



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 31, 1995

Honorable Sonya Letson
County Attorney
Potter County
303 Courthouse
Amarillo, Texas 79101

Letter Opinion No. 95-041

Re: Whether section 161.091 of the Health and Safety Code prohibits a physician from investing in, and referring patients to, a business entity that offers certain health care services (ID# 30361)

Dear Ms. Letson:

You ask whether section 161.091 of the Health and Safety Code prohibits a physician from investing in, and referring patients to, a business entity that offers certain health care services. You describe a company that offers monitoring services to high risk obstetrical patients and that is owned by a group of physicians. The patients are generally referred to the monitoring company by the physicians who are also investors in the monitoring company. The monitoring company contracts with a second company to provide the monitoring equipment and services to the patients. Although the monitoring company does not directly furnish the monitoring equipment and services, the monitoring company does receive payments from the patient or third-party payor, such as the patient's health insurance company.

Section 161.091 of the Health and Safety Code provides in pertinent part:

(a) A person¹ commits an offense if the person intentionally or knowingly offers to pay or agrees to *accept any remuneration* directly or indirectly, overtly or covertly, in cash or in kind, *to or from any person, firm, association of persons, partnership, or corporation for securing or soliciting patients or patronage for or from a person licensed, certified, or registered by a state health care regulatory agency.*

....

(e) This section shall be construed to permit any payment, business arrangements, or payments practice permitted by 42 U.S.C. Section 1320a-7b(b) or any regulations promulgated pursuant thereto. [Emphasis added; footnote added.]

¹The Code Construction Act defines the term "person" to include a "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." Gov't Code § 311.005(2).

Section 1320a-7b(b) of title 42 of the United States Code generally criminalizes kickbacks in Medicare and federally-funded state health care programs. Pursuant to its statutory authority, the Office of the Inspector General of the United States Department of Health has issued regulations which exempt certain payment practices from those criminal penalties. *See* 42 C.F.R. §§ 1001.951 - .952. *See also* Attorney General Opinion DM-138 (1992).

As you point out, the monitoring company appears to violate the section 161.091(a) of the Health and Safety Code by providing an investment return to the physicians who refer the patients to the company. We will assume for purposes of this opinion that the arrangement violates the statute. You ask whether the investment arrangement described above is exempt from the prohibition of subsection (a) of section 161.091 by virtue of subsection (e) of that provision. You state, "We have been advised that the safe harbors which may be relevant to the arrangement described above are the ones for investment interests in small entities (42 C.F.R. § 1001.952(a)) and personal services and management contracts (42 C.F.R. § 1001.952(d))." You have not provided us with sufficient information to determine whether the investment arrangement satisfies the criteria of either of these two exceptions.² Although we do not have adequate information to further assist you in determining whether the investment agreement runs afoul of section 161.091, we note that even if the investment arrangement is exempt from section 161.091(a) by virtue of subsection (e), recently enacted section 161.092 provides that a person commits an offense if he or she accepts remuneration otherwise permitted under section 161.091 and fails to make certain specified disclosures to the patient.³

S U M M A R Y

An investment arrangement that satisfies certain federal regulations may be exempt from the prohibition set forth in section 161.091 of the Health and Safety Code. We have not been provided with sufficient information to determine whether the particular arrangement at issue satisfies the federal criteria.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

²Moreover, as we have said before in this context, this office generally refrains from considering the legality of private contracts. *See, e.g.*, Attorney General Opinion DM-138 (1992) at 3; Letter Opinion No. 94-1 (1994) at 2.

³We do not address the implications of any federal laws or regulations other than those discussed above.