



[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: October 12, 2007

Posted: October 19, 2007

[Name and address redacted]

Re: OIG Advisory Opinion No. 07-14

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding a county's exclusive contracts for emergency ambulance services, which set out how three private ambulance companies should absorb the costs of transporting uninsured arrestees and reimburse the county for the costs of providing certain specified administrative services and emergency dispatch services (collectively, 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, the Federal anti-kickback statute.

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 while 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 [name redacted] County 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 [name redacted] County, 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”) in [State name redacted] (the “State”) operates an emergency medical services (“EMS”) system that provides ambulance transportation and pre-hospital emergency medical care to County residents. All EMS dispatches are conducted through the [name redacted] County Fire Protection District (the “FPD”). The FPD is a political subdivision of the State separate from the County government. The County’s Board of Supervisors serves as the governing board of the FPD. The County is the governmental entity legally empowered to regulate the provision of EMS in the County.

The County has continuously contracted with the same three ambulance companies (the “Ambulance Services”) to serve the EMS system since January 1, 1981. Each Ambulance Service exclusively covers one of the County’s three regions. The County, at its own initiative, recently entered into three new, essentially identical contracts with the Ambulance Services. Under State law, no competitive bidding was necessary as long as the County continued to use the same ambulance companies as were being used in 1981. Like previous contracts between the County and the Ambulance Services, the new contracts provide that the Ambulance Services generally bill and collect for their services from individuals transported and third party payers.¹ The Proposed Arrangement involves new provisions that would only take effect upon a favorable advisory opinion from the OIG.

The Proposed Arrangement contains three main provisions. First, the Ambulance Services would bear the cost of transporting uninsured arrestees, defined as persons who are arrested or otherwise taken into custody by police or governmental agencies. The Ambulance Services would be able to bill, or seek to collect from, either the individual arrestee or third party payers other than the County. No Federal health care program would be billed for these services. Under the Proposed Arrangement the Ambulance Services would be

¹We have not been asked to opine, and express no opinion, about these historical provisions.

expected to transport or care for fewer than 400 arrestees annually across all three regions of the County combined. According to the County, a large portion of the arrestees that receive transport and care from the Ambulance Services are uninsured. Second, the Ambulance Services would be required to reimburse the County for the costs the County incurs in providing quality assurance oversight, medical oversight, and contract administration services² with respect to the EMS system (the “Oversight and Administration Payment”).³ Third, the Ambulance Services would be required to pay FPD a share of the overall estimated costs of providing EMS dispatch services (the “Dispatch Services Payment”). The Dispatch Services Payment would ultimately not exceed actual costs in any given year.

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”

²The contract administration services represent oversight arrangements to ensure the Ambulance Service’s compliance with requirements of the new contracts. These would include continuous review of mandatory education for local EMT-P accreditation; continuous review of mandatory training required by EMS Agency; monitoring ambulance staffing requirements according to EMS Agency policies; and monitoring the Ambulance Services’ EMT-P and EMT-I Records.

³The amount that would be payable by each of the Ambulance Services would be calculated as follows. First, each of the Ambulance Services would be charged with costs directly incurred by the County with respect to that supplier. Second, system-wide costs, *i.e.*, costs not clearly attributable to a particular supplier, would be allocated pro-rata to the County’s operating areas based on population. In no event would the payments made by any supplier exceed the lower of (1) the County’s actual costs incurred for quality assurance oversight, medical oversight, and contract administration with respect to that supplier, or (2) a “not to exceed amount,” which would be a fixed total of \$150,000 across all regions of the County (to be adjusted annually by the change in the Consumer Price Index (CPI)). The County indicates that total payments are expected to be significantly less than the “not to exceed amount.”

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 Proposed Arrangement would implicate the anti-kickback statute, as it would require that the Ambulance Services bear the cost of transporting uninsured arrestees and pay the County for certain services as part of the exclusive contracts to provide emergency ambulance transport services in the County, some of which will be reimbursable under the Federal health care programs. Notwithstanding this fact, we conclude that a number of factors, in combination, would be present in the Proposed Arrangement that mitigate the risk of Federal health care program fraud or abuse.

