

[We have redacted specific information regarding the requestor and certain privileged, confidential or financial information associated with the individual or entity, unless otherwise specified by the requestor.]

[Posted: 1/27/99]

[Dated: 1/20/99]

[Name and Address Redacted]

Re: [Name Redacted]

OIG Advisory Opinion 99-1

Dear [Name Redacted]:

We are writing in response to your request for an advisory opinion regarding an arrangement for the provision of back-up emergency ambulance services that involves waivers of copayments and deductible amounts (the "Arrangement"). You have asked whether the Arrangement constitutes prohibited remuneration within the meaning of the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act").

You have certified that all of the information provided in the 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, this opinion is without force and effect.

Based on the facts certified in your request for an advisory opinion, we conclude that the Arrangement could potentially violate the anti-kickback statute if the requisite intent to induce referrals were present, but that the Office of Inspector General ("OIG") will not subject the Arrangement, as described in the request letter and supplemental submissions, to sanctions arising under the anti-kickback statute, section 1128B(b) of the Act.

This opinion may not be relied on by any persons other than the requestor and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

FACTUAL BACKGROUND

The State A Emergency Medical Response System & Company X

In State A, there are two types of emergency medical response services. The first is basic ambulance service, which involves transportation only ("Emergency BAS").⁽¹⁾ More than seventy-three basic ambulance service providers operate in the service area relevant to the Arrangement (County B and County C). Approximately 95% of these providers are volunteer first aid squads.

The second type of service is paramedic service, which requires a State A certificate of need. In general, paramedic service providers do not transport patients. Thus, if paramedic services are needed at the scene of an emergency injury or illness, both a paramedic unit and a volunteer first aid squad (or other transport service) are called.⁽²⁾ Patients receive paramedic treatment at the scene from the paramedic service and are transported to the hospital by the local volunteer first aid squad, accompanied by paramedics from the paramedic service, if appropriate.

Requests for "911" emergency ambulance transportation are received by public safety answering points ("PSAPs"), which determine the appropriate level of ambulance service to send in response. The PSAPs have sole discretion in determining how to direct responses. They are operated by municipal law enforcement agencies supported by city and county taxes.

Company X ("Company X" or the "Requestor") is a non-profit 501(c)(3) corporation owned in equal shares by nine acute care hospitals in Counties B and C, State A. Company X provides various shared services on behalf of its owner-member hospitals, among them basic ambulance and paramedic services. Company X operates a number of paramedic units in its service area.⁽³⁾

Because Company X is the sole certificate of need holder providing paramedic services within its response area, all requests for paramedic services are referred to Company X. Company X is prohibited, pursuant to its certificate of need, from transporting patients in conjunction with its paramedic services, except in exigent circumstances.⁽⁴⁾

The Arrangement

Volunteer first aid squads are sometimes unable to respond to Emergency BAS requests in a timely manner. In these circumstances, Company X is willing to provide back-up transportation services. These back-up services are offered on an occasional basis as a community service and are not part of any formal arrangement or agreement between Company X and any PSAP or municipal or county government or agency. Providing the back-up service is not a condition of any contract or referral arrangement, and Company X may decline to provide the back-up service at any time.

Company X offers back-up Emergency BAS in two circumstances: (1) when Company X responds to a paramedic service request and a volunteer first aid squad fails to arrive at the scene to transport the patient to a hospital ("Emergency BAS incidental to paramedic service"); and (2) when a PSAP receives a "911" request for Emergency BAS, but a volunteer first aid squad is not available to respond ("Back-up Emergency BAS"). Unless the circumstances are exigent, Company X usually waits approximately thirty minutes for a volunteer squad to arrive before transporting a patient to a hospital.⁽⁵⁾

The volunteer first aid squads in Company X's service area bill neither Federal programs, private payors, nor patients for their services. Thus, typically basic ambulance service to a hospital is provided without cost to insurers and to patients. By contrast, Company X bills for its services in three ways. First, Company X bills insurers when Company X provides paramedic services. These paramedic services are provided under arrangement with hospitals, and, in the case of Medicare, are paid under Part A. Second, when Company X provides Emergency BAS incidental to paramedic ambulance service, the paramedic services are billed, but no payor or patient is billed for the basic ambulance service. Third, when Company X provides Back-up Emergency BAS only (i.e., without any paramedic services), Company X bills insurers, including Medicare, for transportation. Specifically, it bills Medicare Part B under Method 4.⁽⁶⁾ Company X's charges for its Back-up Emergency BAS do not vary based on the payor.

It is the third billing situation that gives rise to the Arrangement. Because the patients in Company X's service area do not typically pay fees for basic ambulance service and because collection of such fees would tend to cast the volunteer basic ambulance service system in a poor light, Company X waives patient copayments and deductibles when it provides Back-up Emergency BAS for volunteer first aid squads.⁽⁷⁾ Company X does not advertise this practice. Except in these circumstances, Company X collects applicable coinsurance whenever it bills an insurer.

Pursuant to the Arrangement, Company X waives copayments and deductibles for only a small number of its patients. For the period from August 25, 1997, to August 25, 1998, Company X waived copayments and deductibles for [] patients. These [] patients constituted [less than one percent] of Company X's total patients and [less than three percent] of its Medicare Part B patients. Company X waived Medicare Part B copayments and deductibles in the amount of

\$[], representing [less than one percent] of Company X's \$[] in total Medicare Part B program payments, including copayments and deductibles. During this period, Company X collected \$[] in payments from private insurers, including applicable copayments and deductibles.

