**Introductory Guidance: Endorsements**

**Background**

Often, vendors request that a PCA-HCCN promote the goods and services it offers to the PCA-HCCN’s health center members by endorsing such goods or services. Examples of endorsement activities may include, but are not limited to, lending the PCA-HCCN’s name to the vendor’s activities targeted to health center members, providing letters of support directed to the PCA-HCCN’s members, and making exhibit space at the PCA-HCN’s annual conference available to the vendor at discounted rates.

Several legal issues may arise from endorsing a product or service. If the PCA-HCCN is paid a fee for providing the endorsement, it must consider:

1. Whether the fee is subject to unrelated business income tax (“UBIT”) pursuant to Section 512 of the Internal Revenue Code (“IRC”)[[1]](#footnote-1); and,
2. If the vendor’s products or services will be paid for by a federal health care program (i.e., Medicare, Medicaid or any health care program, such as Section 330, wholly or partially funded by the Federal Government), whether the fee would be considered a kickback under the federal Anti-Kickback Statute.

Under the IRC, revenue received by a PCA-HCCN for advertising is subject to UBIT. Typically, fees paid in connection with an endorsement will not be taxable as advertising revenue so long as the PCA-HCCN follows certain guidelines in endorsing vendor products. In particular, the endorsement should not include comparative descriptions of products. Value-neutral descriptions of a vendor’s product line and a list of locations, addresses, telephone numbers and brand/trade names are allowed.

The federal Anti-Kickback Statute[[2]](#footnote-2) prohibits payment of any remuneration to induce a person “to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service” or to induce a person “to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item” for which payment may be made wholly or partially by a federal health care program. The payment and receipt of an endorsement fee could be considered remuneration paid to induce the PCA-HCCN to recommend purchasing a service or ordering an item for which payment may be made by a federal health care program.

Although there is a safe harbor intended to protect contracts for services, the total compensation for such services must be set in advance and may not take into account the volume or value of any business generated between the parties. Accordingly, if the PCA-HCCN’s compensation for endorsing a product is based on the volume and/or value of the vendor’s business, such as a percentage of sales, the arrangement would not be protected under the safe harbor. Moreover, the Office of the Inspector General of the Department of Health and Human Services (“OIG”) has emphasized in various advisory opinions that providing compensation for marketing services on a percentage of revenue basis presents a high risk of a fraud and abuse violation.

Finally, a PCA-HCCN that endorses a vendor of services or goods is potentially subject to tort liability to its members who use the services/goods, i.e., when a member relies on the association's endorsement and is harmed because of the negligence of the service provider. While the likelihood of such liability is relatively remote, PCAs-HCCNs should exercise due diligence before agreeing to an endorsement.

**Advice and Recommendations[[3]](#footnote-3)**

PCAs-HCCNs may endorse a vendor’s services or goods so long as the arrangement is structured carefully to avoid federal income tax and fraud and abuse problems.

Trade associations typically attempt to structure endorsement deals so that they qualify for the statutory exemption from unrelated business income provided for “royalties.”[[4]](#footnote-4) The IRC does not define what a royalty is. There often is a question as to whether the income paid to the trade association by a vendor is merely a payment for the use of the association’s name (e.g., a royalty) or payment for advertising or other services provided by the association in consideration for the payment. If the latter, the income is taxable as unrelated business income. As a general rule, the more involved the PCA-HCCN will be in marketing the vendor’s product in return for the payment, the more likely it is that the activity will be considered unrelated business income.

With respect to federal anti-kickback concerns, to date, the OIG has not issued an advisory opinion that specifically addresses trade association endorsements. The OIG holds a long-standing view that the federal Anti-Kickback Statute on its face prohibits offering or accepting remuneration, inter alia, for the purposes of arranging for or recommending purchasing, leasing, or ordering any . . . service or item payable under Medicare or Medicaid. It is reasonable, therefore, to assume that the OIG will scrutinize endorsement arrangements carefully.

Whether an endorsement arrangement is found to violate the federal Anti-Kickback Statute will likely be a question of degree. A reasonable argument could be made that, as long as the PCA-HCCN’s activities in return for a vendor’s payments are limited so as to constitute a “royalty” under the tax law, there is no anti-kickback problem. It should be noted that, in the advisory opinions, the OIG typically analyzes questionable arrangements in terms of increased potential for program abuse or overutilization. The OIG tends to find less potential for abuse in situations in which the party receiving the payment (in this case, the PCA-HCCN):

* Does not have direct contact with health care providers in a position to order the item or service that would be paid for by a federal health care program;
* Does not have direct contact with program beneficiaries; and,
* Is not in a position to exert undue pressure on purchasers or patients to use the item being endorsed.

Since in the typical endorsement deal, the PCA-HCCN has no control over whether its member health centers actually use the endorsed product, these factors work in the PCA-HCCN’s favor in a fraud and abuse analysis.

Obviously, neither the Anti-Kickback Statute nor UBIT would pose a material risk if the PCA-HCCN does not receive compensation for its endorsements.

* [Endorsements: Sample policy and procedure](http://www.healthcentercompliance.com/subscriber/pca-toolkit/volume-2/851)
1. See [Unrelated business activities](https://www.healthcentercompliance.com/subscriber/pca-toolkit/volume-2/844): Introductory guidance. [↑](#footnote-ref-1)
2. 42 U.S.C. § 1320a-7b(b). [↑](#footnote-ref-2)
3. The Authors of these materials include attorneys at the law firm of Feldesman Tucker Leifer Fidell LLP. The advice and recommendations consist of general guidance based on federal law and regulations and do not necessarily apply to all PCAs-HCCNs under all facts and circumstances. Further, these materials do not replace, and are not a substitute for, legal advice from qualified legal counsel. [↑](#footnote-ref-3)
4. See Section 512(b)(2) of the IRC. [↑](#footnote-ref-4)