



[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: August 9, 2005

Posted: August 16, 2005

[Names and addresses redacted]

Re: OIG Advisory Opinion No. 05-11

Gentlemen:

We are writing in response to your request for an advisory opinion regarding a hospital's proposed donation of a medical office building to a state-affiliated medical school that will use the building to relocate the school's existing family medicine clinic (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 [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 Donation. This opinion is limited to the Proposed Donation 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 [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

Under the Proposed Donation, [Entity Y], a for-profit company that owns and operates [Hospital A] (the “Hospital”), would donate a medical office building located on the Hospital’s campus (the “Building”) to the [Entity X].

A. The Parties

The [*Entity X*] (the “University”) is an agency of the State of [state redacted] (the “State”) that oversees facilities, programs, and policies related to students, staff, and faculty at institutions within the University system. The [name of medical school redacted] (the “Medical School”) is a college within the University that was established thirty years ago in [city redacted] (the “City”) for the purpose of operating primary care residency programs. When the Medical School was formed, the Hospital, [Hospital B], and [Hospital C] (collectively, the “Area Hospitals”) stopped operating their hospital-based residency programs, and the Medical School began operating nine different residency programs, including its Family Medicine Residency Program (the “Residency Program”), through

affiliation agreements with the Area Hospitals.¹ Area Hospitals remit funds to the University to support graduate medical education program costs incurred by the Medical School's residency programs.²

In addition to inpatient clinical experience, the Medical School offers residents participating in the Residency Program education in outpatient care through the operation of its outpatient family medicine clinic (the "Clinic"). The Clinic is currently housed in two different locations. According to the Requestors, the current Clinic sites are less than optimal because: (i) the facilities are outdated and inconveniently located; (ii) the space needed to accommodate the Clinic patient population continues to grow without available proximate vacancies; (iii) the necessity for two sites results in a fragmented delivery system; (iv) ambulance transport to a hospital is required in emergency situations because the Clinic sites are not located on a hospital's campus; and (v) closer proximity to a hospital would, in particular, facilitate the provision of obstetrical care to patients in the Clinic.

The Clinic provides a significant amount of care to a medically underserved population and is the largest provider of Medicaid and uncompensated care in the City. Fifty-nine percent of the Clinic's patients are Medicaid beneficiaries and twenty percent are self-pay patients. The Clinic averages a per visit payment of approximately \$4 for self-pay patients. Only eleven percent of the Clinic's patients are covered by commercial insurance, and only ten percent are Medicare beneficiaries. Twenty-one percent of the Clinic's patients reside in a designated medically underserved area.

¹The Graduate Medical Education Affiliation Agreements between the Medical School, Area Hospitals, and the [name of foundation redacted], a non-profit tax-exempt corporation governed by a board of directors with representatives appointed by the University and the Area Hospitals, outline the (i) operation of the residency programs by the Medical School, (ii) rotation of residents through Area Hospitals, (iii) establishment of salaries and benefits for residents, and (iv) establishment of an administrative structure to assist with policy and decision making, record-keeping, and other requirements associated with accreditation of the residency programs.

²This arrangement is documented in an Annual Supplemental Agreement to the Graduate Medical Education Affiliation Agreements. We express no opinion regarding the Graduate Medical Education Affiliation Agreements or any Annual Supplemental Agreement.

The Medical School's Department of Family Medicine employs full-time and part-time physicians (the "Teaching Physicians") to serve as faculty members. The University pays the Teaching Physicians a fixed annual salary as compensation for teaching, administrative, and research services. For part-time Teaching Physicians, the fixed annual salary also includes compensation for clinical services. However, the University pays full-time Teaching Physicians separate compensation (*i.e.*, in addition to the fixed annual salary) for clinical services provided to patients in the Clinic and other settings, including the Hospital. Each department within the Medical School establishes a plan for distribution of clinical revenues to its physicians. For the last fiscal year, the practice plan for the Medical School's Department of Family Medicine provided for payment of a fixed monthly salary for clinical services to each full-time Teaching Physician. Teaching Physicians are also eligible for annual bonuses if funds are available in the Department of Family Medicine in excess of expenses incurred and budgeted. In allocating bonuses, the Medical School does not take into account referrals to the Hospital or other institutions.³

[Entity Y] (the "Hospital Parent"), a part of [Entity Z], owns and operates the Hospital.⁴ Last year, the Hospital Parent acquired the Hospital from its prior owner. According to the Requestors, for thirty years, the Hospital (through its previous owner) and the Medical School have shared a common mission in educating physicians for, and providing quality medical care to, the people of the State, through the Residency Program. For a number of years before the acquisition, the Hospital's previous owner and the Medical School had shared a common vision of consolidating and relocating the Clinic to a new modern building to be located on the Hospital's campus.

³The practice plan considers the following factors in allocating bonuses: (i) overall clinical productivity; (ii) teaching quantitative and qualitative factors; (iii) scholarly and research activities; (iv) special contribution to the department; and (v) full-time equivalent status and length of employment within the department.

⁴For purposes relevant to this advisory opinion, we consider the [Entity Y], [Hospital A] (*i.e.*, the Hospital), and [Entity Z], as well as all entities that are owned or controlled, in whole or in part, directly or indirectly, by any of the foregoing to be sufficiently related to be treated as a single entity, which will be referred to for purposes of this advisory opinion as the "Hospital Parent."

