



*[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:** August 12, 2002

**Posted:** August 19, 2002

[name and address redacted]

Re: OIG Advisory Opinion No. 02-11

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding charitable contributions that the University of [State] Hospital Authority proposes to make to the [State] University Endowment Association in order to support and promote education and research at the School of Medicine of the University of [State] through a clinical cardiology services program (the "Proposed Grant"). Specifically, you have inquired whether the Proposed Grant 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.

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Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Grant could potentially constitute 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 (the “OIG”) would not impose administrative sanctions on the University of [State] Hospital Authority, the [State] University Endowment Association, or the University of [State] (the “Requestors”) 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 Grant.

This opinion is limited to the Proposed Grant and, therefore, we express no opinion about any ancillary 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 University of [State] Hospital Authority, the [State] University Endowment Association, or the University of [State], the requestors of this opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

## **I. FACTUAL BACKGROUND**

The Proposed Grant involves various interrelated parties that are components of an academic medical center (the “Medical Center”).<sup>1</sup> The parties and their relationships are described below.

### **A. The Parties**

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<sup>1</sup> For purposes of this advisory opinion, the Medical Center includes, without limitation, the following components: (1) the University of [State] and the University of [State] School of Medicine; (2) fifteen [State] non-profit, tax-exempt foundations that generally correspond, by clinical specialty, to each academic department within the University of [State] School of Medicine; (3) [State] University Physicians, Inc.; (4) the University of [State] Hospital Authority; and (5) the University of [State] Hospital.

## 1. The University

The University of [State] (the “University”) is a public body of [State] governed by the [State] Board of Regents. The University owns and operates various campuses, among

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which is the University of [State] Medical Center located in [city]. The University’s School of Medicine is located on the University of [State] Medical Center campus.

The University employs, or contracts with, physicians who serve as faculty members at the University’s School of Medicine (the “Faculty Physicians”). Faculty Physicians are either salaried full-time and part-time faculty members (the “Salaried Faculty Physicians”) or unsalaried voluntary faculty members (the “Voluntary Faculty Physicians”). All Faculty Physicians are licensed to practice in [State], have bona fide faculty appointments with the University’s School of Medicine, and provide substantial academic, research, clinical teaching, or clinical services.

With four exceptions, each Faculty Physician who is involved in clinical activities is also employed by the University of [State] Hospital Authority or one of fifteen [State] non-profit, tax-exempt foundations (the “Foundations”) that generally correspond, by clinical specialty, to each academic department within the University’s School of Medicine. Each Foundation pays Faculty Physicians for professional medical services provided on its behalf and has entered into a professional services agreement with [State] University Physicians, Inc. (the “Faculty Practice Plan”), a [State] non-profit, tax-exempt corporation. The Faculty Practice Plan, in turn, has entered into an agreement with the University for the provision of professional medical services to patients at the Medical Center.

The University pays all Salaried Faculty Physicians an annual salary determined in advance for teaching, research, and other non-clinical service activities. All Salaried Faculty Physicians are bona fide employees of the University on a full-time basis or a substantial part-time basis. The University does not pay Voluntary Faculty Physicians salaries for teaching, research, or other non-clinical service activities. However, Voluntary Faculty Physicians are compensated for academic, research, and clinical teaching services directly or indirectly by the University, the Faculty Practice Plan, the Foundations, the University of [State] Hospital Authority, the University of [State] Hospital, or other sources within the Medical Center.

## **2. The Hospital Authority**

The University of [State] Hospital (the “Hospital”) has been the teaching hospital of the University and the University’s School of Medicine for almost a century and is located on the Medical Center campus. The Hospital’s medical staff is closed, such that only Faculty Physicians can be members of the Hospital’s medical staff.

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Prior to 1998, the University operated the Hospital and its related assets and operations and employed its personnel. In 1998, the [State] legislature created the University of [State] Hospital Authority (the “Hospital Authority”) as a public body of [State] governed by its own Board of Directors and transferred the Hospital and its assets, operations, and employees to the Hospital Authority.

The Hospital Authority employs approximately twenty-five primary care physicians and ten emergency care physicians, as well as twenty-four cardiologists and four cardiothoracic surgeons. With the exception of the primary care physicians, who do not have faculty appointments, all other physicians employed by the Hospital Authority are Faculty Physicians.

The Hospital Authority is indirectly the sole shareholder of two for-profit subsidiary corporations that employ certain non-physician support personnel, own certain physician medical office practice assets, and lease certain medical office building locations in the [city] area.

## **3. The Endowment Association**

The [State] University Endowment Association (the “Endowment Association”) is an independent non-profit, tax-exempt corporation. The Endowment Association secures donor contributions and manages and invests the funds established from those contributions to support various University activities. The Endowment Association is governed by its own Board of Trustees that does not include any member of the Hospital Authority’s Board of Directors or any University officer or employee.

