



[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 23, 2007

Posted: July 30, 2007

[Name and address redacted]

Re: OIG Advisory Opinion No. 07-07

Dear [name deleted]:

We are writing in response to your request for an advisory opinion regarding a cash donation to a senior residence program from a charitable foundation affiliated with a health system (the "Donation"). Specifically, you have inquired whether the 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 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 [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 Donation.

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 “Health System”) is a health system that, among other things, operates [name redacted] (the “Hospital”).¹ The Hospital is the only hospital in [location redacted] (the “City”), a city within [location redacted] (the “Region”). All 25 counties in the Region are Federally-designated “medically underserved areas” under 42 C.F.R. Part 51c. The Health System formed and provided the initial capital for [name redacted] (the “Foundation”). The Foundation was formed to assist hospitals and other non-profit providers of health services within the Region and to provide grants and scholarships to ensure the continuation and improvement of quality health care offered to the residents of the Region and contiguous areas. The Foundation, the Health System, and the Hospital are non-profit corporations exempt from Federal taxation. Many of the Foundation’s directors are also directors of the Health System and the Hospital. In addition, two of the Foundation’s officers also serve as officers with the Health System and the Hospital.

[Name redacted] is a not-for-profit organization, exempt from Federal taxation (the “Senior Services Non-profit”). The Senior Services Non-profit operates [name redacted] (the “Retirement Community”). According to the Foundation, the Retirement Community’s charitable mission mirrors that of the Foundation and the Hospital. One member of the board of trustees of the Senior Services Non-profit also serves as a director for the Foundation. Another member of the Senior Services Non-profit’s board also serves as a director for both the Health System and the Hospital.

The Foundation has certified that the Retirement Community provides attractive and affordable housing options for seniors in the Region, including 41 independent living cottages, a personal care program for seniors who can no longer function in an

¹The Health System includes six acute care hospitals; nursing homes; a home care service; a behavioral health center; a cancer center; and an in-home hospice program operated by the Hospital. For purposes of convenience in this advisory opinion, we consider the Health System and all of its subsidiaries, including the Hospital, to be sufficiently related that they will be referred to individually and collectively as the “Health System.”

independent living environment, a Medicare and Medicaid-certified skilled nursing facility offering 24-hour care, and an Alzheimer's unit. In 2003, as part of the skilled nursing facility, the Retirement Community developed a residential project based on an innovative approach to long-term, skilled nursing care (the "Residential Project"). The Residential Project de-institutionalizes nursing home residents in order to improve their quality of life. About ten residents share each home in the Residential Project with a primary caretaker who prepares their meals, facilitates meaningful activities, and cares for their personal and relational needs. At the same time, a clinical support team of physicians, nurses, therapists, and dieticians regularly visits each house to supervise residents' care and provide them with medical treatment. According to the Foundation, a significant portion of seniors who participate in the Residential Project have various psychological and other health needs that might not be met in a conventional nursing home facility. The Residential Project serves an important function as the only senior housing program in the Region that addresses those needs. The Residential Project includes residents insured by Medicare and Medicaid, as well as privately-insured residents. Seniors may qualify to participate in the program without regard to their ability to pay.

The Retirement Community planned that 112 seniors would be living in ten Residential Project homes on its City campus. To finance the development, the Retirement Community reached out to both individuals and institutions with wide-ranging community-based fundraising efforts. The Retirement Community planned to raise a total of \$3.9 million for the project. Based on its own projected budget, the Retirement Community asked the Foundation to provide a single, unrestricted contribution of \$100,000 (the "Donation"). The \$100,000 sum was proportionate to contributions made by other businesses of comparable size to the Foundation. The Foundation has certified that neither the Foundation, nor the Health System, exerts or will exert any influence over the Retirement Community's use of the donated funds.

The Retirement Community may, but is not required to, purchase various items and services from the Health System.² The Foundation has certified that the Donation was not based on any linkage to potential referrals from the Retirement Community or its employees or contracting physicians for items or services to a Health System affiliate or a Health System employed or contracting physician. In addition, the Foundation made the Donation contingent on the following safeguards:

- 1) The Retirement Community will accept the Donation in the form of a written grant specifying its terms and conditions;

² We express no opinion on the legality of any specific purchase or any other agreement or arrangement between the Retirement Community and the Health System.

