



*[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: December 5, 2000

Posted: December 12, 2000

Ms. Ann Sweeney  
Director  
Housing Referrals of Maine  
P.O. Box 2347  
Augusta, ME 04338-2347

**Re: Spectrum Housing, d/b/a Housing Referrals of Maine  
OIG Advisory Opinion No. 00-8**

Dear Ms. Sweeney:

We are writing in response to your request for an advisory opinion, in which you ask whether operating a housing referral service for the elderly (the "Service") will subject you to sanction under the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act").

You have certified that all of the information you provided in your request, including all supplementary letters, is true and correct, and constitutes a complete description of the material facts regarding the Service. 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 Service 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 Spectrum Housing, d/b/a Housing Referrals of Maine (the "Requestor"), 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 Service. This advisory

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

## I. FACTUAL BACKGROUND

The Requestor is a non-profit agency operating a housing referral service (the “Service”) that places the elderly (the “Prospective Tenants” or “Tenants”) in various types of housing facilities located within the state of Maine (the “State”). The Requestor has referral service contracts with facilities (the “Facilities”) that include nursing homes, senior apartment complexes, retirement communities, and assisted living facilities.

Facilities must meet certain “qualifications for participation” to register with the Service. The Requestor determines whether a facility is qualified to participate by inspecting each facility to ensure that it is State licensed and performing services in compliance with State laws. The Requestor also uses the site inspection to determine what services are provided by the Facility. The Requestor does not exclude from the Service any facilities that meet the qualifications for participation. The Requestor imposes no requirements on the manner in which a Facility provides services, except that the Requestor requires that the Facilities charge the Prospective Tenants referred through the Service the same rate that it charges other individuals.

In addition, each Facility pays a fee to the Requestor to register with the Service. The Facilities pay the Requestor in one of the following ways: (i) if a Facility accepts any Federal health care program payment (rendering it a “Federal Payment Facility”), then the Requestor charges the Facility a set rate for a period of one year; (ii) if a Facility does not accept any Federal health care program payment, i.e., private payment only (a “Private Payment Facility”), then the Requestor charges the Facility [X]% of each placed Tenant’s first month’s charges for rent and personal care services, provided the Tenant resides in the Facility for more than one month.<sup>1</sup> The Requestor has certified that the charges to the Federal Payment Facilities are less than or equal to the cost of the Requestor’s provision of the services to the Federal Payment Facilities. At present, all of the Federal Payment Facilities are nursing homes.

Prospective Tenants contact the Requestor to find housing in Facilities that suit their needs. Upon a Prospective Tenant’s initial contact with the Requestor, the Requestor describes to the Prospective Tenant the services provided through the Service and the various housing and care options available. The Requestor then interviews the

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<sup>1</sup>If a Tenant resides in a Private Payment Facility for less than one month, the Requestor charges the Facility progressively smaller percentages of the first month’s charges, depending on the Tenant’s length of stay.

Prospective Tenant to determine the Prospective Tenant's medical, financial, and geographical needs. Using the information gathered, the Requestor selects a number of Facilities for the Prospective Tenant. Prospective Tenants are only referred to Facilities with whom the Requestor has a referral service contract. The Requestor does not charge the Prospective Tenants for using the referral services.

The Requestor makes the following five disclosures in writing to each Prospective Tenant:

- That the Requestor selects the Facilities to which it refers, in the manner described above;
- That the Facility has paid a fee to the Requestor to register with the Service;
- That the Requestor selects one or more Facilities for the Prospective Tenant according to information regarding the Prospective Tenant's medical, financial, and geographical needs;
- That the only relationship between the Requestor and the Facilities to whom it makes referrals is the relationship through the Service; and
- That a Facility would be excluded from continuing to participate in the Service if the Facility ceases to meet the qualifications for participation, or if a Facility represents that it will provide a service but fails to do so.

The Requestor requires each Prospective Tenant to sign a confirmation certifying that the Prospective Tenant has read these disclosures.

## **II. LEGAL ANALYSIS**

### **A. Law**

The anti-kickback statute, section 1128B(b) of the Act, 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 for which payment may be made 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 is 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 any thing of value, in cash or in-kind, directly or indirectly, covertly or overtly.

