

[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.]

Issued: March 20, 2001

Posted: March 27, 2001

[name and address redacted]

Re: OIG Advisory Opinion No. 01-2

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding the solicitation and acceptance by [name redacted] (the “Health Center” or the “Requester”) of proceeds from a charitable fund-raising event – a golf tournament to be held on its behalf in July 2001– in which some of the Health Center’s vendors and suppliers participate as sponsors and registrants (the “Proposed Arrangement”). Specifically, the question raised by your request is whether the Proposed Arrangement would constitute grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (the “Act”) or the civil monetary penalty provision at section 1128A(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act.

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. 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 facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement would potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce or reward referrals of Federal health care program business were present, but that the Office of Inspector General (“OIG”) would not impose administrative sanctions on the Requester under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement. We express no opinion with respect to donations outside the

Proposed Arrangement or the proceeds from other charitable events to benefit the Requester.¹

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

I. FACTUAL BACKGROUND

The Requester is a not-for-profit, multi-site community health center that is tax-exempt under Federal and state law. The Health Center was created to serve the Hispanic community with an emphasis on underserved and uninsured populations. It operates a skilled nursing facility, a vocational counseling center, a childcare center, a home health division, a family practice residency program, substance abuse residential treatment centers, and medical, dental, and mental health clinics, some of which are satellite clinics that serve migrant and seasonal farm workers and the homeless in rural settings. The Health Center participates in Medicare and State health care programs and receives Federal grants to deliver health care services as a Federally qualified community health center.

Some years ago, community members and business people who support the Requester organized the [name redacted] Golf Committee (the “Golf Committee”) to hold an annual golf tournament to raise funds to support the Requester’s mission. The tournament has been held for several consecutive years.

The Golf Committee is an unincorporated association whose members are business and civic leaders drawn from the community-at-large, including state legislators, local officials, and members of the academic community from the local university. While the Requester’s Chief Executive Officer and some persons who do business with the Requester may serve on the Golf Committee, a majority of the Golf Committee members have no business or employment relationship with the Requester. The Requester does provide support to the Golf Committee, including an employee of the Requester who serves as the tournament director (mostly on his own time) and other staff who

¹We are unable to opine at this time about the propriety of donations other than the tournament registration fee and the three levels of sponsorship (described in Part I of this opinion) for the golf tournament scheduled for July 2001, or about sponsorship of charitable events other than the golf tournament scheduled for July 2001. Such possible donations and tournaments and the facts and circumstances surrounding them are hypothetical or have not been presented for our consideration and, therefore, are not a proper subject for an advisory opinion. See 42 C.F.R. § 1008.15(b).

voluntarily provide assistance for the event itself, such as assistance with tournament registration.

The Golf Committee organizes and promotes the annual golf tournament and solicits sponsorships, registrations, and donated items from businesses and individuals. The sponsorship levels range from \$2,500 to \$15,000.² Each level entitles the sponsor to registration of multiple players, tickets to the banquet, and some advertising on tournament materials. The Committee solicits sponsors and participants broadly from the local community. Recent sponsors include architects, construction companies, shipping companies, the local port authority, and other local business people. Non-sponsors may compete in the golf tournament at a cost of \$1,000 per foursome.³ Participating players in past tournaments have also broadly represented the local community. In sum, while some sponsors and participants have been vendors that do business with the Requester, including providers of items or services to the Requester that are reimbursed in whole or in part by the Federal health care programs, both the solicitation for, and actual participation in, the event are part of a much broader community-wide effort. The Requester has certified that it does not take tournament participation into account when awarding or renewing contracts or purchasing items or services.

In the prior two years, the Golf Committee has grossed in excess of \$90,000 per year from the tournament, generating in excess of \$50,000 in net proceeds for the Requester. In past years, the proceeds have been used for scholarship awards, holiday gifts to low-income families, the Requester's homeless programs, and the Requester's senior programs. The Requester anticipates that the proceeds from the July 2001 tournament will be put to the same or similar uses.

II. THE ANTI-KICKBACK STATUTE

The anti-kickback statute makes it a criminal offense knowingly and wilfully to offer, pay, solicit, or receive any remuneration to induce referrals of items or services reimbursable by Federal health care programs. See section 1128B(b) of the Act. Where remuneration is paid purposefully to induce referrals of items or services paid for 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"

²Most of each sponsorship donation is tax-deductible, as follows: \$1,703.50 of the \$2,500 donation; \$4,191 of the \$5,000 donation; \$12,598 of the \$15,000 donation.

³The tax-deductible portion of the \$1,000 foursome registration fee is \$216.00.

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. Where a party commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such party under section 1128A(a)(7) of the Act. The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs under section 1128(b)(7) of the Act.

This Office's concern with the provision of monetary donations to actual or potential referral sources is longstanding and clear: such arrangements are suspect and may violate the anti-kickback statute if one purpose is to induce or reward referrals of Federal health care program business. Those concerns are not necessarily ameliorated when the donation is in the form of sponsorships or participation in a charity golf tournament that would benefit the Requester, an actual or potential source of Federal health care program business for some sponsors and participants.

III. ANALYSIS

We accept that the majority of donors who make contributions to tax-exempt organizations, including donors with ongoing business relationships with the donees, are motivated by bona fide charitable purposes and a desire to help their communities. Substantial numbers of health care providers are not-for-profit organizations, many of which are community-based service providers, and depend on tax-deductible charitable donations to fund all or part of their operations. We recognize that soliciting donations is vital to these providers' viability and that the potential donor pool will include many persons and entities in the local community with which the soliciting entity has past, present, or potential business relationships. Invariably, some of the persons or entities solicited will be in a position to receive referrals or business from the soliciting provider. This business relationship does not make a tax-deductible donation automatically suspect under the anti-kickback statute.

For the following reasons, the Proposed Arrangement presents a minimal risk of abuse of Federal health care programs, while providing significant community benefits. First, the golf tournament appears to be a bona fide charitable event intended to provide benefits to

the community, in particular, to the local Hispanic community with an emphasis on underserved and uninsured populations. The purposes to which the Requester expects to put the donated sums -- social service programs, scholarships, and holiday gift giving to low-income families -- clearly further that mission. Second, the participation of the Requester's vendors is incidental to a broad community solicitation and broad participation by non-vendors. The Golf Committee's members and tournament sponsors and participants are drawn from a broad pool of civic leaders and business sources, many of whom have little or no nexus to the health care industry or to the Requester's business with the Federal health care programs. The tournament's promotional materials are widely disseminated and emphasize the community service provided by the Requester and the tournament's charitable goals. Third, the Requester has certified that it does not take tournament participation or sponsorship into account when awarding or renewing contracts or purchasing items or services. Overall, the Proposed Arrangement provides significant community benefits without presenting a significant risk of abuse of Federal health care programs.

IV. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement would potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce or reward referrals of Federal health care program business were present, but that the OIG would not impose administrative sanctions on the Requester under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement. We express no opinion with respect to other donations or payments.

V. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name redacted] Community Health Centers, the requester 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 requester 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 Proposed Arrangement described in this letter and has no applicability to other arrangements or proposed 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 Requester 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, and the Proposed 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, rescind, modify or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against the Requester 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