



[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: August 27, 2009

Posted: September 3, 2009

[Name and address redacted]

Re: OIG Advisory Opinion No. 09-14

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding an exclusive contract for ambulance transport services between a township and an ambulance company that provides for reimbursement to the township for the costs of providing emergency dispatch services (the "Arrangement"). Specifically, you have inquired whether the Arrangement constitutes 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 supplemental submissions, 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 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") will 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 Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

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.

I. FACTUAL BACKGROUND

The Town of [name of municipality redacted] (the “Township”) is a municipal corporation charged with providing essential governmental and public safety services within the township limits of [names of municipality and state redacted]. The Township operates an emergency 911 dispatch center (the “Dispatch Center”) to monitor and manage calls requesting assistance from local police, fire, and emergency medical services (“EMS”).

The Township issued a Request for Proposal (“RFP”) for an exclusive three-year contract to provide local ambulance transport and primary EMS. The RFP was written with performance standards, criteria for the award, and other standard procurement methodology. The requestor, [name redacted] (the “Ambulance Company”), certified that the Township undertook procedures to ensure an open, transparent, and competitive bidding process. The Ambulance Company, which had been the private vendor serving the community’s emergency ambulance transport needs for more than a decade, competed for, and was awarded, the contract. The Ambulance Company certified that the RFP was initiated and conducted, and the contract was awarded, by the Township in a manner consistent with local contracting laws. The Ambulance Company also certified that the scheme underlying the Arrangement was developed at the Township’s sole initiative.

At the time that the ambulance transport RFP was issued, the Dispatch Center’s annual operating costs totaled \$600,000.¹ Annually, over 25,000 calls came into the Dispatch Center. The ratio of ambulance transport calls to total calls was approximately 1:10. On this basis, approximately \$60,000 of the Dispatch Center’s annual operating costs was ascribed to ambulance transport calls.

Under the Arrangement, the Ambulance Company provides exclusive primary response for emergency ambulance calls in the Township. Many recipients of the ambulance transport and EMS services are Medicare or Medicaid beneficiaries. The Township does

¹ This figure includes salaries and overtime payments made to nine full-time dispatchers, as well as the Dispatch Center’s health insurance and utilities costs.

not pay a fee for the ambulance service to the Ambulance Company. The Ambulance Company is entirely responsible for the maintenance and housing of its own vehicles and equipment. The Township does not supply personnel, equipment, or public facilities for use in the Ambulance Company's operations. The contract requires the Ambulance Company to reimburse the Township an annual remittance of \$60,000 payable in monthly installments (the "Remittance").² The Remittance was calculated to approximate the Township's expenditure on the Dispatch Center's handling of ambulance calls.

With implementation of the Arrangement, a minor change was made to the Township's emergency dispatch procedures. Now, dispatch procedures call for additional communication between the Dispatch Center and the ambulance when the vehicle arrives on the emergency scene, departs, and later returns. Otherwise, dispatch procedures in the Township have not changed since the implementation of the Arrangement. The Ambulance Company certified that the change in procedure was not expected to result in substantial change to the dispatch costs for ambulance calls.

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

² In the second and third years of the contract, the Remittance is subject to an annual adjustment for inflation as determined by the U.S. Department of Labor's Consumer Price Index statistics.

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

“Pay to play” arrangements, like the one set out under the Arrangement, clearly implicate the anti-kickback statute. The payment of a \$60,000 annual fee to the Township for the opportunity to be exclusive primary response provider for emergency ambulance calls, the cost of some of which would be payable by a Federal health care program, fits squarely within the language of the anti-kickback statute. Depending on the intent of the parties, the Arrangement could violate the statute. Notwithstanding, we conclude that a number of factors are present in the Arrangement that mitigate the risk of Federal health care program fraud or abuse.

First, the Arrangement is part of a comprehensive regulatory scheme by the Township to manage the delivery of EMS. The Arrangement was established by a valid governmental entity legally empowered to regulate the provision of EMS in the Township. 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 Ambulance Company certified that the Township entered the contract with the Ambulance Company in a manner consistent with the relevant government contracting laws.

Second, the Ambulance Company certified that the Arrangement provides compensation for the approximate costs of the Township’s delivery of dispatch services attributable to ambulance transports. As a result, the Ambulance Company is not overpaying the sources of the referrals, which represents the typical anti-kickback concern. It is reasonable to expect the Township to seek reimbursement for services it provides to the Ambulance Company where those services relate directly to the EMS that are the subject of the contractual arrangement.

Third, the annual fee will not be tied directly or indirectly to the volume or value of referrals between the parties. The amount of the annual fee will, subject to an independently-determined inflation adjustment, be the same over the course of the three-year contract regardless of the volume or value of business that accrues to the Ambulance Company.

Fourth, because the Arrangement is limited to EMS and involves no substantive change in the dispatch procedures already utilized by the Township, 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 does not increase Federal health care program costs. Neither the number of Federal program beneficiaries requiring emergency transport in the Township, nor the treatment these patients will require or receive at a hospital are related to, or impacted by, the Arrangement.

Fifth, the contract exclusivity should not have an adverse impact on competition. The Ambulance Company certified that the Township undertook procedures to ensure an open, transparent, and competitive bidding process, consistent with the relevant government contracting laws. Furthermore, we believe it is within the Township's discretion to conclude that, for administrative and system efficiencies, the contract should be awarded to one emergency ambulance service provider pursuant to an open and competitive bidding process.

Sixth, the putative prohibited remuneration (*i.e.*, the Remittance) inures 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 receives the financial benefit of the Arrangement by enabling the Township to receive reimbursement for costs of ambulance dispatch services.

Seventh, the Arrangement does not represent a fundamental change in the delivery of emergency response services in the Township. The Township has contracted with the Ambulance Company for more than a decade. Further, the Arrangement was not initiated by the Ambulance Company or another ambulance company. The Ambulance Company certified that the scheme for the Arrangement was developed at the Township's sole initiative.

We might have reached a different result if the Ambulance Company had paid the Township remuneration not directly related to the provision of the emergency medical transports covered by the contract including, by way of example, free or reduced cost equipment.

In light of the totality of these factors, we conclude that the Arrangement poses 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 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 will 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 Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion 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 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 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 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,

/Lewis Morris/

Lewis Morris
Chief Counsel to the Inspector General