

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

Dated: April 1, 1999

Posted: April 8, 1999

[name and address redacted]

Re: [name redacted]

Advisory Opinion No. 99-5

Dear [name redacted]:

We are writing in response to your request for an advisory opinion, in which you ask whether an annual fee imposed by city ordinance on ambulance companies wishing to provide ambulance services in the city (the "Ambulance Fee") constitutes prohibited remuneration under the anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act"), and, if so, whether the Ambulance Fee assessment constitutes grounds for the imposition of sanctions under the anti-kickback statute, section 1128B(b) of the Act, the exclusion authority related to kickbacks, section 1128(b)(7) of the Act, or the civil monetary penalty provision for kickbacks, section 1128A(a)(7) of the Act.

You have certified that all of the information you provided in your request, including all supplementary information, is true and correct, and constitutes a complete description of the material facts regarding the assessment of the Ambulance Fee. In issuing this opinion, we have relied solely on the facts and information you presented to us. We have not undertaken any 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 Ambulance Fee could constitute prohibited remuneration under 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 Ambulance Fee, as described in the request and supplemental submissions, to sanctions arising under the anti-kickback statute pursuant to sections 1128(b)(7) or 1128A(a)(7) of the Act. This opinion may not be relied on by any persons other than the addressee and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

The requester of this advisory opinion is the City of [name redacted] (the "City"). By city ordinance, the City established the Ambulance Fee (\$50,000 per year) for ambulance companies wishing to provide ambulance services in the City. The City intends that the collected Ambulance Fees will partially offset the costs of the City's 911 dispatch system. The factual background is as follows.

In addition to fire fighting, the City's fire department operates the City's emergency "911" dispatch service, as well as its Basic Life Support First Responder service (the "First Responder" service). The 911 system receives and dispatches calls for assistance from police, fire, and emergency medical services ("EMS"). In the event of a medical emergency, the 911 dispatcher will dispatch both a fire department vehicle to provide First Responder service and a City-licensed ambulance company vehicle. In 1998, the 911 dispatch service received 4,886 calls, of which 3,232 (approximately 66%) required the dispatching of an ambulance. The costs of providing the fire department's 911 dispatch service and the First Responder service are not reimbursed by any Federal health care program.

Until recently, the City was served by one ambulance company. On August 11, 1998, the City Council adopted Ordinance No. 98-49 (the "Ordinance"). The Ordinance amended the City's existing ambulance regulations to allow the City to enter into ambulance agreements with any ambulance company that pays the requisite fees and meets specified regulatory requirements, such as minimum levels of equipment, staffing and insurance. Under the Ordinance, companies that desire to operate an ambulance in the City must file a sworn application with a non-refundable application fee of \$1,000. If the City approves the application, the company may enter into a three-year ambulance agreement with the City and pay the City an annual fee of \$50,000. There is no other remuneration from the ambulance company to the City.⁽¹⁾

If the new arrangement created by the Ordinance leads to more than one ambulance company operating in the City, then the referral of emergency 911 calls shall rotate among the participating ambulance companies on a weekly basis. Each ambulance company shall be responsible for responding to all emergency 911 calls during the one-week "shift" assigned to it. When each participating ambulance company has served its one-week shift, the rotation shall repeat in the same order. To date, two ambulance companies have paid the \$50,000 annual fee to participate in the ambulance arrangement created by the Ordinance.

The City Council determined \$50,000 to be a reasonable amount for the Ambulance Fee after reviewing the cost and scope of the City fire department's involvement in the provision of EMS in the City. This process included the formation of a committee⁽²⁾ (the "Ambulance Committee") to review the proposed ambulance arrangement later adopted by the Ordinance. The Ambulance Committee considered the City's FY 1998 budget, as well as the fact that the majority of calls to which the fire department responded in 1997 involved emergencies requiring both ambulance and First Responder services.

The City has certified that the cost to the City of its 911 system for dispatching EMS calls is approximately \$150,000 per year (including salaries, benefits and overhead).⁽³⁾ This amount represents the proportion of the total cost of the 911 system attributable to ambulance dispatching services.

The City Attorney has certified that the Ordinance was duly noticed as required by the State's Open Meetings Act, that the Ordinance and Ambulance Fee fall within the City's authority under the State's Health and Safety Code to regulate EMS, and that the Ordinance's enactment was in accordance with local and state law.

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 any Federal health care program. See section 1128B(b) of the Act. Where remuneration is paid purposefully to induce referrals of items or services for which payment may be made 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 was 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, 474 U.S. 988 (1985). Violation of the statute constitutes 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 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.⁽⁴⁾

"Pay to play" arrangements, like the proposed arrangement between the ambulance companies and the City enacted by the Ordinance, clearly implicate the anti-kickback statute. The payment of the Ambulance Fee to the

City for the opportunity to provide EMS fits squarely within the language of the anti-kickback statute. Depending on the intent of the parties, the proposed arrangement could violate the statute.

