



DEPARTMENT OF HEALTH AND HUMAN SERVICES

## OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 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:** April 19, 2012

**Posted:** April 26, 2012

[Name and address redacted]

### **Re: OIG Advisory Opinion No. 12-03**

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding a proposal by a municipal fire department to share certain costs related to dispatch and other services with hospital-based ambulance providers that participate in the local 911 emergency dispatch system (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 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, although 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] 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 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 redacted] (the “City”) is located in the State of [name redacted] (the “State”) and discharges its obligation to provide essential public safety services within the City’s limits through the operation of a 911 emergency dispatch system (the “911 System”). [Name redacted] (the “Fire Department”) coordinates the 911 System’s emergency medical services (“EMS”) component, which encompasses pre-hospital treatment and transport.<sup>1</sup> While the Fire Department provides the majority of EMS tours<sup>2</sup> in the City through its own ambulances, various hospitals (the “Participating Hospitals”) also participate as EMS providers in the 911 System on a voluntary basis, without separate compensation from the City.<sup>3</sup> EMS in the City has involved hospital-based providers, with hospitals (municipal and private) operating ambulances and responding to calls for emergency medical assistance, since the late 19<sup>th</sup> century. When the Fire Department assumed responsibility for EMS operations in [year redacted], it continued the hospital-based EMS paradigm. The Fire Department and the Participating Hospitals operate separately and separately bill their patients, or their patients’ insurers as appropriate, for their services. Some of the patients receiving EMS in the City are

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<sup>1</sup> Pursuant to City law, the Fire Department is responsible for EMS operations, including the operation and staffing of municipal ambulances and the coordination of pre-hospital emergency medical care and ambulance transport through the 911 System.

<sup>2</sup> An EMS tour is one scheduled eight-hour shift.

<sup>3</sup> Each Participating Hospital enters into an ambulance agreement with the Fire Department that specifies the Participating Hospital’s tour complement commitment (i.e., the type, number, and hours of operation of the ambulances) and the operational requirements for participation. The Fire Department certified that it has entered into the ambulance agreements in a manner that conforms to applicable law governing such agreements. The Participating Hospitals participate in the 911 System as independent ambulance providers, not as contractors for the City.

Federal health care program beneficiaries, including Medicare and Medicaid beneficiaries.

All EMS ambulances, regardless of whether they are operated by the Fire Department or a Participating Hospital, are assigned a designated street corner location to which they return after responding to a call.<sup>4</sup> The 911 System dispatching is “dynamic,” meaning that any ambulance, regardless of its affiliation, may be dispatched from any location during its tour if it is the nearest appropriate ambulance. Decisions about the hospital to which an ambulance should transport patients are guided by a computer-aided dispatch system and are based on the type of emergency patient care needed (including dispatch to such specialized care facilities as cardiac centers, stroke centers, burn centers, and hyperbaric care centers) and estimated time to arrival, including traffic patterns. Ambulances are required by State and regional protocols, as well as the ambulance agreements, to transport patients to the nearest appropriate hospital; EMS crew members may not “steer” or otherwise unlawfully transport patients to the Participating Hospital that is operating the ambulance.<sup>5</sup>

In connection with the 911 System, the Fire Department provides certain dispatch-related services and, through its online medical control unit, also offers assistance to EMS crews (both those of the Fire Department and those of the Participating Hospitals) with decisions about critical patient care, situations involving refusal of medical aid by patients, and ambulance transport destinations (collectively, the “Services”). Currently, the Fire Department is responsible for all of the costs associated with providing the Services. Under the Proposed Arrangement, the Fire Department would share the personnel-related costs of providing the Services (the “Costs”) with the Participating Hospitals. Specifically, the Fire Department would use data on the Costs and the number of scheduled tours from the prior fiscal year to approximate each Participating Hospital’s pro rata share of the Costs for the coming fiscal year and develop a payment schedule for

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<sup>4</sup> The Fire Department alone determines the street corner locations to which each Participating Hospital is assigned; the Participating Hospitals are not involved in that decision.

