



[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: September 30, 2002

Posted: October 7, 2002

[Name and address redacted]

Re: OIG Advisory Opinion No. 02-15

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion about a municipal corporation that owns and operates an ambulance service and that proposes to treat revenue received from local real estate taxes as payment of otherwise applicable copayments and deductibles due from residents (the "Proposed Arrangement"). Specifically, you have asked whether the Proposed Arrangement would constitute 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, or under the civil monetary penalties provision for illegal remuneration to beneficiaries, section 1128A(a)(5) of the Act.

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 material facts regarding the Proposed Arrangement.

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 information, we conclude that the Proposed Arrangement would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the Office of Inspector

General (“OIG”) would not impose administrative sanctions on [name of requestor 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. In addition, the OIG would not impose administrative sanctions on [name of requestor redacted] under section 1128A(a)(5) of the Act in connection with the Proposed Arrangement.

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

I. FACTUAL BACKGROUND

[Name of requestor redacted] (the “Fire District”) is a municipal corporation under the [state act and citation redacted] that serves certain areas of [county and state redacted]. The Fire District is the exclusive provider of emergency medical services (“EMS”) for its residents and does not subcontract these services. The Fire District provides emergency medical treatment and transport services 24-hours a day, seven days a week. The Fire District does not provide routine transportation services.

Currently, the Fire District provides emergency medical services through funds received primarily from real estate taxes. The Fire District is considering adopting an ordinance under which it will not bill residents for emergency medical services. Under the Proposed Arrangement, the Fire District will bill residents or their insurers, including Federal health care programs, but only to the extent of their insurance coverage (i.e., no out-of-pocket costs) and will treat the revenues received from local taxes as payment of any otherwise applicable copayments and deductibles due from the residents (i.e., “insurance only” billing).

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.), 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

The “insurance only” billing under the Proposed Arrangement may implicate the anti-kickback statute to the extent that it constitutes a limited waiver of copayment and deductible amounts. Our concern about potentially abusive waivers of Medicare copayments and deductibles under the anti-kickback statute is longstanding. For example, we have previously stated that providers who routinely waive Medicare copayments or deductibles 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. 65374 (Dec. 19, 1994). Such waivers may constitute prohibited remuneration to induce referrals under the anti-kickback statute and a violation of the civil monetary penalty for inducements to beneficiaries, section 1128A(a)(5).

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 municipality or fire district. The Centers for Medicare and Medicaid Services (“CMS”) Carrier Manual section 2309.4 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.

CMS Carrier Manual section 2309.4; see also CMS Intermediary Manual section 3153.3A. Notwithstanding the use of the term “facility”, CMS has confirmed that this provision would apply to a state or municipal ambulance company that is a Medicare Part B supplier.

Accordingly, since Medicare does not require the Fire District (a municipal company) to collect copayments or deductibles from residents, we would not impose sanctions under the anti-kickback statute where the waiver is implemented by the Fire District categorically for *bona fide* residents of the Fire District.¹ Nothing in this advisory opinion would apply to copayments or deductible waivers based on criteria other than residency.

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 municipality contracts with an outside ambulance supplier for the provision of services to residents of its service area, the municipality cannot require the ambulance supplier to waive out-of-pocket coinsurance amounts unless the municipality pays the coinsurance owed or otherwise makes provisions for the payment of such coinsurance. See OIG Advisory Opinion No. 01-12 (July 20, 2001). There is an important difference between a municipally owned ambulance company voluntarily waiving copayments for its own residents and municipality requiring a private company to bill “insurance only” as a condition of getting the municipality’s EMS business, including Medicare business. Lump sum or periodic payments by the municipality, on behalf of residents or others, may be permitted if the payments are reasonably calculated to cover the expected uncollected coinsurance obligations.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental information, we conclude that the Proposed Arrangement would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the OIG will not impose administrative sanctions on [name of requestor 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. In addition, the OIG would not impose administrative sanctions on [name of requestor redacted] under section 1128A(a)(5) of the Act in connection with the Proposed Arrangement.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

¹ We note that for the same reasons we would not impose sanctions under section 1128A(a)(5) of the Act.

- This advisory opinion is issued only to [name of requestor redacted], 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 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 Proposed 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 the [name of requestor 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 [name of requestor 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,

/s/

D. McCarty Thornton
Chief Counsel to the Inspector General