The only patients who receive Company X's Back-up Emergency BAS are those who have dialed "911" to request basic ambulance service in an emergency. Routine scheduled transportation services (i.e., home to physician's office, home to diagnostic testing, home to dialysis center, Emergency Department discharge to home, etc.) are not provided under any circumstances as part of the Arrangement.

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 referrals of items or services reimbursable by the Federal health care programs. Section 1128B(b) of the Act. Where remuneration is paid purposefully to induce referrals of items or services paid for 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, in cash or in-kind, directly or indirectly, covertly or overtly.

The statute has been interpreted to cover any arrangement where one purpose of the remuneration is 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, 476 U.S. 988 (1985). Violations of the statute constitute 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. This Office may also initiate administrative proceedings to exclude persons from the Federal and state health care programs or to impose civil monetary penalties for fraud, kickbacks, and other prohibited activities under sections 1128(b)(7) and 1128A(a)(7) of the Act.⁽⁸⁾

We have a clear and long-standing concern about potentially abusive waivers of Medicare copayments and deductibles. For example, we have previously stated that providers who routinely waive Medicare copayments or deductibles may be held liable under the anti-kickback statute. See, e.g., Special Fraud Alert, 59 Fed. Reg. 65374 (Dec. 19, 1994); Advisory Opinion 98-6 (April 20, 1998); Advisory Opinion 97-4 (Sept. 25, 1997). One indicator of a potentially prohibited waiver is the failure to collect copayments or deductibles for a specific group of Medicare patients for reasons unrelated to individualized, good faith assessments of financial hardship.

Waivers of copayments and deductibles offered to Federal health care program beneficiaries may constitute prohibited remuneration to induce self-referrals under the anti-kickback statute. In the circumstances presented here, however, the risk of such prohibited remuneration is minimal. Critical to this determination is a recognition that in areas where Company X provides Back-up Emergency BAS for volunteer first aid squads, there is no expectation on the part of an emergency patient that there will be a charge -- much less a copayment -- for Emergency BAS. In light of that fact, Company X's failure to collect a copayment for the isolated instances in which it provides Back-up Emergency BAS can hardly be described as an inducement to use the service. Moreover, even if Company X were trying to induce referrals, the certificate of need requirements preclude it from expanding its provision of such services substantially.

III. CONCLUSION

Based on the facts certified by Company X, we conclude that, although the Arrangement technically would fall within the prohibition of the anti-kickback statute if the requisite intent were present, we will not seek to impose sanctions under sections 1128(b)(7) (as it relates to kickbacks) or 1128A(a)(7) of the Act for waivers of copayments and deductibles made under the Arrangement.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to Company X, the Requestor of this opinion. This advisory opinion has no application, 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 to this opinion.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is herein expressed or implied 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 Arrangement. We express no opinion with respect to State A law.
- No opinion is herein expressed or implied 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 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.

This opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008.

The OIG will not proceed against the Requestor with respect to any action that is part of the Arrangement taken in good faith reliance upon this advisory opinion as long as all of the material facts have been fully, completely, and accurately presented, and the Arrangement in practice comports with the information provided. The OIG reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, rescind, modify or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against the Requestor with respect to any action taken in good faith reliance upon this advisory opinion, where all of the relevant facts were fully, completely, and accurately presented and where such action was promptly discontinued upon notification of the modification or termination of this advisory opinion. An advisory opinion may be rescinded only if the relevant and material facts have not been fully, completely and accurately disclosed to the OIG.

Sincerely,

/s/

D. McCarty Thornton

Chief Counsel to the Inspector General

FOOTNOTES

1. According to the request for an advisory opinion and supplemental submissions, State A's two types of emergency transportation services are known as basic life support ("BLS") and advanced life support ("ALS"). To avoid confusion with the use of the terms BLS and ALS for purposes of Medicare reimbursement, this advisory opinion uses the terms "basic ambulance service" and "paramedic service" to describe the two State A services.

2. In rare circumstances, Emergency BAS may be provided by providers other than volunteer first aid squads.

3. As required by state regulation, Company X operates a minimum of 7.5 full time equivalent paramedic units in its service area.

4. Company X provides non-Emergency BAS and paramedic services under contractual arrangements not relevant here. This opinion is limited to emergency transport services only. No opinion is expressed with respect to any non-emergency services.
5. Usually Company X provides basic ambulance service only within its service area; however, under exigent circumstances it will receive and respond to requests for basic ambulance service from outside its service area.
6. Under Method 4, providers bill separate charges for services, mileage, and supplies.
7. Company X waives copayments and deductibles only in connection with its provision of Back-up Emergency BAS for volunteer first aid squads. Except for waivers of copayments and deductibles in connection with Back-up Emergency BAS for volunteer first aid squads, this opinion is without force and effect for waivers of a Federal health care program coinsurance amount.
8. Because both the criminal and administrative sanctions related to the Arrangement are based on violations of the anti-kickback statute, the analysis for purposes of this advisory opinion is the same for both.