



[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: February 18, 2005

Posted: February 25, 2005

[names and addresses redacted]

Re: OIG Advisory Opinion No. 05-07

Dear [names redacted]:

We are writing in response to your request for an advisory opinion regarding an exclusive contract for ambulance services between a municipality and ambulance company that provides for an in-kind exchange of dispatch services and billing services between the parties (the "Proposed Arrangement").¹ 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.

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 could potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce or

¹We express no opinion on any other aspect of the ambulance services contract.

reward referrals of Federal health care program business were present, but that the Office of Inspector General (“OIG”) would not impose administrative sanctions on [names 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 letter or supplemental submissions.

This opinion may not be relied on by any persons other than [names redacted] the requestors of this opinion (the “Requestors”), and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

1. FACTUAL BACKGROUND

[Name redacted] (the “City”) is a municipal corporation charged with providing essential governmental and public safety services within the city limits of [city and state redacted]. To that end, the [name redacted] (the “Fire Department”) provides a variety of programs designed to protect the lives and property of residents from the adverse effects of fires, sudden medical emergencies, or exposure to dangerous conditions.

In an effort to enhance services to residents, achieve cost-savings, and streamline Fire Department operations, the City Council directed the City to issue a request for proposal (“RFP”) for an exclusive five-year contract to provide emergency ambulance services and billing and collection services. The City certified that it employed an open competitive bidding process consistent with relevant government contracting laws and awarded the contract to [name redacted] (the “Ambulance Company”).² Included in the contract was an in-kind exchange of dispatch services for billing services.³ Under the Proposed Arrangement, the City would provide dispatch services through the [name redacted] (the “Communication Center”) at no charge to the Ambulance Company. The Communication Center is a central communications network and record-keeping system that serves the City and several adjacent municipalities. The Communication Center reduces administrative costs that would otherwise be incurred by each city separately in dispatching for fire suppression, emergency medical assistance, rescue service, and related services.⁴ In exchange for the

²We have not been asked, nor are we in a position, to opine on the validity of the RFP process.

³The parties have entered into a contract pursuant to the RFP; however, they have delayed implementation of the in-kind exchange aspect of the Proposed Arrangement until issuance of a favorable opinion from the OIG.

⁴Costs associated with maintaining the staff and equipment necessary to operate the Communication Center are apportioned to reflect the extent to which each member utilizes the service.

dispatch services, the Ambulance Company would provide billing and collections services for the City.

The Requestors have certified that the dispatching services and the billing and collection services are of like value and result in a fair and equitable exchange between the parties. The Requestors have further certified that the total costs and savings of the in-kind exchange applicable to each party are approximately equivalent.

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 central issue raised by the Proposed Arrangement is whether the Ambulance Company’s offer to provide free billing and collection services to the City in exchange for an exclusive contract for the provision of ambulance services. The OIG’s concern with the provision of goods or services for free or at below-market rates to actual or potential referral sources is longstanding and clear: such arrangements are suspect and may violate the anti-kickback statute if one purpose is to induce or reward referrals of Federal health care program business. The provision of billing and collection services by the Ambulance Company at no cost to the City would fit squarely within the meaning of remuneration for purposes of the anti-kickback statute. An inference could be drawn that one purpose of such remuneration would be to induce the award of the exclusive agreement for ambulance services by the City

to the Ambulance Company (i.e., the award of all transports, some of which will be reimbursable under the Federal health care programs). However, the strength of the inference may vary with the circumstances of the particular arrangement.

Based on the combination of the following factors, we conclude that the OIG would not subject the Requestors to sanctions arising under the anti-kickback statute pursuant to section 1128(b)(7) or 1128A(a)(7) of the Act in connection with the Proposed Arrangement.

First, the Requestors have certified that the dispatching services and the billing and collection services are of like value and result in a fair and equitable exchange between the parties. The Requestors have further certified that the monetary costs and savings of the in-kind exchange are approximately equivalent. The parties have essentially bartered services of equal value, reducing the likelihood that the Ambulance Company is providing services at no cost in exchange for Federal health care business.

Second, the Proposed Arrangement is likely to have a positive impact on the quality of patient care by facilitating fast, efficient, and effective response to emergency situations in the City. By integrating the Ambulance Company into the City's existing dispatching system, the City would be able to maintain greater command and control over the dispatch of emergency ambulance services. The Communication Center would automatically dispatch the Ambulance Company to the emergency location, instead of placing a call to the Ambulance Company, which would then dispatch an ambulance to the emergency location. The elimination of this added step would directly impact response time and would ultimately benefit the injured or ill individual and the public at large.

Third, because the Proposed Arrangement would be limited to emergency medical services and involves no change in the dispatch procedures already utilized by the City, it is unlikely to increase the risk of overutilization and is also unlikely to lead to increased costs to the Federal health care programs. In addition, the exclusivity of the contract would not increase Federal health care program costs. Neither the number of Federal program beneficiaries requiring emergency transport in the City, nor the treatment these patients will require or receive at a hospital would be related to, or impacted by, the Proposed Arrangement. Furthermore, we believe it is within the City's discretion to conclude that, for administrative and system efficiencies, the contract should be awarded to one ambulance company.

Fourth, the contract exclusivity should not have an adverse impact on competition or freedom of choice. The City employed an open, competitive bidding process consistent with relevant contracting laws. Public policy favors open and legitimate price competition. With respect to freedom of choice, the ambulance crews have relatively limited opportunities to steer patients to particular hospitals. Rather, in the case of emergency services, the choice of the hospital is more likely dictated by local emergency response protocols, taking into account the patient's condition, the patient's preference, the patient's physician, or the patient's insurer.

In light of the specific circumstances presented and the likely positive impact on the quality of patient care, we would not impose sanctions arising under the anti-kickback statute in connection with the Proposed Arrangement.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that 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, but that the OIG would not impose administrative sanctions on [names 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 letter or supplemental submissions.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [names redacted], the Requestors 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 [names 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 [names 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 General