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The State of South Carolina

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December 8, 1994

The Honorable Timothy F. Rogers
Member, House of Representatives
Box 5151
Columbia, South Carolina 29250

Dear Representative Rogers:

You have presented the following question:

> Does a physician's ownership of shares of common stock in a publicly-held company whose subsidiary provides "designated health services" as defined by § 44-113-20(4) constitute a prohibited "investment interest" pursuant to the Provider Self-Referral Act of 1993?

It is our opinion that, based upon the specific facts, as you have presented them, and upon the reasoning set forth below, such ownership of stock is not a prohibited "investment interest."

In your letter, you set forth the following facts:

> As consideration for selling all operating assets of a diagnostic center to a national corporation which owns other diagnostic centers, physicians who were limited partners in that diagnostic center received common stock in a publicly traded, publicly held corporation. Before June 15, 1993, ownership of the shares of common stock was transferred to those physicians. The shares are registered securities purchased on a national exchange, issued by a publicly held

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> corporation whose total assets in the most recent fiscal quarter exceeded 50 million.

Analysis

Of course, this Office is not authorized to make factual findings or to determine factual issues. Op. Atty. Gen., December 12, 1983. Therefore, our analysis must necessarily depend upon the facts as you have presented them.

The General Assembly enacted the "Provider Self-Referral Act of 1993", now codified at Section 44-113-10 et seq. The purpose of the Act is set forth in its preamble:

> Whereas, it is recognized by the General Assembly, that the referral of a patient by a health care provider to a provider of health services in which the referring health care provider has an investment interest represents a potential conflict of interest. The General Assembly finds these referral practices may limit or eliminate competitive alternatives in the health services market, may result in over-utilization of health services, may increase costs to the health care system, and may adversely affect the quality of health care. The General Assembly also recognizes, however, that it may be appropriate for providers to own entities provide health care services and to refer patients to these entities, as long as certain safeguards are present in the arrangement. It is the intent of the General Assembly to provide guidance to health care providers regarding prohibited patient referrals between health care providers and entities providing health care services and to protect the citizens of South Carolina from unnecessary and costly health care expenditures. (Section 1 of Act No. 71 of 1993).

Section 44-113-20 of that Act provides an extensive definitional section. The principal prohibitory provisions are contained in Section 44-113-30. That section states in pertinent part:

> Section 44-113-30.
>
> (A) Except as provided in this section and other provisions of this chapter, a health care provider may not refer

> a patient for the provisions of designated health services to an entity in which the health care provider is an investor or has an investment interest. However, this prohibition does not apply to:
>
> ....
>
> (2) the provider's investment interest is in registered securities purchased on a national exchange or over-the-counter market and issued by a publicly-held corporation:
>
> (a) whose shares are traded on a national exchange or on the over-the-counter market; and
>
> (b) whose total assets at the end of the most recent fiscal quarter exceeded fifty million dollars ....

When construing any statute, including Section 44-113-30, the primary objective of both the courts and this Office is to ascertain and effectuate legislative intent. McGlohon v. Harlan, 254 S.C. 207, 174 S.E.2d 753 (1970). Words used in a statute are given their plain and ordinary meanings; in the absence of ambiguity, such words are to be applied literally. Bohlen v. Allen, 228 S.. 135, 89 S.E.2d 99 (1955).

As plainly written, the prohibition against a health care provider referring a patient "for the provision of designated health services to an entity in which the health care provider is an investor or has an investment interest" does not apply, where the facts comport with Subsection (A)(2). The General Assembly has determined that the public need for prohibition against such referrals is unnecessary, where the provider's investment interest is in registered securities purchased on a national exchange or over-the-counter market and issued by a public-held corporation whose shares are trade on a national exchange or over-the-counter market and whose total assets at the end of the corporation's most recent fiscal quarter exceeded fifty million dollars. As you have advised that the facts meet these express requirements, it is apparent that the ownership of such stock is

simply not a prohibited "investment interest" pursuant to the statute.[1] Accordingly, Section 44-113-20 is not violated, pursuant to the specific facts as you have presented them.

If we can be of further assistance, please let us know.

With kindest regards,

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

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[1] As we conclude that, in this instance, the ownership of such stock is not a prohibited "investment interest", it is unnecessary to consider whether that stock ownership in a parent corporation is a sufficient nexus pursuant to Section 44-113-30, to prohibit referrals to a diagnostic center which is a subsidiary of that parent corporation. Accordingly, we express no opinion thereupon.