



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 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 4, 2004

Posted: June 14, 2004

[name and address redacted]

Re: OIG Advisory Opinion No. 04-06

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding a municipal corporation that is proposing to reduce its fees for ambulance services for residents by an amount consistent with their cost-sharing obligations (the “Proposed Arrangement”). Specifically, you have inquired 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 provided in your request, including all supplementary letters, 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 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 redacted] (the “Requestor” or “Fire District”) 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 redacted] under section 1128A(a)(5) 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 letter.

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.

1. FACTUAL BACKGROUND

The Fire District is an [state redacted] municipal corporation that serves certain areas of [counties redacted]. Pursuant to state law, the Fire District provides emergency ambulance services and fire protection and prevention services. To fulfill its legal obligations, the Fire District uses the [name redacted], a nonprofit corporation (the “Fire Department”), that operates ambulances and provides ambulance personnel.¹ However, the Fire District remains the supplier of, and accordingly bills for, the services, including Medicare Part B services.

The Fire District currently funds its ambulance operations primarily through real estate taxes levied annually to its residents and other miscellaneous income. In addition, the Fire District bills non-residents of the Fire District (“Non-residents”) for its services; Fire District residents (“Residents”) are not billed.

In response to significant increases in costs, the Fire District has passed an ordinance (the “Ordinance”) establishing a fee schedule for emergency medical services that includes a base transport rate. Residents receive a reduction in the base transport rate in

¹The Fire District and the Fire Department are closely-related municipal entities serving the same community. The Fire Department has been treated by the [state redacted] Courts as a quasi-municipal entity and been afforded the immunities provided under State law for municipal entities. No opinion has been sought, and we express no opinion, regarding the arrangement between the Fire District and the Fire Department. In addition, the Fire District contracts with a specialty billing company to collect monies for services rendered by the Fire District under the Ordinance. No opinion has been sought, and we express no opinion, regarding the contract for billing and collection services.

consideration of the taxes the Residents pay to support these services. The Fire District has certified that the reduction will be consistent with applicable cost-sharing amounts otherwise due from the Residents. Thus, the Ordinance only requires Residents to pay for ambulance services to the extent of their insurance coverage (i.e., “insurance only” billing), and treats the operating revenues received from local taxes as payment of any otherwise applicable cost-sharing amounts due from the Residents. The Fire District has suspended imposition of the Ordinance pending receipt of a favorable OIG advisory opinion.

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 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 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, as well as a violation of the civil monetary penalty prohibition on inducements to beneficiaries, section 1128A(a)(5) of the Act.

However, there is a special rule for providers and suppliers that are a state or a political subdivision of a state, such as a municipality or fire district. The Centers for Medicare & Medicaid Services (“CMS”) Medicare Benefit Policy Manual (“BPM”) Chap. 16, section 50.3 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.

BPM Chap. 16, section 50.3 (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 municipal ambulance supplier that is a Medicare Part B supplier where, as here, it fulfills its functions through an arrangement with another closely-related municipal entity.

Accordingly, since the Medicare Program does not require the Fire District (a municipal company that is a Medicare Part B supplier) to collect cost-sharing amounts from residents, we would not impose sanctions under the anti-kickback statute or section 1128A(a)(5) of the Act where the waiver is implemented by the Fire District categorically for *bona fide* residents of the Fire District. Nothing in this advisory opinion would apply to cost-sharing 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 that will bill for the services. For example, a municipality cannot require a contracted 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 e.g. OIG Advisory Opinion 01-12 (July 20, 2001).

III. CONCLUSION

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

Lewis Morris
Chief Counsel to the Inspector