



[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: December 8, 2008

Posted: December 15, 2008

[Name and address redacted]

Re: OIG Advisory Opinion No. 08-22

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding certain part-time physician employment arrangements (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, the Federal anti-kickback statute.

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] 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.

I. FACTUAL BACKGROUND

[Name redacted] (the “Requestor”) is a nonprofit, tax-exempt corporation organized under the laws of the State of [state redacted] to employ physicians. It has certified that it satisfies all the criteria of a “physician group” set out in 42 C.F.R. § 411.352. It is a wholly-owned subsidiary of [name redacted] (the “Parent”).

The Requestor proposes to employ two physicians (the “Physician Employees”) on a part-time basis to perform endoscopies on the Requestor’s own premises. Each of the Physician Employees also has a separate medical practice, at separate premises, at which he or she will continue to see patients outside the part-time employment relationship with the Requestor. The Requestor has certified that the Physician Employees will be its *bona fide* employees within the meaning of 26 U.S.C. § 3121(d)(2). The Requestor also has certified that it will pay each Physician Employee a salary that will be based on the fair market value of the professional services that he or she personally provides while employed by the Requestor.¹

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

¹We are precluded by statute from opining on whether fair market value shall be or was paid for goods, services, or property. 42 U.S.C. § 1320a-7d(b)(3)(A). While the Requestor has certified that the salaries to be paid to the Physician Employees under the Proposed Arrangement will be based on fair market value, we do not rely on that certification in this opinion, nor have we made an independent fair market value assessment. We do, however, rely upon the certification that the salaries will be for professional services personally performed by the Physician Employees.

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 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, Medicaid or other Federal health care programs. 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).

42 C.F.R. § 1001.952(i).

B. Analysis

As indicated above, the anti-kickback statute does not prohibit payments made by employers to their *bona fide* employees, for employment in the furnishing of items or services for which payment may be made under Medicare, Medicaid, or other Federal health care programs. 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 rely upon the certification of the Requestor that the Physician Employees are *bona fide* employees of the Requestor in accordance with the

definition of the term set forth at 26 U.S.C. § 3121(d)(2) and Internal Revenue Service (“IRS”) interpretations of that provision as codified in its regulations and other interpretive sources. The Requestor also has certified that the Physician Employees will be employed to perform endoscopies, which are services for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs, and that the compensation they will receive will be for professional services they personally perform. On the basis of these certifications, we conclude that the Proposed Arrangement would satisfy the criteria set forth in section 1128B(b)(3)(B) of the Act and 42 C.F.R. § 1001.952(i) and, therefore, the wages paid to the Physician Employees by the Requestor would not constitute prohibited remuneration under the anti-kickback statute, section 1128B(b) of the Act. If the part-time physicians are not *bona fide* employees under the IRS definition, this opinion is without force and effect.

This opinion is limited to the Proposed Arrangement’s compliance with the employee safe harbor of the anti-kickback statute. We express no opinion as to whether the Proposed Arrangement complies with the physician self-referral law, Section 1877 of the Act, 42 U.S.C. § 1395nn,² or any other Federal or state law or regulation. Moreover, this opinion is limited to the employment compensation paid by the Requestor to the Physician Employees; we express no opinion with respect to any other relationships disclosed in the request.

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

²The physician self-referral law is a distinct legal authority that would require a separate analysis; application of the physician self-referral law falls outside the OIG’s advisory opinion jurisdiction. The employment exception to the physician self-referral law differs in material respects from the employee safe harbor to the anti-kickback statute. Compare 42 U.S.C. § 1395nn(e)(2) and 42 C.F.R. § 411.357(c) with 42 U.S.C. § 1320a-7b(b)(3)(B) and 42 C.F.R. § 1001.952(i). Among other things, compliance with the employment exception to the physician self-referral law requires that the amount of the remuneration under the employment is consistent with fair market value, is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician, and is provided under an agreement that would be commercially reasonable even if no referrals were made to the employer. As these are not requirements of the anti-kickback statute safe harbor, we express no opinion as to whether they would be met in the Proposed Arrangement. That compensation to an employee fits in a safe harbor to the anti-kickback statute is neither dispositive nor probative of compliance under the physician self-referral law. See, e.g., 66 Fed. Reg. 856, 860 (Jan. 4, 2001) (“conduct that may be proscribed by section 1877 of the Act may not violate the anti-kickback statute”).

remuneration under the anti-kickback statute. Accordingly, the OIG would not impose administrative sanctions on the Requestor 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], 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,

/Lewis Morris/

Lewis Morris
Chief Counsel to the Inspector General