First, the Proposed Arrangement would be part of a comprehensive regulatory scheme by the County to manage the delivery of EMS. The Proposed Arrangement would be established by a valid governmental entity legally empowered to regulate the provision of EMS in the County. The organization of a local emergency medical transportation system, including a local government’s decision whether to provide EMS directly or indirectly through the selection of a private supplier, is within the police powers traditionally delegated to local government. As with the exercise of any police power, the local government is ultimately responsible for the quality of the services delivered and is accountable to the public through the political process. Municipalities should have sufficient flexibility to organize local emergency medical transport systems efficiently and economically. The County has represented that it chose to maintain the contracts with the Ambulance Services in a manner consistent with the relevant government contracting laws.

Second, the County certified that the Proposed Arrangement would only provide partial compensation for the actual costs of the County’s delivery of oversight and administration-related services and the FPD’s delivery of dispatch services. As such, the Ambulance Services would not be overpaying the sources of the referrals, which is the typical anti-kickback concern. It is reasonable to expect that the County and the FPD would seek

reimbursement for services they provide to the Ambulance Services where those services relate directly to the EMS that are the subject of the contractual arrangement.

Third, although the aggregate Oversight and Administration Payment and Dispatch Services Payment to the County and FPD would necessarily vary with the volume of referrals from the County, in the context of emergency response services and in consideration of the facts of the Proposed Arrangement, we do not believe that these payments would pose an increased risk of overutilization or increased costs to the Federal health care programs. Neither the County, the FPD, nor the Ambulance Services have significant ability to affect the utilization of “911” services among the County’s population.

Ambulance services are paid by Medicare and Medicaid on a fee schedule, and the Ambulance Services remain obligated to bill for such services in accordance with the applicable Federal health care program payment and coverage rules.

Fourth, the contract exclusivity should not have an adverse impact on competition. The County has continuously contracted with the Ambulance Services to serve the EMS system since January 1, 1981. The County has represented, moreover, that it chose to maintain the contracts with the Ambulance Services in a manner consistent with the relevant government contracting laws.

Fifth, the putative prohibited remuneration (i.e., the privately-borne costs of uninsured arrestee transports, the Oversight and Administration Payment, and the Dispatch Services Payment) would inure to the public, and not private, benefit. One of the core evils addressed by kickback or bribery statutes, whether involving public or private business, is the abuse of a position of trust, such as the ability to award contracts or business on behalf of a principal for personal financial gain. Here, the public would receive the financial benefit of the Proposed Arrangement by relief of costs for uninsured arrestee transports, and by enabling the County and the FPD to receive some reimbursement for the costs of oversight and administration of the EMS and the costs of EMS dispatch services.

Sixth, the Proposed Arrangement would not represent a fundamental change in the delivery of emergency response services in the County. The County has contracted with the Ambulance Services for more than a quarter of a century. Further, the Proposed Arrangement was not initiated by the Ambulance Services or another ambulance company. The scheme for the Proposed Arrangement was developed on the County’s sole initiative.

Finally, the free transports for uninsured arrestees, Oversight and Administration Payment, and Dispatch Payment relate directly to the Ambulance Services’ provision of the emergency medical transports covered by the contracts. Importantly, there is no ancillary or unrelated remuneration offered or paid by the Ambulance Services to the County or the FPD. We might have reached a different result if the Ambulance Services had offered the County or the FPD some remuneration not directly related to the provision of the

emergency medical transports covered by the contracts including, by way of example, free or reduced cost equipment for the FPD or other County agencies.

In light of the totality of these factors, we conclude that the Proposed Arrangement would pose minimal risk of Federal health care program fraud or abuse.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that while 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 [name redacted] County 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.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name redacted] County, 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] County 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] County 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,

Lewis Morris
Chief Counsel to the Inspector General