians will be significantly constrained.

Third, the Proposed Donation will confer a community benefit on the residents of the City and the State. The State continues to have many medically underserved areas, many of which are rural. As part of the State's effort to alleviate the inadequate number of physicians providing services in underserved areas and to underserved populations, the Medical School specializes in rural health issues and training of primary care physicians.

IV. CONCLUSION

For all of the above reasons, and based on the information provided, we conclude that the Proposed Donation 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 Medical School or Hospital X 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 Proposed Donation, as described and certified in the request letter and supplemental submissions. This opinion is limited to the Proposed Donation and, therefore, we express no opinion about any other agreements or arrangements disclosed or referenced in your request letter or supplemental submissions.

V. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to the Medical School and Hospital X, who are the requestors 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 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 Donation.
- 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.
- 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 Proposed Donation 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 Donation 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. Notwithstanding, as more fully set forth in Part V below and in 42 C.F.R. Part 1008, this opinion is issued only to, and can only be relied upon by, the Requestors.
2. Deferred rental payments accrue interest and must be secured.
3. Entity Y financed its purchase of the Clinical Areas through the issuance of tax-exempt revenue bonds.
4. The lease for the Clinical Areas formerly existing between Hospital X and Entity Y, as owners and lessors of the Clinical Areas, and Entity Y, as lessee, was terminated, and a new lease for the Clinical Areas was executed with the State Agency, as lessor, and the Faculty Practice Plan, as lessee. The State Agency will use the rental payments it receives under this new lease to retire the bonds described *supra* note 3.
5. Consistent with its responsibilities as a teaching institution, the Medical School requires Teaching Physicians to admit patients only to facilities that have an academic affiliation with the Medical School. All hospitals within the City or the County have such an affiliation with the Medical School.
6. Consistent with accreditation and similar requirements, for purposes of medical student and resident teaching and supervision, the Medical School keeps records of where Teaching Physicians perform procedures, but the

Medical School has certified that it does not use those records for any purpose relating to setting physician compensation or influencing choice of hospital.

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

8. *See supra* note 5.

9. *See supra* note 6.