



*[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. 09-15**

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 municipality and an ambulance company that provides reimbursement to the city for the costs of providing emergency dispatch services and for monitoring the quality of the emergency ambulance operation (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 City of [name of municipality redacted] (the “City”) is a municipal corporation duly organized and existing under the laws of [name of state redacted]. The City is charged with providing essential governmental and public safety services within the city limits. The City’s fire department operates an emergency 911 dispatch center (the “Dispatch Center”) to monitor and direct calls requesting assistance from local police, fire, and emergency medical services (“EMS”). The City’s fire department is also responsible for monitoring the quality of the local emergency ambulance operation.

The City issued a Request for Proposal (“RFP”) for an exclusive three-year contract to provide local ambulance transport and EMS. The requestor, [name redacted] (the “Ambulance Company”) certified that the City undertook procedures to ensure an open, transparent, and competitive bidding process. A selection team consisting of representatives from the City’s police and fire departments and the City purchasing department evaluated the submitted proposals and conducted interviews with representatives of each bidding company. The Ambulance Company was one of the private ambulance transport companies that competed for the contract. It had already been the private vendor serving the community’s emergency ambulance transport needs for nearly eight years. The three-year contract was ultimately awarded to the Ambulance Company. The Ambulance Company certified that the RFP was initiated and conducted, and the contract was awarded, by the City in a manner consistent with local contracting laws. The Ambulance Company also certified that the scheme underlying the Arrangement was developed at the City’s sole initiative.

Under the Arrangement, the Ambulance Company pays the City an annual remittance (the “Remittance”) of \$52,000 to offset the costs of the City fire department’s operation of emergency ambulance dispatch services and monitoring the Ambulance Company’s performance. The City’s fire chief calculated the Remittance based on an estimate of total fire department resources that are annually devoted to emergency ambulance

dispatch. Payment of the Remittance has so far been withheld pending the outcome of this advisory opinion.<sup>1</sup>

Under the Arrangement, the Ambulance Company provides exclusive emergency ambulance service in the City. The City does 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 City does not supply personnel, equipment, or public facilities for use by the Ambulance Company's operation. Many recipients of the ambulance transport and EMS services provided for under the Arrangement are Medicare or Medicaid beneficiaries.

With implementation of the Arrangement, a minor change was made to the City's emergency dispatch procedures. Dispatch procedures now call for additional communication between the Dispatch Center and the ambulance when the vehicle arrives on the emergency scene, departs, or later returns to the scene. Otherwise dispatch procedures in the City 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

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<sup>1</sup> Nonpayment of amounts owed pursuant to a contractual agreement does not, by itself, absolve parties from liability under the fraud and abuse laws.

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 Arrangement implicates the anti-kickback statute, as it requires that the Ambulance Company bear the costs of ambulance dispatch and monitoring the quality of the emergency ambulance operation as part of the exclusive contract to provide emergency ambulance transport services in the City, some of which will be reimbursable under the Federal health care programs. Notwithstanding this fact, we conclude that a number of factors, in combination, 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 City 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 City. 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 City chose to enter 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 City's emergency ambulance dispatch services and the expense of monitoring ambulance performance. 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 City 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 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 emergency medical services and involves no substantive 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 does 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 are related to, or impacted by, the 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.

Fifth, the contract exclusivity should not have an adverse impact on competition. The Ambulance Company certified that the City undertook procedures to ensure an open, transparent, and competitive bidding process and that the City chose to maintain its contract with the Ambulance Company in a manner consistent with the relevant government contracting laws.

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 City to receive reimbursement for the costs of emergency ambulance dispatch services and monitoring of ambulance performance.

Seventh, the Arrangement does not represent a fundamental change in the delivery of emergency ambulance services in the City. The City had contracted with the Ambulance Company for nearly eight years by the time of the contract award. 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 City's sole initiative.

We might have reached a different result if the Ambulance Company had paid the City 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