However, for the following reasons and based on the facts certified in your request for an advisory opinion and in subsequent submissions, the OIG will not subject the Ambulance Fee to sanctions arising under the anti-kickback statute pursuant to sections 1128(b)(7) or 1128A(a)(7) of the Act. First, the Ambulance Fee is only one part of a comprehensive regulatory scheme by the City to provide oversight and fiscal management to the delivery of EMS. The Ambulance Fee was established by a valid governmental entity legally empowered to regulate the provision of EMS in the City.

Second, the Ambulance Fee is reasonably related to the costs of the operation of the City's 911 system attributable to dispatching ambulances. The City has certified that its annual cost of dispatching ambulances is approximately \$150,000. So long as the aggregate collected Ambulance Fees do not exceed the City's cost of dispatching ambulances, then the Fee is a reasonable charge to participating ambulance companies. To date, only two ambulance companies have paid Ambulance Fees, the aggregate of which (\$102,000⁽⁵⁾) falls far short of the City's cost of dispatching ambulances.

Third, the Ambulance Fee is not tied directly or indirectly to the volume or value of referrals. The amount of the Ambulance Fee is the same regardless of the volume of business that accrues to the ambulance company that pays it. The City's 911 system employs a fixed rotation system for distributing calls. There is no guarantee as to the volume of business that will accrue to any single ambulance company. Indeed, there is no guarantee against a decrease in business volume resulting from an additional ambulance company contracting with the City for a place in the rotation.

Fourth, the Ambulance Fee assessment should not increase the risk of overutilization or costs to Federal health care programs. Neither the number of Federal program beneficiaries requiring emergency transport in the City, nor the treatment these patients will require or receive at a hospital, is related to the existence or use of the Ambulance Fee. In light of the specific circumstances presented, we would not impose sanctions arising under the anti-kickback statute in connection with the Ambulance Fee.

III. CONCLUSION

The advisory opinion process is a "means of relating the anti-kickback statute to the particular facts of a specific arrangement." 62 Fed. Reg. 7350, 7351 (Feb. 19, 1997). The advisory opinion process permits the OIG to protect specific arrangements that "contain[] limitations, requirements, or controls that give adequate assurance that Federal health care programs cannot be abused." Id. In evaluating an arrangement's potential to lead to fraud or abuse of the Federal health care programs, no one fact or element is necessarily dispositive. We are persuaded that, taken as a whole, the aspects of the Ambulance Fee described above -- including, but not limited to, its reasonable relationship to the costs of the 911 system, its existence within a municipal regulatory scheme and legislative-representative context, and its uniformity across providers -- create sufficient limitations, requirements, or controls so as to give adequate assurance that the Ambulance Fee will not lead to program abuse under the anti-kickback statute.

Accordingly, we conclude that while the Ambulance Fee might technically violate the anti-kickback statute if the requisite intent to induce referrals were present, the OIG will not impose sanctions on the requesters under sections 1128(b)(7) (as it relates to kickbacks) or 1128A(a)(7) of the Act, based on the facts certified in the requester's request for an advisory opinion.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- o This advisory opinion is issued only to the City of [name redacted], the requester of this opinion. This advisory opinion has no application, and cannot be relied upon, by any other individual or entity.

o This advisory opinion may not be introduced into evidence in any matter involving an entity or individual that is not a requester to this opinion.

o This advisory opinion is applicable only to the statutory provisions specifically noted in the first paragraph of this advisory opinion. 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 Ambulance Fee or the Ordinance.

o This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.

o 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.

o No opinion is expressed herein 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 opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008.

The OIG will not proceed against the requester with respect to any action regarding the Ambulance Fee 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 administration of the Ambulance Fee 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 any requester 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. The City has certified that ambulance companies operating in the City have restocked medical supplies used by the fire department when assisting the ambulance companies with First Responder services. The Ambulance Fee arrangement is the complete and entire arrangement that is the subject of this advisory opinion. No opinion is expressed with respect to the fire department restocking.

2. The Committee was comprised of the City's Mayor, City Manager, City Attorney, Fire Chief, Police Chief, and two City Council members.

3. While the OIG does not make independent assessments of the fair market value of given services (see section 1128D(b)(3) of the Act), we note that the City justified its figure for the cost of its 911 system by delineating the cost of each item of overhead and then apportioning those costs in accordance with the ratio of ambulance calls to total 911 calls.

4. Because both the criminal and administrative sanctions related to the anti-kickback implications of the Ambulance Fee are based on violations of the anti-kickback statute, the analysis for purposes of this advisory

opinion is the same under both.

5. This figure includes a \$1,000 application fee per ambulance company.