



DEPARTMENT OF HEALTH AND HUMAN SERVICES

**OFFICE OF INSPECTOR GENERAL**

WASHINGTON, DC 20201



*[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 7, 2013

**Posted:** June 14, 2013

[Name and address redacted]

**Re: OIG Advisory Opinion No. 13-04**

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding an arrangement among a county, a county health district, and various municipalities concerning the provision of non-emergency ambulance transportation services by the county health district (the “Arrangement”). Specifically, you have inquired whether the Arrangement constitutes 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, 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, although 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 [name 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 [name redacted], the requestor 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**

### **A. The Parties**

[Name redacted] (the “County”) is a political subdivision in the State of [state name redacted] (the “State”) and is the requestor of this advisory opinion. The cities of [city name redacted], [city name redacted], [city name redacted], [city name redacted], and [village name redacted] (each, a “City” and collectively, the “Cities”) are located within the County. The County and the Cities have general authority under State law to provide for the health and welfare of persons within their boundaries.

[Name redacted] (the “Health District”) was created pursuant to State law by the County, seven cities (including some of the Cities), and a water district more than 40 years ago. The Health District is a non-taxing governmental entity under State law. The Health District operates a federally qualified health center (the “Clinic”) that provides primary care, counseling, and dental services for the County’s residents.<sup>1</sup> The Health District also acts through one of its divisions, [name redacted], to provide certain services, including non-emergency ambulance transportation services (“Non-Emergency Transports”). The County certified that the Arrangement does not involve the transport of any patients to the Clinic or to any other facility owned or operated by the Health District, the County, or the Cities.

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<sup>1</sup> The Clinic, which maintains two sites, is operated by a separate board of directors and is not a party to the Arrangement.

## **B. The Arrangement**

The Arrangement is set forth in an interlocal agreement for Non-Emergency Transports to which the County, the Cities, and the Health District are parties.<sup>2</sup> Under the Arrangement, the County and the Cities have granted the Health District the exclusive right to provide Non-Emergency Transports within their respective boundaries.<sup>3</sup> The Health District bears the initial costs of providing the Non-Emergency Transports and bills Federal health care programs and other payers for these services, as appropriate.<sup>4</sup> At the end of each fiscal year, the Health District determines whether the Non-Emergency Transports resulted in net losses or net profits. The Health District pays to the County any net profits, minus 10 percent for a reserve fund to cover any future net losses. Conversely, the County reimburses the Health District for any net losses (directly or through the reserve fund). Since the Arrangement began, total net losses have exceeded total net profits. The County certified that the parties entered into the Arrangement to address frequent turnover of ambulance suppliers and to ensure a stable and cost-effective means of providing the Non-Emergency Transports within the County.

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<sup>2</sup> According to the County, the parties entered into the Arrangement pursuant to [name of State law redacted], which authorizes governmental entities to contract with one another and with agencies of the State on governmental functions in which the contracting parties are mutually interested. [Citation redacted]. The County and the Cities also have separate contracts with the Health District for the provision of emergency medical services and transports. The County certified that the contracts for emergency medical services and transports are unrelated to the Arrangement. This advisory opinion is limited to the Arrangement. We have not been asked to opine on, and express no opinion regarding, any of these other contracts or arrangements.

<sup>3</sup> The Health District has entered into agreements with private entities to provide Non-Emergency Transports when demand exceeds the Health District's capacity. We have not been asked to opine on, and express no opinion regarding, any of these contracts or arrangements.

<sup>4</sup> The Health District is subject to applicable program requirements, including origin and destination requirements, when submitting claims for Non-Emergency Transports to Federal health care programs.

## II. LEGAL ANALYSIS

### A. Law

The anti-kickback statute makes it a criminal offense to knowingly and willfully 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. See, e.g., United States v. Borrasi, 639 F.3d 774 (7th Cir. 2011); United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000); United States v. Davis, 132 F.3d 1092 (5th Cir. 1998); 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.

### B. Analysis

Under the Arrangement, the County and the Cities granted the Health District the exclusive right to provide Non-Emergency Transports within their respective boundaries. Although the Health District bills Federal health care programs and other payers for these services, as appropriate, the County has both the contractual right to receive any net profits from the services and the contractual obligation to reimburse the Health District for any net losses. No other remuneration passes between or among the parties under the Arrangement. There may be circumstances, depending on the intent of the parties, in which such an arrangement could violate the anti-kickback statute; however, we conclude that a number of factors present in the Arrangement mitigate the risk of Federal health care program fraud or abuse.

First, the Arrangement is part of a comprehensive regulatory plan by the County and the Cities to manage the delivery of Non-Emergency Transports within their boundaries.

The County and the Cities are all valid governmental entities that have general authority to provide for the health and welfare of persons within their boundaries. Further, State law authorizes governmental entities, such as the County and the Cities, to contract with one another and with agencies of the State on governmental functions in which the contracting parties are mutually interested. As with the exercise of any similar governmental entity power, the County and the Cities are ultimately responsible for the quality of services delivered and accountable to the public through the political process. Such governmental entities should have sufficient flexibility to organize local medical transport services in an efficient and economical manner. Moreover, the Arrangement appears to be part of a reasonable response to a history of instability resulting from frequent turnover of ambulance providers in the area.

Second, the only remuneration that the County provides to the Cities under the Arrangement is the guarantee against financial losses, in return for the benefit of any financial gain. No other remuneration changes hands. As a result, the County is not overpaying the Cities, which have granted exclusivity for Non-Emergency Transports within their boundaries.

Finally, although arrangements for Non-Emergency Transports can give rise to patient steering concerns, we believe that the risk of steering under the Arrangement is low. The relative lack of exigency in Non-Emergency Transports can create a greater opportunity to steer patients to a provider favored by the medical transport service provider. Here, however, none of the Non-Emergency Transports covered by the Arrangement will involve the transportation of any patients to the Clinic or any other facility owned or operated by the Health District, the County, or the Cities. Thus, the Arrangement does not appear to be designed to generate any revenue for any of the parties other than the revenue associated with the Non-Emergency Transports within their boundaries. Under these circumstances, therefore, the risk of patient steering is substantially limited.

In light of the totality of these factors, we conclude that the Arrangement poses minimal risk of Federal health care program fraud or abuse.

### **III. CONCLUSION**

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although 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 [name 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 [name redacted], 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 by a person or entity other than [name redacted] to prove that the person or entity did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.
- 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 (or that provision's application to the Medicaid program at section 1903(s) 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 [name 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 [name redacted] with respect to any action that is part of the Arrangement 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,

/Gregory E. Demske/

Gregory E. Demske  
Chief Counsel to the Inspector General