



*[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: July 15, 2004**

**Posted: July 22, 2004**

[name and address redacted]

**Re: OIG Advisory Opinion No. 04-09**

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding a geriatric group practice's proposal to employ certain primary care physicians to serve as consultants in connection with the group's nursing home patients (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 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 not generate prohibited remuneration under the anti-kickback statute. Accordingly, the Office of Inspector General (“OIG”) would not impose administrative sanctions on [name redacted] (the “Requestor” or [name redacted]) 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 [name redacted], the requestor of this opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

## **1. FACTUAL BACKGROUND**

The Requestor is a professional service corporation comprised of physicians specializing in geriatric medicine and the treatment of patients residing in nursing homes. The Requestor asserts that it has consistently encountered difficulty obtaining complete and accurate patient histories and essential patient information, such as past treatments, tests, and responses or reactions to medications, for its nursing home patients.

The Requestor wishes to employ the primary care physician who treated the patient prior to the patient’s admission to the nursing home (the “Consulting Physician”) to assist the Requestor in treating the patient. Under the employment agreement, the Consulting Physician would agree to be on call and available for telephone consultation twenty-four hours per day, seven days a week to respond to the Requestor’s requests for medical consultation. Such requests for consultation may include, but are not limited to, confirming the accuracy or completeness of the patient’s medical record, and discussing the history of the present illness, past surgical history, family medical history, social history, code status, history of immunizations, previous laboratory or other testing results, previous medications and responses to treatment, the patient’s current medical condition, and the proposed course of treatment.

The Consulting Physician will receive fifty dollars per hour for a maximum number of hours per month based upon the number of patients for which the Consulting Physician agrees to consult. For example, if the Consulting Physician agrees to provide services for up to five patients, the maximum monthly hours of services would be two hours, which results in a maximum monthly compensation of one hundred dollars. The maximum

monthly compensation is capped at seven hundred and fifty dollars for fifteen hours of service provided with respect to twenty or more patients. None of the costs incurred by the Requestor for consulting services will be billed to any Federal health care program or to any patient or other third party payor.

The Requestor has furnished us with a copy of a private letter ruling issued to the Requestor by the Internal Revenue Service (“IRS”) indicating that the Consulting Physicians qualify as bona fide employees of the Requestor.

## II. LEGAL ANALYSIS

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.

The anti-kickback statute excepts from its reach “any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services.” Section 1128B(b)(3)(B) of

the Act. The OIG safe harbor regulations provide that the term “remuneration,” as used in the anti-kickback statute, does not include:

[A]ny amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare or a State health care program. For purposes of paragraph (i) of this section, the term *employee* has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).

See 42 C.F.R. § 1001.952(i).

Whether an employee is a *bona fide* employee for purposes of the employee exception to the anti-kickback statute is a matter that is outside the scope of the advisory opinion process. See section 1128D(b)(3)(B) of the Act. Thus, for purposes of rendering this advisory opinion, we assume that the Consulting Physicians are *bona fide* employees in accordance with the IRS definition of the term set forth at 26 U.S.C. § 3121(d)(2) and IRS interpretations of that provision as codified in its regulations and other interpretive sources. If the Consulting Physicians are not *bona fide* employees under the IRS definition, this advisory opinion is without force and effect.

Based on the facts presented, including, but not limited to, the IRS determination provided by the Requestor, we conclude that the Proposed Arrangement comes within the language of the statutory exception and regulatory safe harbor for employee compensation, because the compensation will be paid to the Consulting Physicians pursuant to an employment agreement for the furnishing of covered items and services. We note that a similar arrangement with independent contractor physicians or other non-employees would not be protected and would raise additional fraud and abuse concerns, as would any similar payment arrangement with a nursing home. The anti-kickback statute disfavors payment structures that tie compensation, even for services, to patients referred by the compensated party. Here, where such payments are made through an employment relationship specifically deemed *bona fide* by the IRS, the arrangement is protected despite the risk it otherwise presents of fraud and abuse.

In sum, the compensation under the Proposed Arrangement would not constitute prohibited remuneration under the anti-kickback statute, section 1128B(b) of the Act.

### **III. CONCLUSION**

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the OIG would not impose administrative sanctions on [name redacted] 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 [name redacted], P.C., the requestor 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 [name redacted] 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 [name redacted] 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