

# PUBLICATION

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## OIG Advisory Opinion 18-13 Allows Charitable Donations Made by Business Affiliates to Fund Research Institute

November 29, 2018

**The Office of Inspector General (OIG) issued a favorable opinion for an arrangement involving a charitable trust and contributions of the trust's individual trustees to support a medical research center (institute) – a public-private enterprise established by a state university and a regional hospital network (health care system) (Advisory Opinion 18-13). The OIG observed the potential for generating prohibited remuneration because all the trustees directing the contributions have ownership or financial interests in long term care facilities that exchange health care items and services with the health care system. Nevertheless, the OIG concluded the arrangement posed a sufficiently low risk of fraud and abuse and advised it would not impose sanctions due to the combination of donor certifications, the governance structure of the institute, prior established ties between the parties, and the motivating factors behind the trust's donation.**

The requestors include the trust and one of the individual trustees. The trustee proposes to make a supplemental contribution to the institute in his/her individual capacity and shares a family relation with certain other trustees and the original grantor of the trust. The grantor founded the trust in 1989 and his estate interests make up the majority of the trust funds. By the terms of the trust, preferences were made to support higher learning institutions and local charity activities based in the grantor's community, which was in line with his lifetime of civic contributions and involvement with the university.

The trustee-owned long term care facilities do not have exclusive arrangements with the health care system, nor does the trust itself have any financial interests in these facilities. However, the facilities do have varied arrangements with the health care system that include transfer agreements, medical director services, education services, laboratory services, hospice services, and clinical research projects. These reciprocal arrangements may involve federal health care beneficiaries and raise the issue of whether or not the trust-related donations likely are improper payments intended to generate federal health care program referrals for the trustee-owned facilities.

The OIG explained that the limitation and restriction certifications by the trust and the individual trustee contributed to its conclusion that the donations were low risk. No donations would be conditioned upon the generation of referrals to the trustees' facilities, nor would the donations vary in any way that takes into account the volume or value of any referrals the health care system may send to the trustees' facilities. Furthermore, the only restriction placed on the donations in this arrangement would be the requirement that the institute use the funds to promote and make advancements in biomedical research.

The institute's governance and independent control also factored into the OIG's analysis. In addition to certifications that stated the institute would have absolute discretion on how the funds are utilized and the health care system had no control over the institute's budget or expenditures, the OIG noted the primary connection between the health care system and the institute is their shared mission to develop standing as a national leader in human health and disease research. Although the health care system contributed funds to initially create the institute, the university has overseen the institute's budget operations since its inception. Thus, the OIG found that the institute's separate and autonomous governance reduced the risk of improper

relationships between the trust-related donations and the health care system as a source of referrals to the trustees' long term care facilities.

Finally, the OIG explained that the extensive business relationships already existing between the parties, along with other "unique factors," distinguished the arrangement and lessened the likelihood it involved improper motivations. While the trustees' facilities and the health care system have several established agreements for items and services reimbursable under federal health care programs, the OIG noted this does not render charitable contributions to affiliated recipients automatically suspicious. In addition, when the grantor created the trust approximately two decades prior to the public-private enterprise that created the institute, the trust terms expressed the grantor's preferences to support both higher learning institutions and local charitable endeavors. The trust-related donations satisfy both of these preferences because the institute is part of the university, of which the grantor served on various boards, and is located within the community in which the grantor resided.

The OIG described these factors as distinguishing the arrangement from others in which proposed donors are motivated by the expectation of additional federal health care program business. Accordingly, the OIG found that in light of these combined factors, the trust's and the individual trustee's commitment of funds to the institute appeared to be for a bona fide charitable purpose and presented a sufficiently low risk of fraud and abuse under the Anti-Kickback Statute.

### **Takeaways for Charitable Donations**

The fact-intensive analysis provided in this opinion adds to the OIG's body of guidance relating to charitable contributions without deviating from the main issues addressed in prior opinions. Donor recipients should be free from improper influence or control by donors or affiliated persons in business relationships with donors. Furthermore, no conditions should be attached to donations that appear to increase or assure the continuation of federal health care program business between involved parties. Facts evidencing the presence or absence of such independence or conditions take various forms based on each unique arrangement and are specifically relied upon by the OIG in its conclusions. The OIG stated the instant opinion would be without force and effect in the event any exclusive arrangements were discovered to exist between the trustees' facilities and the health care system, or the health care system was found to have any influence or control over the institute.