

[October 8, 1997]

[name and address redacted]

**Re: [name redacted]
Advisory Opinion No. 97-6**

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion, in which you asked whether a proposed arrangement for restocking ambulance supplies and medications (the "Proposed Arrangement") would constitute illegal remuneration as defined in the anti-kickback statute, 42 U.S.C. § 1320a-7b(b).

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 facts and agreements among the parties regarding the Proposed Arrangement.

In issuing this opinion, we have relied solely on the facts and information you presented to us. We have not undertaken any independent investigation of such information. This opinion is limited to the facts presented. If material facts have not been disclosed, this opinion is without force and effect.

Based on the information provided and subject to certain conditions described below, we conclude that the Proposed Arrangement would likely constitute prohibited remuneration under 42 U.S.C. § 1320a-7b(b).

I. FACTUAL BACKGROUND

Company X owns and operates two acute care hospitals (the "Hospitals") located in the City Y area. Ambulance services operated by local municipalities frequently transport patients to the Hospitals. Under the Proposed Arrangement, the Hospitals would, without charge, restock the local ambulance squads with any supplies or medications used while transporting patients to the Hospitals. Neither Company X nor the Hospitals would bill any Federal health care program,¹ and the ambulance services would receive no other

¹ Federal health care programs are any plans or programs that provide health

reimbursement for the items supplied.

Ambulance services in State Z are regulated pursuant to a State Z administrative regulation, [citation redacted], which provides, in pertinent part, that an ambulance service must transfer a patient to a hospital emergency room selected by the patient or the patient's physician, unless the ambulance attendant determines that transport to another facility is necessary to save the patient's life or limb or the ambulance service is operating under a governmentally-approved local or regional diversion plan or medical triage protocol.

II. LEGAL ANALYSIS

The anti-kickback statute, 42 U.S.C. §1320a-7b(b), makes it a criminal offense knowingly and willfully to offer, pay, solicit, or receive any remuneration to induce the referral of business covered by a Federal health care program. Specifically, the statute provides that:

Whoever knowingly and willfully offers or pays [or solicits or receives] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person -- to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony.

benefits, whether directly, through insurance, or otherwise, that are funded directly, in whole or in part, by the United States government (other than the health insurance program under chapter 89 of title 5, United States Code), or any State health care program as defined at 42 U.S.C. § 1320a-7(h). See 42 U.S.C. § 1320a-7b(f).

42 U.S.C. § 1320a-7b(b). In other words, the statute prohibits payments made purposefully to induce referrals of business paid for by a Federal health care program. The statute ascribes liability to both sides of an impermissible "kickback" transaction. 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). "Remuneration" for purposes of the anti-kickback statute includes the transfer of anything of value, in cash or in-kind, directly or indirectly, covertly or overtly.

The Hospitals' proposed provision of free supplies and medications to the municipal ambulance services fits squarely within the meaning of remuneration for purposes of the anti-kickback statute. An inference may be drawn that at least one purpose of this remuneration may be to induce the ambulance services to bring patients to the Hospitals. To the extent those patients include beneficiaries of Federal health care programs who require covered hospital services, the anti-kickback statute may be implicated.

Company X asserts that the Proposed Arrangement would not be abusive because it would not lead to increased costs for the Federal health care programs. This argument misses the mark. As we have said elsewhere, increased cost to the programs is not the only criteria used in determining whether a particular business arrangement is abusive. See, e.g., 56 Fed. Reg. 35952, 35954 (July 29, 1991). Others include preventing overutilization of health care items and services, ensuring quality of care for Federal program beneficiaries, preserving patient freedom of choice, and safeguarding fair competition in the health care marketplace.

The Proposed Arrangement poses a risk of improper steering of patients and unfair competition. With regard to the former, State Z administrative regulation [citation redacted] requires ambulance services to transport patients to the facility of the patient's choice, except in certain exigent circumstances. However, compliance with State Z administrative regulation [citation redacted] is not sufficient to deter the abuses addressed by the anti-kickback statute. Patients in need of ambulance services are often in a vulnerable state, and their choice of emergency room may be influenced by ambulance service personnel. In these circumstances, where the payments relate directly to the delivery of patients, remuneration paid by a hospital to an ambulance service, including the provision of free goods, would be highly suspect.

Accordingly, for the above-stated reasons, we conclude that the Proposed

Arrangement would likely constitute prohibited remuneration under 42 U.S.C. § 1320a-7b(b).

III. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is applicable only to the statutory provision 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. In particular, no opinion is herein expressed or implied with respect to [State Z administrative regulation, citation redacted].
- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.

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