B. The Proposed Donation

Under the Proposed Donation, the Hospital Parent would (i) donate the Building to the University for use as a family medicine clinic staffed by Teaching Physicians, residents, fellows, and medical students in support of the University's educational, research, and clinical services mission and (ii) enter into a long-term, nominal value (i.e., \$1 per year) ground lease for the Building's footprint. The Proposed Donation would be subject to a reverter clause transferring ownership of the Building back to the Hospital Parent and terminating the ground lease, if the Building is not used for the stipulated purpose. Upon receipt of the Building, the University will assume full responsibility for the Building's operating costs, and, except for the restrictions in the reverter clause, the Hospital Parent will not be involved in any decisions related to the Building, including, without limitation, decisions regarding the nature of the services to be offered in the Clinic.

The Proposed Donation would not be subject to any explicit or implicit requirements as to referrals to the Hospital Parent. In addition, the University has made the following certifications regarding its Teaching Physicians and other physicians affiliated with the University, including all physicians employed by, or affiliated with, the University or the Medical School (collectively, the "University Physicians"):

- The University will not require or encourage University Physicians to refer patients to the Hospital Parent or any other institution.
- The University will not track referrals made by University Physicians to the Hospital Parent or any other institution.⁵
- Compensation paid to University Physicians (including, without limitation, salaries and bonuses paid to Teaching Physicians) will not be related to the volume or value of referrals by such physicians to the Hospital Parent or any other institution. Such compensation will be consistent with fair market value in arm's-length transactions.

⁵To the extent that accreditation and similar requirements for undergraduate and graduate medical education programs require that the Medical School keep records of where Teaching Physicians, residents, fellows, and medical students perform services and procedures, the Medical School has certified that it does not use those records for any purpose relating to setting Teaching Physician compensation or influencing choice of hospital.

- On an annual basis, the University will provide written notice of the limitations described in each of the three foregoing paragraphs to all University Physicians affiliated with the Medical School.

The Hospital Parent has certified that it has not, and will not, provide to the University any free or below market value goods or services that are directly or indirectly related to the Building, including, without limitation, any utilities (e.g., sewer charges, water, gas, electricity, telephone, and every other service supplied to the University or used upon, or in connection with, the Building or the land upon which it is located), expenses, and any real estate taxes or other taxes associated with or assessed against the Building or the land upon which it is located.

The Requestors have further certified that the Proposed Donation is not contingent upon or directly or indirectly related to any other understandings, arrangements, or agreements, whether oral or written, between the Requestors.

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

Charitable donations play an essential role in sustaining and strengthening the health care safety net. We have long recognized that the majority of donors who make contributions to charitable organizations and the majority of charitable 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 benefit their communities. A business relationship between a donor and a donee does not make a charitable donation automatically suspect under the anti-kickback statute.

The Proposed Donation is as straightforward as it is problematic: a substantial one-time donation by a hospital to a referral source. (Since the University's Medical School employs, and is affiliated with, physicians who make referrals to the Hospital, the University is a referral source for the Hospital.) In addition, through the Proposed Donation, the Clinic will be moved to the Hospital's campus, thereby cementing the longstanding relationship between the parties, possibly to the detriment of other existing or potential competitors of the Hospital.

However, for the following reasons, we would not impose sanctions in connection with the Proposed Donation. First, the Proposed Donation will confer a community benefit on the Clinic's patients, most of whom are either Medicaid beneficiaries or uninsured. In particular, because of the Proposed Donation, Clinic patients will receive services in an up-to-date, conveniently located facility and have faster access to emergency medical care at a hospital, when needed. The State continues to have many medically underserved areas located in the City and the surrounding communities. The Clinic serves this population, and, by consolidating two antiquated and inefficient facilities, the Proposed Donation will enable the Clinic to continue doing so in greater numbers. The new facility should also improve the training of residents in the Residency Program.

Second, the Requestors' consummation of the Proposed Donation continues a common mission that the University and the Hospital have shared for thirty years (i.e., training physicians for, and providing quality medical care to, the people of the State), minimizing the likelihood that the Proposed Donation is motivated by the prospect of increased referrals. Although one effect of the Proposed Donation will be to move the Clinic onto the Hospital's campus, thereby making referrals to the Hospital somewhat more convenient, given the

singular set of facts presented, including the pre-existing relationship between the Hospital and the Medical School, a significant increase in referrals is unlikely. Moreover, any increased referrals may be offset, at least in part, by the Clinic's commitment to providing services to uninsured and under-insured patients. Given the entities' pre-existing shared history and mission, the Proposed Donation appears to be a reasonable accommodation by the Hospital Parent to help support the teaching and indigent care activities of the University's Medical School.

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 Parent, including the following:

- The University will not require or encourage University Physicians to refer patients to the Hospital Parent or any other institution.
- The University will not track referrals made by University Physicians to the Hospital Parent or any other institution.⁶
- Compensation paid to University Physicians (including, without limitation, salaries and bonuses paid to Teaching Physicians) will not be related to the volume or value of referrals by such physicians to the Hospital Parent or any other institution. Such compensation will be consistent with fair market value in arm's-length transactions.
- On an annual basis, the University will provide written notice of the limitations described in each of the three foregoing paragraphs to all University Physicians affiliated with the Medical School.

Thus, the University's ability to direct the referrals of University Physicians will be significantly constrained.

Finally, the University will own, operate, and maintain the Building for use by the Medical School, and, except for the limited reverter clause, the Hospital Parent will not be involved in any decisions related to the Building, including, without limitation, decisions regarding the nature of the services to be offered in the Clinic.

⁶See *supra* note 5.

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 [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 Donation. This opinion is limited to the Proposed Donation 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 [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 Donation, 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 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 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