



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: November 14, 2013

Posted: November 21, 2013

[Name and address redacted]

Re: OIG Advisory Opinion No. 13-17

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding a proposal to use tax revenues to cover out-of-pocket amounts owed for county-operated emergency ambulance services received by non-residents (the “Proposed Arrangement”).

Specifically, you have inquired whether the Proposed Arrangement would constitute 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 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 (i) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) although the Proposed 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”) would not impose administrative sanctions on [county 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 Proposed Arrangement. This opinion is limited to the Proposed 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 [county 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

[County name redacted] (the “County”) is a legal subdivision of [state name redacted] that provides all emergency ambulance services in the County through the [agency name redacted] (the “County Fire and Rescue Service”). The County Fire and Rescue Service consists of combined career and volunteer staff under the command of a single County fire chief. The County imposes a charge for all emergency ambulance services provided by the County Fire and Rescue Service. The County does not provide non-emergency ambulance services.

Currently, the County does not bill bona fide County residents (“Residents”) who receive emergency ambulance services for out-of-pocket expenses (including otherwise applicable cost-sharing amounts, e.g., co-payments and deductibles, as well as amounts owed by uninsured individuals).¹ The County accepts payment from Residents’ insurers, including Federal health care programs, as payment in full for the emergency ambulance services (i.e., “insurance only billing”) and treats revenues received from taxes as payment for cost-sharing amounts. The County annually transfers from its general fund to the County Fire and Rescue Service fund an amount that is a bona fide estimate of the amounts not paid by insurance for emergency ambulance services provided to Residents.

Under the Proposed Arrangement, the County would transfer an amount estimated to cover charges for emergency ambulance services that are not paid by insurance for non-residents (“Non-Residents”) in addition to Residents, and would use those funds to cover out-of-pocket expenses for Non-Residents in the same manner as it covers them for Residents. The County certified that Non-Residents pay ample taxes directly or indirectly to the County to offset the amounts owed for emergency ambulance services

¹ No opinion has been sought regarding the County’s current arrangement with respect to emergency ambulance services provided to Residents. This opinion is limited solely to the Proposed Arrangement regarding non-residents.

that are not paid by insurance. Taxes paid to the County by or for many Non-Residents include, for example, hotel/motel tax, real property tax, taxes on certain personal property used in businesses owned by Non-Residents, and taxes paid by entities conducting operations in the County that employ Non-Residents. Thus, the County proposes to treat Non-Residents who receive emergency ambulance services in the County in the same manner as Residents.

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. Borraji, 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.

Section 1128A(a)(5) of the Act provides for the imposition of civil monetary penalties against any person who offers or transfers remuneration 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 “insurance only” billing under the Proposed Arrangement may implicate the anti-kickback statute to the extent that it constitutes a limited waiver of Medicare or other Federal health care program cost-sharing amounts. Our concern about potentially abusive waivers of Medicare cost-sharing amounts under the anti-kickback statute is longstanding. For example, we have previously stated that providers that routinely waive Medicare cost-sharing amounts 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 against inducements to beneficiaries, section 1128A(a)(5) of the Act.

However, there is a special rule for providers and suppliers that are owned and operated by a state or a political subdivision of a state, such as a county or fire department. The Centers for Medicare & Medicaid Services (“CMS”) Medicare Benefit Policy Manual (“BPM”) Chapter 16, section 50.3.1 provides that:

A [state or local government] facility which reduces or waives its charges for patients unable to pay, or charges patients only to the extent of their Medicare and other health insurance coverage, is not viewed as furnishing free services and may therefore receive program payment.

Pub. 100-02 BPM Chap. 16, section 50.3.1 at:

<http://www.cms.hhs.gov/manuals/Downloads/bp102c16.pdf> (formerly Medicare Carrier Manual section 2309.4 and Medicare Intermediary Manual section 3153.3A).

Notwithstanding the use of the term “facility,” CMS has confirmed that this provision would apply to a state or county ambulance company that is a Medicare Part B supplier. CMS has also confirmed that this provision would apply to waivers of cost-sharing amounts for Non-Residents who need emergency ambulance services within the County.

Accordingly, since Medicare would not require the County to collect cost-sharing amounts from Non-Residents, we would not impose sanctions under the anti-kickback statute where the cost-sharing waiver is implemented by the County categorically for Non-Residents within County limits.²

² For the same reasons, we would not impose sanctions under section 1128A(a)(5) of the Act.

We note that this provision of the CMS manual applies only to situations in which the governmental unit is the ambulance supplier; it does not apply to contracts with outside ambulance suppliers. For example, where a county contracts with an outside ambulance supplier for the provision of services to residents of its service area, the county cannot require the ambulance supplier to waive out-of-pocket cost-sharing amounts unless the county pays the cost-sharing amounts owed or otherwise makes provisions for the payment of such cost-sharing amounts. See, e.g., OIG Advisory Opinion No. 01-12 (July 20, 2001). There is an important difference between a county-owned ambulance company voluntarily waiving cost-sharing amounts for its own residents and others and a county requiring a private company to bill “insurance only” as a condition of getting the county’s EMS business, including Medicare business. Lump sum or periodic payments by the county, on behalf of residents and others, may be permitted if the payments are reasonably calculated to cover the expected uncollected cost-sharing amounts.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that (i) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) although the Proposed 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 would not impose administrative sanctions on [county 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 Proposed Arrangement. This opinion is limited to the Proposed 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 [county 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 [county 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 Proposed 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 [county name redacted] with respect to any action that is part of the Proposed 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 Proposed 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 [county name redacted] with respect to any action that is part of the Proposed 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