



[We redact certain identifying information and certain potentially privileged, confidential, or proprietary information associated with the individual or entity, unless otherwise approved by the requestor.]

Issued: July 20, 2001

Posted: July 26, 2001

[Name and address redacted]

Re: OIG Advisory Opinion No. 01-12

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion, in which you ask whether an exclusive contract between a city and an ambulance company for the provision of emergency medical services for city residents that includes a requirement that the contracting ambulance company waive any out-of-pocket Medicare copayments for city residents (the “Arrangement”) would constitute grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (the “Act”) or the civil monetary penalty provision at section 1128A(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act.

You have certified that all of the information you provided in your request, including all supplementary letters, is true and correct, and constitutes a complete description of the material facts regarding the Arrangement. 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 or have been misrepresented, this opinion is without force and effect.

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Arrangement potentially generates prohibited remuneration under the anti-kickback statute and that the Office of Inspector General

(“OIG”) could subject [Name redacted] to administrative sanctions under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Arrangement.

This advisory opinion may not be relied on by any person other than [Name redacted] and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

[Name redacted] (“Company A”) is a non-profit corporation that has a membership of ten hospitals and medical centers located throughout State X. Among other things, Company A provides “911” emergency basic life support (“BLS”) ambulance services on behalf of its members.

The [Name redacted] (the “City”) is an urban municipality in State X. In 1998, the City issued a request for proposals (the “RFP”) for the provision of all 911 emergency BLS ambulance services within the City.¹ Under the RFP, the successful bidder would provide these services under an exclusive, three-year contract (the “Contract”). Company A offered to provide the services at no cost to the City and was awarded the Contract.

The Contract provides that Company A will bill and collect from patients and their health care insurers, including the Federal health care programs, for services provided under the Contract. The Contract prohibits Company A from billing any out-of-pocket copayments and deductibles to *bona fide* residents of the City.

Company A began providing 911 emergency BLS ambulance services under the Contract in October 1998 and continues to provide such services today.

II. LEGAL ANALYSIS

The anti-kickback statute makes it a criminal offense knowingly and wilfully to offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by Federal health care programs. See section 1128B(b) of the Act. Where

¹We assume for purposes of this advisory opinion that the City has authority pursuant to state law to provide, or arrange for, emergency medical services within the municipality and followed the applicable state and local laws.

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 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. Where a party commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such party under section 1128A(a)(7) of the Act. The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs under section 1128(b)(7) of the Act.

The contractual provision barring Company A from billing patients for out-of-pocket Medicare copayments raises the question whether the City's failure to reimburse Company A for those copayments will result in waivers of copayments that would implicate the anti-kickback statute.²

In this case, the City has effectuated the routine waiver of out-of-pocket copayments by requiring Company A to bill residents "insurance only" and then by not paying the Medicare copayments on the residents' behalf. In short, if the City wishes to assume the copayment obligation owed to an independent ambulance provider or supplier for City residents, it must pay the owed amounts. Failure to make the payments – or to permit City residents to be billed for them – implicates the anti-kickback statute, as well as the False Claims Act, 31 U.S.C. §§ 3729-3733.³ We note that insurance only billing by

²Our concerns regarding routine waivers of copayment are longstanding. See, e.g., Special Fraud Alert: Routine Waiver of Copayments or Deductibles Under Medicare Part B, 59 Fed. Reg. 65,372, 65,374 (1994).

³Section 1128A(a)(5) of the Act provides for the imposition of civil monetary penalties against any person who offers remuneration to a Federal health care program beneficiary that such person knows or should know is likely to influence such individual to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made under a Federal health care program. For purposes of

municipalities that operate their own emergency ambulance services raises different questions not addressed here.⁴ There is an important difference between a municipally owned ambulance company voluntarily waiving copayments for its own residents and a municipality requiring a private company to bill “insurance only” as a condition of getting the municipality’s EMS business, including Medicare business.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Arrangement potentially generates prohibited remuneration under the anti-kickback statute and that the OIG could subject Company A to administrative sanctions under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Arrangement.⁵

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to Company A, the requestor of this opinion. This advisory opinion has no application to, 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.

section 1128A(a)(5) of the Act, "remuneration" includes, *inter alia*, the waiver of copayment and deductible amounts. See section 1128A(i)(6) of the Act. However, under the Arrangement, City residents have no choice of “911” service provider or supplier. Thus, the OIG would not impose administrative sanctions on Company A under section 1128A(a)(5) in connection with the Arrangement.

⁴See CMS Carrier Manual section 2309.4; CMS Intermediary Manual section 3153.3A; see also OIG Advisory Opinion No. 01-10 (July 20, 2001); OIG Advisory Opinion No. 01-11 (July 20, 2001).

⁵We express no opinion with respect to any aspect of the Arrangement other than the insurance only billing requirement.

- 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.
- 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.
- 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 reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, modify or terminate this opinion.

Sincerely,

/s/

D. McCarty Thornton
Chief Counsel to the Inspector General