Violation of the anti-kickback 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>2</sup>

A number of statutory and regulatory "safe harbors" protect certain arrangements that might otherwise violate the anti-kickback statute. See 42 U.S.C. § 1320a-7b(b)(3); 42 C.F.R. § 1001.952. The safe harbor potentially applicable to the Service is the referral services safe harbor at 42 C.F.R. § 1001.952(f). This safe harbor protects referral service payments between an individual or entity (a "participant") and another entity serving as a referral service (a "referral service"), provided certain conditions described in the regulation are satisfied. Among the conditions to be satisfied under the safe harbor are that payments made by participants to the referral service are assessed equally against and collected equally from all participants, and are based only on the cost of operating the referral service, rather than the volume or value of referrals to or business generated by either party for the other party for which payment

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<sup>2</sup>Because both the criminal and administrative sanctions related to the anti-kickback implications of the Service are based on violations of the anti-kickback statute, the analysis for purposes of this advisory opinion is the same under both.

may be made in whole or in part under Medicare or a State health care program. In addition, the safe harbor requires that the referral service make specific disclosures to each person seeking a referral. 42 C.F.R. § 1001.952(f). Strict compliance with all safe harbor elements is required in order to receive safe harbor protection. See 56 Fed. Reg. 35952, 35954 (July 29, 1991).

## **B. Analysis**

Referral services, such as the Service, clearly implicate the anti-kickback statute to the extent that individuals or entities make payments to the referral services in exchange for referrals or business for which payment may be made by a Federal health care program. In this instance, the Service meets all of the requirements of the safe harbor, except for the requirement that fees be assessed equally against all participants in the referral service.

There are no financial relationships between the Requestor and the Facilities other than the referral service relationship. The Service is open to all facilities that meet the qualifications for participation and the participation fees charged to the Federal Payment Facilities are less than the Requestor's cost of operating the Service. The Requestor imposes no requirements on the manner in which a Facility provides services, except that the Requestor requires that the Facilities charge the Prospective Tenants referred through the Service at the same rate as it charges other individuals. The Requestor makes the five disclosures, as described in the referral services safe harbor, in the manner prescribed by the safe harbor. 42 C.F.R. § 1001.952(f)(4).

Notwithstanding these similarities, the payment methodology "carves out" Federal Payment Facilities from the other Facilities. Such differential payment arrangements do not meet the safe harbor requirement that any payment made by a participant to a referral service be assessed equally against and collected equally from all participants. See 42 C.F.R. § 1001.952(f)(4). We want to iterate our longstanding antipathy to attempts by referring parties to "carve out" referrals of Federal health care beneficiaries or business generated by Federal health care programs from otherwise questionable financial arrangements. Such arrangements may violate the anti-kickback statute by disguising remuneration for Federal referrals through offers or payments of inflated amounts for non-Federal business or simply by offering or paying remuneration for non-Federal referrals to "pull through" the Federal business. In the nursing home context, for example, even if payment to the referral service is based only on referrals of private pay beneficiaries, we are mindful that a substantial portion of those private pay beneficiaries ultimately will "spend down" their assets and qualify for Medicaid. The referral fee is for the patients' entire stream of funding, including the Federal health care program payment.

Under the proposed arrangement, however, the Service receives a fixed, annual payment from participating Facilities that receive any reimbursement or payment from a Federal health care program, regardless of whether the patients referred by the Service are covered by a Federal health care program or commercial insurance. These Federal Payment Facilities do not pay the Service based on the volume or value of referrals. As a practical matter, the Service's payment methodology as applied to Federal Payment Facilities is effectively equivalent to the safe harbor requirement that fees be assessed against and collected equally from all participants; all referrals to any Federal Payment Facility for any beneficiary will be covered by the fixed annual fee, eliminating the risk that the commercial fee will be manipulated to reward referrals of Federal business.

In light of the minimal risk of Federal health care program fraud or abuse posed by the Service, we consider the benefits that result from the Service. The Service provides some benefit to the elderly by helping them to find housing that will meet their needs efficiently. For all of these reasons, we will not subject the Requestor to sanctions under sections 1128(b)(7) or 1128A(a)(7) of the Act in connection with the Service.

### III. CONCLUSION

For the above-stated reasons, and based on the information provided, we conclude that the Service 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 OIG will not subject the Requestor 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 Service.

### IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to Spectrum Housing, d/b/a Housing Referrals of Maine, the requestor 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 Service.

- 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 Requestor with respect to any action that is part of the Service 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 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, 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