<sup>5</sup> EMS crew members have limited discretion in transport decisions to accommodate patient choice when the patient’s condition is stable, but online medical control unit staff must approve transports that are more than ten minutes further than the nearest appropriate hospital. The Fire Department staffs its online medical control unit with physicians and paramedics. Some of the Participating Hospitals operate their own online medical control units. According to the Fire Department, the various State and regional policies and protocols, in combination with the provisions of the ambulance agreements, impose on the Participating Hospitals a prohibition against steering patients.

each Participating Hospital.<sup>6</sup> Participation as a Participating Hospital would continue to remain voluntary under the Proposed Arrangement. According to the Fire Department, any hospital licensed by the State that obtained an ambulance operating certificate from the State's Department of Health authorizing the provision of ambulance services in the City could request to participate as a Participating Hospital. Upon receipt of such a request, the Fire Department would assess the operational need for additional EMS resources in the area in which the interested hospital was licensed to operate. The Fire Department would approve such participation if it determined that participation would operationally benefit the 911 System.<sup>7</sup> Any new Participating Hospital would be required to contribute its pro rata share of the Costs.<sup>8</sup>

## II. LEGAL ANALYSIS

### A. Law

The anti-kickback statute makes it a criminal offense to knowingly and willfully 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. See, e.g., United States v. Borrasi, 639 F.3d 774 (7th Cir. 2011); United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000); United States v. Davis, 132 F.3d 1092 (5th Cir. 1998); United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir. 1985), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up

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<sup>6</sup> The Fire Department certified that this approach would result in a reasonable approximation of each Participating Hospital's pro rata share of the Costs for each fiscal year.

<sup>7</sup> This same assessment occurs when an existing Participating Hospital seeks to increase its tour complement.

<sup>8</sup> Because each Participating Hospital's pro rata share would be determined at the beginning of each fiscal year, a new Participating Hospital that begins participating after the beginning of a particular fiscal year would be included in the calculations for, and begin paying a pro rata share during, the next fiscal year.

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 the Participating Hospitals—which are potential referral recipients—to bear a portion of the Costs as a condition of providing EMS in the City. Some of the EMS would be reimbursable under the Federal health care programs. Notwithstanding this fact, we conclude that a number of factors, in combination, that would be present in the Proposed Arrangement would mitigate the risk of Federal health care program fraud or abuse.

First, the Proposed Arrangement would be part of a comprehensive scheme by the City to manage the delivery of EMS through the Fire Department. The Proposed Arrangement would be established by a valid governmental entity—acting through the Fire Department—that is legally empowered to direct the provision of the EMS in the City. The organization of a local EMS system 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 EMS systems efficiently and economically. The Fire Department certified that it has entered into the ambulance agreements in a manner that conforms to applicable law governing such agreements.

Second, the Proposed Arrangement would be structured in such a way that each Participating Hospital's payment would reasonably approximate its proportionate share of the Costs. As a result, the Participating Hospitals would not be overpaying the source of the referrals, which represents the typical anti-kickback concern. It is reasonable to expect the City, through the Fire Department, to seek reimbursement for the Services it provides to the Participating Hospitals where those Services relate directly to the EMS that are the subject of the ambulance agreements between the Fire Department and the Participating Hospitals.

Third, the amounts paid by the Participating Hospitals under the Proposed Arrangement would not be tied, directly or indirectly, to the volume or value of referrals between the parties. Rather, the amount due from a particular Participating Hospital would be determined based on the Participating Hospital's number of scheduled tours, and not on either the number or nature of services it provides during those tours or the number of transports to the Participating Hospital.

Fourth, because the Proposed Arrangement would be limited to EMS and would involve no substantive change in the dispatch procedures already utilized by the Fire Department on behalf of the City, it would be unlikely to increase the risk of overutilization and also would be unlikely to lead to increased costs to the Federal health care programs. Neither the number of Federal health care program beneficiaries requiring EMS in the City, nor the treatment these beneficiaries would require or receive would be related to, or impacted by, the Proposed Arrangement.

Fifth, the Proposed Arrangement should not have an adverse impact on competition. Any hospital licensed by the State that obtained an ambulance operating certificate from the State's Department of Health authorizing the provision of ambulance services in the City could request to participate as a Participating Hospital. Such a hospital would be permitted to participate if the Fire Department determined that the additional EMS resources would satisfy an operational need in the area in which the interested hospital was licensed to operate and that such participation would operationally benefit the 911 System. Any new Participating Hospital would be required to contribute its pro rata share of the Costs, starting in the next fiscal year. Further, the 911 System dispatching is dynamic, dispatching the nearest appropriate ambulance in accordance with protocols that are unrelated to the ambulance's affiliation (whether with the Fire Department or a Participating Hospital), and patients must be transported in accordance with regulatory and operational requirements that would limit the risk of inappropriate steering to a Participating Hospital.

We might have reached a different result if the Participating Hospitals would pay the City or the Fire Department remuneration not directly related to the provision of the EMS that are the subject of the ambulance agreements between the Fire Department and the Participating Hospitals including, by way of example, remuneration such as free or reduced cost equipment. 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, although 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] 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 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 by a person or entity other than [name redacted] to prove that the person or entity did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.
- 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 (or that provision's application to the Medicaid program at section 1903(s) 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 that is part of the

Proposed Arrangement 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,

/Gregory E. Demske/

Gregory E. Demske  
Chief Counsel to the Inspector General