



*[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:** June 11, 2010

**Posted:** June 18, 2010

[Name and address redacted]

**Re: OIG Advisory Opinion No. 10-10**

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding an arrangement whereby two municipalities reciprocally waive otherwise applicable cost-sharing obligations of the other's bona fide residents when providing backup emergency medical services ("EMS") to such residents pursuant to a mutual response arrangement (the "Arrangement"). Specifically, you have inquired whether the Arrangement constitutes grounds for the imposition of sanctions under the civil monetary penalty provision prohibiting inducements to beneficiaries, section 1128A(a)(5) of the Social Security Act (the "Act"), or under the exclusion authority at section 1128(b)(7) of the Act, or the civil monetary penalty provision at section 1128(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act, the Federal anti-kickback statute.

You have certified that all of the information provided in your request, including all supplemental submissions, 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 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: (i) the Arrangement does not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) while the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce or reward referrals of Federal health care program business were present, the Office of Inspector General (“OIG”) will not impose administrative sanctions on [names redacted] 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 opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

This opinion may not be relied on by any persons other than [names redacted], the requestors of this opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

## **I. FACTUAL BACKGROUND**

[Name redacted] (the “County”), is a political subdivision of [state name redacted]. [Name redacted] (the “City”), is also a political subdivision of [state name redacted] and is a distinct enclave geographically located within the County. The County and the City (collectively, the “Requestors”) each provide EMS to their residents in response to “911” emergency calls through their own ambulance services, which they operate through their fire departments. The Requestors’ ambulance services do not provide non-emergency ambulance transports. When providing EMS to their own residents, the Requestors engage in “insurance only” billing, whereby they waive otherwise applicable cost-sharing obligations for bona fide residents of their respective municipalities.<sup>1</sup>

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<sup>1</sup> Depending on the specific facts and circumstances, such “insurance only” billing arrangements may be lawful for state or local government owned and operated facilities under the Medicare program. See, e.g., Centers for Medicare & Medicaid Services, Medicare Benefit Policy Manual, Chapter 16, section 50.3.1, available at <http://www.cms.hhs.gov/manuals/Downloads/bp102c16.pdf>. In this instance, however, the Requestors have not asked for an opinion about their billing arrangements for their residents, and accordingly, we express no opinion regarding any of the Requestors’ billing practices toward their own residents.

The Requestors participate in a mutual response arrangement<sup>2</sup> whereby, in limited circumstances, when an ambulance from one Requestor is closer to a medical emergency within the other’s jurisdiction, that Requestor’s ambulance responds to the 911 emergency call and provides backup EMS. The backup EMS is provided to Federal health care program beneficiaries, among others. The backup EMS only involves non-routine, emergency services and thus is only provided on an unscheduled and sporadic basis. Under the Arrangement, the Requestors, on a reciprocal basis, honor the “insurance only” billing policy of the other when providing the backup EMS for bona fide residents of the other jurisdiction.

## II. LEGAL ANALYSIS

### A. Law

The anti-kickback statute makes it a criminal offense knowingly and willfully to offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program. See section 1128B(b) of the Act. Where remuneration is paid purposefully to induce or reward referrals of items or services payable 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, directly or indirectly, overtly or covertly, in cash or in kind.

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. 1985), 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.

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<sup>2</sup> No opinion has been sought, and we express no opinion, regarding the mutual response arrangement.

Section 1128A(a)(5) of the Act provides for the imposition of civil monetary penalties against any person who gives something of value to a Medicare or state health care program (including Medicaid) beneficiary that the benefactor knows or should know is likely to influence the beneficiary's selection of a particular provider, practitioner, or supplier of any item or service for which payment may be made, in whole or in part, by Medicare or a state health care program (including Medicaid). The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs. Section 1128A(i)(6) of the Act defines "remuneration" for purposes of section 1128A(a)(5) as including "transfers of items or services for free or for other than fair market value."

## **B. Analysis**

The Requestors' practice of "insurance only" billing under the Arrangement implicates the anti-kickback statute to the extent that it constitutes a limited waiver of Medicare or other Federal health care program cost-sharing obligations. Our concern about potentially abusive waivers of Medicare cost-sharing obligations is longstanding. For example, we have previously stated that providers that routinely waive Medicare cost-sharing obligations for reasons unrelated to individualized, good faith assessments of financial hardship may be held liable under the anti-kickback statute. See, e.g., Special Fraud Alert, 59 Fed. Reg. 65372, 65374 (Dec. 19, 1994). Such waivers may constitute prohibited remuneration to induce referrals under the anti-kickback statute, as well as a violation of the civil monetary penalty prohibition on inducements to beneficiaries, section 1128A(a)(5) of the Act. Notwithstanding, in the circumstances presented in the Arrangement, the risk of such prohibited remuneration is minimal for several reasons.

First, the Arrangement does not involve the routine waiver of cost-sharing obligations because the Requestors provide the backup EMS on an unscheduled and sporadic basis. Thus the waivers only occur occasionally.

Second, because the Arrangement does not involve the provision of routine, non-emergency services, but is instead limited to the backup EMS, it does not increase the risk of overutilization and is unlikely to lead to increased costs to Federal health care programs. Further, neither the number of Federal health care program beneficiaries requiring EMS within the geographic limits of the Requestors, nor the treatment the beneficiaries receive or require, is related to the existence of the Arrangement.

Third, because each Requestor waives cost-sharing obligations when it provides EMS to their own bona fide residents, there is no expectation on the part of those residents receiving the backup EMS that they would have cost-sharing obligations. Therefore, the Requestor's waiver of such obligations for the isolated instances in which it provides the backup EMS is unlikely to induce the use of those or any other services.

Finally, the underlying nature of the Arrangement—including, but not limited to, the fact that the waivers are not routine, the Requestors are local governments engaged in a mutual response arrangement for the backup EMS, and the individuals receiving the waiver are, for all intents and purposes, simply being treated the same as any other bona fide resident in the Requestors’ jurisdictions who receives EMS—distinguishes it from arrangements in which a municipality requires a private company to bill “insurance only” as a condition of getting the municipality’s EMS business, including Medicare business.

Based on the foregoing and the totality of the facts present in the Arrangement, we are persuaded that the Arrangement poses minimal risk of fraud and abuse under the anti-kickback statute. For all the same reasons, we will not impose sanctions under section 1128A(a)(5) of the Act.

### **III. CONCLUSION**

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that: (i) the Arrangement does not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) while the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce or reward referrals of Federal health care program business were present, the OIG will not impose administrative sanctions on [names redacted] 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 opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

### **IV. LIMITATIONS**

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [names redacted], the requestors 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 of this opinion.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is expressed or implied herein 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, including, without limitation, the physician self-referral law, section 1877 of the Act.

- 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 will not proceed against [names redacted] 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, to rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against [names redacted] 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,

/Lewis Morris/

Lewis Morris  
Chief Counsel to the Inspector General