- 2) The Retirement Community will not require or encourage any physicians to refer residents to the Health System, or its affiliates;
- 3) The Retirement Community will not track any patient referrals to, or other business generated for, the Health System or its affiliates;
- 4) Retirement Community payments to the Health System's affiliated, employed, or contracting physicians or physician entities for services provided to residents will be consistent with fair market value in arm's-length dealing, and not related to the volume or value of referrals of the Retirement Community residents to the Health System or its affiliates;
- 5) The Retirement Community will advise residents in writing of their freedom to choose health care providers.

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 accept that the majority of donors who make contributions to tax-exempt organizations and the majority of tax-exempt 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. Substantial numbers of health care providers are non-profit organizations, many of which --like the Retirement Community -- are community-based service providers and depend on tax-deductible charitable donations to fund all or part of their operations. A business relationship between a donor and a donee does not make a tax-deductible donation automatically suspect under the anti-kickback statute.

Although the crux of the Donation was an unrestricted donation from a charitable foundation to a non-profit senior care organization, the Donation warrants closer scrutiny. First, there is the donor Foundation's affiliation with the Health System through its origins, common officers and directors. Second, the Senior Services Non-profit's board overlaps with the boards of the Foundation, the Health System, and the Hospital. Third, there is the prospect that the Retirement Community may generate Federal health care program business for the Health System.

In most arrangements between ancillary health service providers and other health care providers, such as hospitals, we are concerned about remuneration flowing from the ancillary health service providers to the other health care providers in exchange for the other providers' referrals of nursing care business payable by a Federal health care program. However, in the instant case, the remuneration (*i.e.*, the Donation) flowed to the Retirement Community. Therefore, to assess the risk of fraud and abuse, we must consider whether there was any nexus between the Donation and the generation of Federal health care program business by the Retirement Community for the Health System.

For the following reasons, we conclude that the Donation was unlikely to result in fraud or abuse under the anti-kickback statute. In particular, the facts make it unlikely that any purpose of the Proposed Donation was to generate business for the Health System. First, the Donation was unrestricted as to the use of funds, and neither the Foundation, nor the Health System, exerted any influence over the Retirement Community's use of the donated funds. The Donation was made as part of a broad solicitation of funding by the Retirement Community. Funding sources included both businesses and community residents. The Donation was in proportion with contributions from other Region businesses of similar size to the Foundation, and constituted only a small percentage of the Retirement Community's overall fundraising campaign.

Second, the Donation represented a one-time only, fixed in advance payment. The Foundation has certified that neither the offer nor the amount of the Donation was determined in a manner that varied with, or otherwise took into account in any way, the volume or value of any referrals or other business that the Retirement Community might generate for the Health System. The Retirement Community was not required to purchase items or services from the Health System. Because skilled nursing facility services are reimbursed on a per diem basis, the Retirement Community has had an incentive to act as a prudent purchaser when deciding on a source for items and services.

Third, the Foundation has certified that the Retirement Community implemented and will maintain the following safeguards against improper influence by the Health System or any of its affiliates:

- the Retirement Community would not require or encourage any physicians to refer residents to the Health System, or its affiliates.
- the Retirement Community would not track any patient referrals to, or other business generated for, the Health System or its affiliates.
- Retirement Community payments to the Health System's affiliated, employed, or contracting physicians or physician entities for services provided to residents would be consistent with fair market value in arm's-length dealing, and not related to the volume or value of referrals of the Retirement Community residents to the Health System or its affiliates.
- the Retirement Community would advise Residential Project residents in writing of their freedom to choose providers.

In addition to the above factors, the Foundation was and remains a charitable entity formed to assist health care providers within the Region and improve the quality of health care services within the Region. The uses to which the Donation has been put -- development of an affordable and innovative non-profit senior care facility in a medically underserved area -- clearly furthered this mission. It is not surprising that non-profit health care institutions that share similar missions in a medically underserved area would also share common origins, directors, and officers. It is also to be expected that they would share patients and do business with one another (as noted, for example, the Hospital is the only hospital in the City where the Retirement Community is based). In the circumstances presented here, the limited overlap of directors and officers of these non-profit organizations and the Health System and its affiliates constitutes no indication that the Foundation was involved in anything other than a legitimate charity arrangement.

Accordingly, based on the totality of facts and circumstances and for all of the reasons stated above, we conclude that the OIG would not subject the Foundation to administrative sanctions under the anti-kickback statute in connection with the Donation.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the 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 the Foundation 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 Donation.

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 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 Foundation with respect to any action that is part of the 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 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 Foundation 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