[*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: June 5, 2002
Posted: June 12, 2002

[name and address redacted]

Re: OIG Advisory Opinion No. 02-7

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding the proposed waiver of coinsurance for portable x-ray services provided to nursing facility residents who are eligible for Medicare and Medicaid, but do not meet the eligibility requirements for Qualified Medicare Beneficiaries, as defined below (the "Proposed Waiver"). Specifically, you have inquired whether the Proposed Waiver 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 Waiver could potentially generate prohibited remuneration under the anti-kickback statute and that the Office of Inspector General ("OIG") could potentially impose administrative sanctions on [Company A] 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 Waiver. Any definitive conclusion regarding the existence of an anti-kickback violation requires a determination of the parties' intent, which determination is beyond the scope of the advisory opinion process.

This opinion may not be relied on by any persons other than [Company A], 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

A. The Regulatory Background

"Dual Eligibles" are Medicare beneficiaries who also receive assistance from Medicaid.[1] Dual Eligibles can be subdivided into different categories depending on the amount of assistance received from Medicaid. The vast majority of Dual Eligibles are Medicare beneficiaries who qualify for full Medicaid benefits ("Full Dual Eligibles").

A smaller proportion of Dual Eligibles receive more limited Medicaid assistance in the form of either (i) payment of Medicare Part B premiums, deductibles, and copayments (these beneficiaries are known as "Qualified Medicare Beneficiaries" or "QMBs") or (ii) payment of Part B premiums only (i.e., beneficiaries remain liable for other cost-sharing amounts). Depending on the application of various income and asset tests, a Medicare beneficiary may fit in one, two, or none of these categories.

As permitted by Federal law, Medicaid benefits provided to Dual Eligibles vary from state to state. In the State of [State X], Medicaid pays the Part B deductibles and copayments ("Part B cost-sharing") for QMBs.[2] [citation redacted]. However, for Full Dual Eligibles, [State X's] Medicaid program pays the Part B cost-sharing only if the costs were incurred for care, services, or supplies included in its Medicaid program. [citation redacted]. Portable x-ray services are included in [State X's] Medicaid program only if the equipment is owned or directly leased by a physician or other qualified practitioner. [citation redacted].

B. The Proposed Waiver

[Company A] (the "Requestor") provides portable x-ray and other mobile diagnostic services within the State of [State X]. The Requestor is not approved as a Medicaid provider of portable x-ray services because it does not meet [State X's] ownership requirements (i.e., the Requestor is not owned by a physician or other qualified practitioner). However, the Requestor is a Medicare-certified provider of portable x-ray services and, in that capacity, provides portable x-ray services within the State of [State X] to Medicare beneficiaries, some of whom are Dual Eligibles. Accordingly, for portable x-ray services provided by the Requestor under Medicare Part B, [State X] will pay the Part B cost-sharing amounts if the beneficiary is a QMB. However, [State X] will not pay such amounts if the beneficiary is a Full Dual Eligible, because portable x-ray services provided by the Requestor are not a [State X] Medicaid benefit. Thus, for Full Dual Eligibles, the Requestor must collect the Part B cost-sharing amounts from the beneficiaries.

The Requestor provides portable x-ray services to Medicare beneficiaries in a variety of locations, including nursing facilities.[3] Under the Proposed Waiver, the Requestor would waive Part B cost-sharing amounts for portable x-ray services provided to Full Dual Eligibles who reside in a nursing facility. The Requestor does not propose to base the Proposed Waiver on financial need, since it will continue to bill and collect copayments from beneficiaries with identical financial resources who receive other services and/or reside in other locations. The Proposed Waiver should reduce the administrative burden on nursing facilities, which must calculate their residents' net available monthly income ("NAMI"), the amount the residents are required to pay each month toward their nursing facility costs. More specifically, according to the Requestor, if Full Dual Eligibles who

reside in a nursing facility are required to pay their Part B cost-sharing amounts for portable x-rays, the nursing facilities will have to do a monthly, rather than an annual, adjustment of the residents' NAMI.

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 Proposed Waiver presents significant problems that preclude issuance of a favorable opinion. First, the Proposed Waiver would not be based upon an individualized, good faith assessment of financial need. Moreover, it would not be applied uniformly to all of the Requestor's customers: the Proposed Waiver would only be offered to some beneficiaries in some locations for some services. Second, nursing facilities, which order Medicare reimbursable portable x-ray services, are potential referral sources for the Requestor. In the absence of any contrary statements by the Requestor, we assume that the Proposed Waiver would benefit nursing facilities by both reducing the administrative paperwork necessary to recalculate the NAMI and increasing their cash flow (i.e., the Proposed Waiver would permit nursing facilities to collect more of their fees directly from the beneficiaries' NAMI, instead of waiting to receive an adjusted, higher Medicaid payment resulting from a lower NAMI). Third, the Proposed Waiver would give the Requestor a competitive advantage in seeking business from nursing facilities, thereby exerting pressure on competitors to make similar waivers. In sum, the Proposed Waiver appears to be designed solely to rectify what the Requestor considers to be [State X's] disparate treatment of non-practitioner owned portable x-ray providers. We believe that dispute should be resolved at the state level.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental

submissions, we conclude that the Proposed Waiver could potentially generate prohibited remuneration under the anti-kickback statute and that the OIG could potentially impose administrative sanctions on [Company A] 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 Waiver. Any definitive conclusion regarding the existence of an anti-kickback violation requires a determination of the parties' intent, which determination is beyond the scope of the advisory opinion process.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [Company A], which is 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 Waiver.
- 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 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.

Sincerely,
/s/
D. McCarty Thornton
Chief Counsel to the Inspector General

ENDNOTES:

1.Although we have simplified our discussion of Dual Eligibles for purposes of this advisory opinion, our discussion accurately reflects the elements that are relevant to the Proposed Waiver.

2.As required by Federal and [State X] law, [State X's] Medicaid program also pays Part B premiums for QMBs. See section 1902(a)(10)(E)(i) of the Act and [citation redacted].

3.For nursing facility residents covered under Medicare Part A, the Requestor provides portable x-ray services “under arrangement” with the nursing facilities. For nursing facility residents who are covered under Medicare Part B, the Requestor submits its own claims.