### **B. The Proposed Grant**

The Hospital Authority proposes to transfer to the Endowment Association a total of \$1,600,000 during the 2002 and 2003 fiscal years (i.e., the Proposed Grant). Concomitant with the creation of the Hospital Authority, the [State] legislature required the Hospital Authority “to facilitate and support the education, research and public service activities of the [Medical Center]” and “to provide patient care and specialized services not widely available elsewhere in [State], and to continue the historic tradition of care by the [Hospital] to medically indigent citizens of [State].”

Pursuant to this legislative mandate, the Hospital Authority and the University on behalf of the University’s School of Medicine have entered into several interrelated agreements to define their respective academic and clinical relationships. One of these is an agreement to develop a comprehensive cardiovascular services program as part of the

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Medical Center in order to (1) maintain the University’s accreditation; (2) achieve excellence in teaching and education of medical students and residents at the University’s School of Medicine; and (3) allow the Hospital Authority to compete with other local and regional hospital systems by offering high-quality cardiovascular services.

To implement and support the cardiovascular services program, the Hospital Authority and the Endowment Association propose to enter into a Support Agreement (the “Support Agreement”) by which the Hospital Authority would make charitable contributions to the Endowment Association in order to establish two funds, one for education and research in internal medicine (the “Internal Medicine Fund”) and the other for education and research in the University’s School of Medicine (the “School of Medicine Fund”). The Hospital Authority would make the Proposed Grant pursuant to the terms of the Support Agreement.

The Proposed Grant would not be subject to any explicit or implicit requirements as to the operation of the cardiovascular services program or referrals to the Hospital. In addition, the University has certified that:

- The University will not require or encourage any physicians to refer patients to the Hospital;
- The University will not track referrals made by any Faculty Physician to the Hospital;

- Any compensation paid to any Faculty Physician from the Internal Medicine Fund or the School of Medicine Fund (including, without limitation, base salaries paid for academic services) will not be related to the volume or value of referrals by any Faculty Physician to the Hospital; and
- The total compensation paid by all components of the Medical Center and any other source within the Medical Center directly or indirectly to (i) any Faculty Physician or (ii) any physician employed, or compensated by, the Hospital Authority will be set in advance, will not exceed in the aggregate fair market value for the services provided, and will not be determined in a manner that takes into account, directly or indirectly, the volume or value of referrals or other business generated by any such physician for any component of the Medical Center.

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## 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**

The Proposed Grant is as straightforward as it is problematic: it is a substantial donation by a hospital to a major referral source. (The University is a referral source for the Hospital Authority, since the University employs, and is affiliated with, Faculty Physicians who make referrals to the Hospital.) Accordingly, the Proposed Grant implicates the Federal anti-kickback statute.

However, for the following reasons, we would not impose administrative sanctions in connection with the Proposed Grant. First, the Proposed Grant would be between components of an academic medical center that historically have shared both a common heritage as public institutions and a common mission in training physicians for, and providing quality medical care to, the people of [State]. We recognize that the relationships among components of academic medical centers are often organizationally

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and financially complex. Given the Requestors' shared history, mission, and public provenance, the Proposed Grant is consistent with the Requestors' shared public and charitable mission.

Second, the Proposed Grant would be consistent with the [State] legislation establishing the Hospital Authority and requiring the Hospital Authority to support the education, research, and public service activities of the Medical Center.

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

- The University will not require or encourage any physicians to refer patients to the Hospital;

- The University will not track referrals made by any Faculty Physician to the Hospital;
- Any compensation paid to any Faculty Physician from the Internal Medicine Fund or the School of Medicine Fund (including, without limitation, base salaries paid for academic services) will not be related to the volume or value of referrals by any Faculty Physician to the Hospital; and
- The total compensation paid by all components of the Medical Center and any other source within the Medical Center directly or indirectly to (i) any Faculty Physician or (ii) any physician employed, or compensated by, the Hospital Authority will be set in advance, will not exceed in the aggregate fair market value for the services provided, and will not be determined in a manner that takes into account, directly or indirectly, the volume or value of referrals or other business generated by any such physician for any component of the Medical Center.

### **III. CONCLUSION**

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Grant could potentially constitute 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 University of [State] Hospital Authority, the [State] University Endowment Association, or the University of [State] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts

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described in section 1128B(b) of the Act) in connection with the Proposed Grant. This opinion is limited to the Proposed Grant and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request letter or supplemental submissions.

### **IV. LIMITATIONS**

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to the University of [State] Hospital Authority, the [State] University Endowment Association, and the University of [State], 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 Grant, including, without limitation, the physician self-referral law, section 1877 of the Act.
- 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 University of [State] Hospital Authority, the [State] University Endowment Association, or the University of [State] with respect to any action that is part of the Proposed Grant taken in good faith reliance upon this advisory

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opinion, as long as all of the material facts have been fully, completely, and accurately presented, and the Proposed Grant 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 University of [State] Hospital Authority, the [State] University Endowment Association, or the University of [State] 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,

D. McCarty Thornton  
Chief Counsel to the Inspector General