



[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: December 11, 2003

Posted: December 18, 2003

[Names and addresses redacted]

Re: OIG Advisory Opinion No. 03-15

Dear [names redacted]:

We are writing in response to your request for an advisory opinion regarding a proposal to reintegrate a medical group and a hospital that were originally a single entity (the "Proposed Arrangement"). Specifically, you have inquired 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 supplemental submissions, 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 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 (the “OIG”) would not impose administrative sanctions on [Entity X] or [Entity Y] 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.

This opinion may not be relied on by any persons other than [Entity X] and [Entity Y], 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.

1. FACTUAL BACKGROUND

In 1932, a physician and his two physician sons opened the [entity’s name redacted], a combined hospital and medical practice. In 1963, they donated the hospital to a non-profit corporation, which is now known as [Entity X] (the “Hospital”). The Hospital is one of the Requestors.

The other Requestor is [Entity Y], an incorporated, multi-specialty group practice (the “Group”). The Group is the successor to the medical practice that remained after the hospital donation. Thirteen physicians (the “Group Shareholders”) are the sole shareholders of the Group.¹ The Group employs twenty-one physicians (including the thirteen Group Shareholders), two nurse practitioners, a podiatrist, and other health professionals. [Entity Z], a retirement and plan trust for the Group’s employees, owns the building in which the Group is located and leases it to the Group. The Group has outgrown its current space and would incur substantial costs in acquiring new space in the absence of the Proposed Arrangement. (For purposes of this advisory opinion only, we consider [Entity Y] and [Entity Z] to be sufficiently related to be treated as a single entity, which will be referred to individually and collectively as the “Group.”)

Under the Proposed Arrangement, the Requestors propose to reunite the businesses of the Hospital and the Group as follows:

- The Group will transfer its assets, including its nursing and technical support workforce, to the Hospital. The Hospital, in turn, will pay the Group an amount equal to the amount necessary to satisfy all encumbrances related to the transferred assets, up to a preset payment cap. The amount of

¹The Group Shareholders are [physicians’ names redacted].

this payment will be less than the fair market value of the assets.²

- The Hospital will give the Group meaningful representation on the Hospital's Board of Directors.³
- The Hospital and the Group will enter into a ten-year professional services agreement (the "PSA"). Under the PSA, the Group will provide professional services in a new Hospital outpatient clinic, as the exclusive provider of such services, and in the Hospital's emergency department. The Hospital will have the exclusive right to bill patients and their third party payors for such services and will pay to the Group a fee, which, according to the Requestors' certifications, will be consistent with fair market value in an arms'-length transaction for services rendered. Patients seen by the Group at the Hospital's clinic will be largely the same patients the Group is currently treating in its existing private practice. The Requestors have certified that the compensation the Group's practitioners will receive under the PSA will be substantially the same as the compensation they received before the Proposed Arrangement.
- The Hospital will purchase the Group's office building from the Group for a purchase price that the Requestors have certified will be consistent with fair market value in an arms'-length transaction. The Group will relocate to space provided by the Hospital at the Hospital's clinic.⁴
- The Hospital and the Group will enter into an administrative and support services agreement, pursuant to which the Hospital will provide the Group with various administrative services and with billing services for accounts

²The Requestors have certified that, based on an independent appraisal, the value of the assets to be transferred is [amount redacted]. The Requestors estimate that the amount necessary to satisfy all encumbrances will be less than the preset payment cap of [amount redacted].

³In particular, the Group's Board of Directors will have the right to appoint four of the Hospital's nine voting directors, and certain designated board actions will require either a "special majority" or "supermajority" vote. The Hospital has obtained a tax exemption ruling from the Internal Revenue Service stating that the proposed restructuring, together with the Group's representation on the Hospital's board, will not effect the Hospital's status as a 501(c)(3) organization.

⁴Upon closing of the real estate transaction, the parties will terminate the Group's lease of the Group's current office space.

receivable generated by the Group prior to implementation of the Proposed Arrangement. The Requestors have certified that compensation under the agreement will be consistent with fair market value in an arms'-length transaction.

The Group will continue to exist after the Proposed Arrangement is implemented, although the Group will generate only a negligible amount of revenues that are not derived from its PSA with the Hospital.⁵

2. 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 payable 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 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” 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

⁵The Proposed Arrangement raises potential issues under the “Stark” law (section 1877 of the Act, also known as the physician self-referral law). We express no opinion regarding the legality of the Proposed Arrangement under the Stark law. The Centers for Medicare & Medicaid Services (“CMS”) is the agency with authority to issue opinions about the application of the Stark law, 42 C.F.R. § 411.370, and issuance of an OIG advisory opinion is not intended to be, and should not be construed as, a determination that an arrangement complies with the Stark law.

health care programs under section 1128(b)(7) of the Act.

B. Analysis

The threshold issue for purposes of the anti-kickback statute is whether there is remuneration flowing from one party to the other party to induce or reward the purchase or referral of Federal health care program business. By contrast, in the Proposed Arrangement, the most obvious remuneration -- the transfer of the Group's assets to the Hospital -- flows in the same direction as the most obvious referral pattern -- the physicians' referrals of their patients to the Hospital. Unless there is some referral of business from the Hospital to the Group in exchange for the Group's assets or remuneration from the Hospital to the Group for its referral of patients to the Hospital, the Proposed Arrangement would generate little concern. Accordingly, the focus of our analysis is on the ancillary transactions and the other referral opportunities.

First, the Hospital could be referring patients to the Group pursuant to the exclusive PSA in exchange for the Group's assets. However, the PSA is unlikely to result in appreciable new business generated for the Group, since the patients seen by the Group at the Hospital's clinic are largely going to be the same patients the Group is currently treating in its existing private practice. Simply put, the Proposed Arrangement is a restructuring and merger of the existing businesses of both the Group and Hospital within a unique historical context; in this instance it is not likely to generate measurable new business.

Second, the Hospital could be providing remuneration to the Group for the Group's referral of patients to the Hospital. Apart from the transferred Group assets, the Proposed Arrangement involves three potential sources of remuneration between the parties: the PSA for services provided in the Hospital's clinic; the administrative services agreement; and the purchase of the Group's building. However, the compensation that the Group's practitioners will receive under the PSA will be substantially the same as the compensation they received before the Proposed Arrangement. Moreover, according to the Requestors, the amounts that the Group will receive under the PSA and pay under the administrative services agreement, as well as the amount that the Hospital will pay for the Group's building, will be consistent with fair market value in arms'-length transactions.⁶ In these circumstances, the Proposed Arrangement is unlikely to generate impermissible remuneration from the Hospital to the Group, especially given the offsetting remuneration from the Group to the Hospital arising from the transfer of the Group's assets.

⁶We are precluded by statute from opining on whether fair market value shall be or was paid for goods, services, or property. See section 1128D(b)(3)(A) of the Act. For purposes of this advisory opinion, we rely on the Requestors' certifications of fair market value. If the payments are not fair market value, this opinion is without force and effect.

Accordingly, based on the totality of these factors, we conclude that we would not subject the Requestors to administrative sanctions for violation of the anti-kickback statute in connection with the Proposed Arrangement.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement 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 [Entity X] or [Entity Y] 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.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [Entity X] and [Entity Y], 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 Arrangement, 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 Requestors 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, 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 rescinded only if the relevant and material facts have not been fully, completely, and accurately disclosed to the OIG.

Sincerely,

/s/

Lewis Morris
Chief Counsel to the Inspector General