



[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: November 14, 2001

Posted: November 21, 2001

[names and addresses redacted]

Re: OIG Advisory Opinion No. 01-19

Dear [names redacted]:

We are writing in response to your request for an advisory opinion regarding a hospital's proposed donation of free office space to an entity that provides free end-of-life services to patients with terminal illnesses (the "Proposed Donation"). Specifically, you have inquired whether the Proposed Donation 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 Donation could 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 [Hospital A] or [Charity B] 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 Donation.

This opinion may not be relied on by any persons other than [Hospital A] and [Charity B], the requestors of this opinion (the “Requestors”), and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

[Charity B] (the “Charitable Organization”) is a non-profit, tax-exempt organization that provides emotional, social, physical, and spiritual assistance to patients who have been diagnosed with a terminal illness, can no longer benefit from curative treatment, and have a life expectancy of six months or less. It also provides bereavement programs, community-wide support programs, and educational programs to the patients’ families, friends, co-workers, and caregivers and to the community at large. However, the Charitable Organization is not a Medicare-certified hospice, and its patients are not required to waive their rights to curative treatment in order to receive the Charitable Organization’s services.

All of the Charitable Organization’s services are free. It does not bill, or receive any reimbursement from, its patients, Federal health care programs, or any other third party payor. Donations are its only source of funding. The Charitable Organization has one paid staff member -- an administrator who must be a registered nurse or licensed social worker and who works part-time. It uses unpaid volunteers to provide all other services, including medical director services provided by a physician.

Currently, the Charitable Organization leases its office space from [Hospital A], a public non-profit health care facility in [city], [state] (the “Hospital”). Under the Proposed Donation, the Hospital would donate the office space to the Charitable Organization. The Requestors have certified that, without the ability to receive free office space, the Charitable Organization may be forced to dissolve due to inadequate funding.

The Hospital and its affiliated durable medical equipment (“DME”) company, [Entity C], receive reimbursement from various third party payors, including Federal health care programs. Many of the Charitable Organization’s patients receive medical equipment from the Hospital’s DME company, and some receive other items and services from the Hospital.

II. LEGAL ANALYSIS

A. Law

The anti-kickback statute makes it a criminal offense knowingly and willfully to offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program. See section 1128B(b) of the Act. Where remuneration is paid purposefully to induce or reward referrals of items or services payable 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, directly or indirectly, overtly or covertly, in cash or in kind.

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.

B. Analysis

Generally, the provision of free goods or services to an actual or potential referral source, whether a for-profit or not-for-profit entity, could implicate the anti-kickback statute if one purpose of the gift is to induce or reward referrals of Federal health care program business. We recognize, however, that the vast majority of donors who make contributions to tax-exempt organizations and the vast majority of tax-exempt donees who solicit or accept donations -- including donors and donees with ongoing business relationships with one another -- are motivated by *bona fide* charitable purposes and a desire to help their communities.

In the instant case, the Proposed Donation presents a minimal risk of Federal health care program abuse, while providing significant benefits to a unique patient population. First, the Hospital and the Charitable Organization not only have a common charitable

background and mission, but they also have a longstanding relationship. Prior to the current financial crisis, the Charitable Organization had regularly paid rent to the Hospital for its office space. In light of that history and the Charitable Organization's reliance on donations as its sole source of funding, the donation of the office space likely represents a *bona fide* contribution in kind to help the Charitable Organization continue its caring mission.

Second, although we are concerned that, in many situations, persons other than health care providers can significantly affect referrals for, or the ordering of, health care items and services, we think it is unlikely in the specific situation presented here. Most importantly, all of the Charitable Organization's clients are terminally ill and are under the direct care and supervision of their own physicians with whom they have pre-existing and continuing relationships. In such circumstances, the ability of the Charitable Organization's volunteers to affect the ordering of medical items and services in the course of providing non-medical assistance is likely to be substantially diminished.

Third, the Charitable Organization provides valuable community services without charge and the Requestors have certified that, without the Proposed Donation, the Charitable Organization might be forced to cease operations.

In sum, based on the totality of the facts and circumstances, the Proposed Donation appears to be a *bona fide* charitable donation.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Donation could 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 [Hospital A] or [Charity B] 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 Donation.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [Hospital A] or [Charity B], which are 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 of this opinion.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is expressed or implied herein 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, to 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

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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