



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 14, 2013

**Posted:** June 21, 2013

[Name and address redacted]

**Re: OIG Advisory Opinion No. 13-05**

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding the aspect of an exclusive contract for emergency medical services and transports between a municipality and an ambulance company that requires the ambulance company to reimburse the municipality for a portion of the costs of providing emergency dispatch services (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**

[Name redacted] (the “Town”) is a municipal corporation existing under the laws of [state name redacted]. The Town is charged with providing essential governmental and public safety services within its own municipal limits. The Town operates an emergency 911 communication center (the “Dispatch Center”) to monitor and direct calls for police and fire assistance and for emergency medical services (“EMS”).

The Town issued a Request for Proposals (“RFP”) for an exclusive contract to provide primary response for EMS calls. The requestor, [name redacted] (the “Ambulance Company”) certified that the Town undertook procedures to ensure an open, transparent, and competitive bidding process. The Ambulance Company was one of the private ambulance transport companies that competed for the contract. The Town ultimately awarded the initial three-year contract (the “Contract”) to the Ambulance Company.<sup>1</sup> The Ambulance Company certified that the Town initiated and conducted the RFP, and awarded the Contract, in a manner consistent with local contracting laws.

Under the Arrangement, the Ambulance Company pays the Town an annual remittance (the “Remittance”) equal to one half of the portion of the Dispatch Center’s operating costs that are associated with EMS dispatches.<sup>2</sup> The Remittance is estimated at the beginning of each year and that estimated amount is paid in twelve equal, monthly installments to the Town. At the end of each year, a reconciliation process occurs to ensure that the actual Remittance paid for the year reflects half of the actual costs. The

---

<sup>1</sup> The Contract includes an option for the Town to extend it for an additional two years.

<sup>2</sup> The Ambulance Company has limited its request for an advisory opinion to the payment of the Remittance during the initial term of the Contract. We have not been asked to opine on, and we express no opinion regarding, the Contract extension or aspects of the Contract other than the payment of that Remittance. Accordingly, we limit this advisory opinion solely to the issue of whether paying the Remittance during the initial term constitutes prohibited remuneration under the anti-kickback statute.

parties estimated the Remittance for the first year of the Contract at \$6,000. Payment of the Remittance has so far been withheld pending the outcome of this advisory opinion.<sup>3</sup> The Ambulance Company certified that the purpose of the Remittance is to partially offset the cost to the Town of call dispatch services directly related to the Ambulance Company's EMS.

Under the Contract, the Ambulance Company serves as the exclusive primary responder for EMS calls in the Town. Many recipients of the EMS provided for under the Contract are Medicare or Medicaid beneficiaries. The Town does not pay a fee to the Ambulance Company for the EMS. The Ambulance Company is entirely responsible for maintaining and housing its own vehicles and equipment. The Town does not supply personnel, equipment, or public facilities to the Ambulance Company.

The Ambulance Company certified that the Town's dispatch procedures have not changed since the implementation of the Contract and that the Contract does not represent a fundamental change in the delivery of EMS in the Town. The Ambulance Company also certified that the plan underlying the Contract, including that portion comprising the Arrangement, was developed at the Town's sole initiative, and not by the Ambulance Company, or any other ambulance company.

## 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

---

<sup>3</sup> Nonpayment of amounts owed pursuant to a contractual agreement does not, by itself, absolve parties from liability under the fraud and abuse laws.

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**

The Arrangement implicates the anti-kickback statute, as it requires the Ambulance Company—which is a potential referral recipient—to bear a portion of the cost of providing EMS call dispatch services as a condition of serving as the Town’s exclusive EMS supplier, and at least some EMS will be reimbursable under the Federal health care programs. We nevertheless conclude that a number of factors are present in the Arrangement that, in combination, mitigate the risk of Federal health care program fraud or abuse.

First, the Arrangement is part of a Contract that itself is part of a comprehensive regulatory plan by the Town to manage the delivery of EMS. The Town, a valid governmental entity legally empowered to regulate the provision of EMS within its boundaries, established the Contract. The organization of a local emergency medical transport system is within the police powers traditionally delegated to local government. As with the exercise of any police power, the local government is ultimately responsible for the quality of the services delivered and is accountable to the public through the political process. Municipalities should have sufficient flexibility to organize local EMS transportation systems efficiently and economically.

Second, the Ambulance Company certified that the Remittance will only partially offset the actual costs of the Town’s dispatch operations attributable to the Ambulance Company’s services. As a result, the Ambulance Company will not be overpaying the source of the referrals, which is the typical anti-kickback concern. Moreover, it is reasonable to expect that the Town would seek reimbursement for the services it provides to the Ambulance Company that relate directly to the EMS the Ambulance Company provides.

Third, although the Remittance varies from year to year based on the costs of operating the Dispatch Center, it is not tied, directly or indirectly, to the volume or value of referrals between the parties. The Remittance will equal fifty percent of the actual costs the Town incurs to provide the EMS dispatch services.

Fourth, the Contract exclusivity is unlikely to adversely impact competition. The Ambulance Company certified that the Town implemented procedures to ensure an open, transparent, and competitive bidding process in connection with the RFP and the

Contract. The Ambulance Company further certified that the Town entered into the Contract in a manner consistent with relevant government contracting laws.

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