



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: November 29, 2012

Posted: December 6, 2012

[Names and addresses redacted]

Re: OIG Advisory Opinion No. 12-18

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding a proposed arrangement whereby three municipalities will reciprocally waive the otherwise applicable cost-sharing obligations of each other's bona fide residents when providing backup emergency medical services ("EMS") transportation to such individuals in certain circumstances (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for the imposition of sanctions under the civil monetary penalty provision prohibiting inducements to beneficiaries, section 1128A(a)(5) of the Social Security Act (the "Act"), or under the exclusion authority at section 1128(b)(7) of 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: (i) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) 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 [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 for an advisory opinion or supplemental submissions.

This opinion may not be relied on by any persons other than [names redacted], the requestors 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”) is a political subdivision of the State of [state name redacted] (the “State”). [Name redacted] (“City A”), [name redacted] (“City B”), and [name redacted] (the “District”) are also political subdivisions of the State and are all located within the County. City A, City B, and the District (collectively, the “Requestors”) each provide EMS to their residents in response to “911” emergency calls through their own ambulance services, which they operate through their fire departments. The Requestors’ ambulance services do not provide non-emergency ambulance transports. When providing EMS to their own residents, City A and the District engage in “insurance only” billing, whereby they waive otherwise applicable cost-sharing obligations for bona fide residents of their respective municipalities.¹

The Requestors are parties to a mutual response arrangement, the terms of which comprise the Proposed Arrangement. They have certified that they will implement the Proposed Arrangement if they receive a favorable OIG advisory opinion. Under the Proposed Arrangement, in limited circumstances, the Requestors’ ambulances will respond to 911 emergency calls and provide backup EMS within another Requestor’s

¹ Depending on the specific facts and circumstances, such “insurance only” billing arrangements may be lawful for state or local government owned and operated facilities under the Medicare program. See, e.g., Centers for Medicare & Medicaid Services, Medicare Benefit Policy Manual, Pub. No. 100-02, Chapter 16, section 50.3.1, available at <http://www.cms.hhs.gov/manuals/Downloads/bp102c16.pdf>. In this instance, however, the Requestors have not asked for an opinion about, and we express no opinion regarding, any of the Requestors’ billing practices toward their own residents.

jurisdiction when such mutual aid is needed to address an emergency. This backup EMS transportation will be provided to Federal health care program beneficiaries, among others. The backup EMS transportation will involve only non-routine, emergency transportation, and thus will be provided only on an unscheduled and sporadic basis. Under the Proposed Arrangement, City B will implement “insurance only” billing for its bona fide residents (like the other jurisdictions). The Requestors will all adopt a uniform pricing structure.² Each Requestor will, on a reciprocal basis, also honor the “insurance only” billing policies of the other jurisdictions when providing backup EMS for bona fide residents of those jurisdictions.

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 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.

² No opinion has been sought, and we express no opinion, regarding the aspects of the Proposed Arrangement pertaining to the pricing structure or anything other than the Requestors’ reciprocal waiver of otherwise applicable cost-sharing obligations of each other’s bona fide residents.

Section 1128A(a)(5) of the Act provides for the imposition of civil monetary penalties against any person who offers or transfers remuneration to a Medicare or state health care program (including Medicaid) beneficiary that the benefactor knows or should know is likely to influence the beneficiary's selection of a particular provider, practitioner, or supplier of any item or service for which payment may be made, in whole or in part, by Medicare or a state health care program (including Medicaid). The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs. Section 1128A(i)(6) of the Act defines "remuneration" for purposes of section 1128A(a)(5) as including "transfers of items or services for free or for other than fair market value."

B. Analysis

The Requestors' practice of "insurance only" billing under the Proposed Arrangement will implicate the anti-kickback statute to the extent that it constitutes a limited waiver of Medicare or other Federal health care program cost-sharing obligations. Our concern about potentially abusive waivers of Medicare cost-sharing obligations is longstanding. For example, we have previously stated that providers that routinely waive Medicare cost-sharing obligations for reasons unrelated to individualized, good faith assessments of financial hardship may be held liable under the anti-kickback statute. See, e.g., Special Fraud Alert, 59 Fed. Reg. 65,372, 65,374 (Dec. 19, 1994). Such waivers may constitute prohibited remuneration to induce referrals under the anti-kickback statute, as well as a violation of the civil monetary penalty prohibition on inducements to beneficiaries, section 1128A(a)(5) of the Act. Notwithstanding, in the circumstances presented in the Proposed Arrangement, the risk of such prohibited remuneration will be minimal for several reasons.

First, the Proposed Arrangement will not involve the routine waiver of cost-sharing obligations because the Requestors will provide the backup EMS transportation on an unscheduled and sporadic basis. Thus the waivers will only occur occasionally.

Second, because the Proposed Arrangement will not involve the provision of routine, non-emergency transportation services, but will instead be limited to backup EMS transportation, it will not increase the risk of overutilization and is unlikely to lead to increased costs to Federal health care programs. Further, neither the number of Federal health care program beneficiaries requiring EMS transportation within the geographic limits of the Requestors, nor the treatment the beneficiaries receive or require, will be related to the existence of the Proposed Arrangement.

Third, because each Requestor will waive cost-sharing obligations when it provides EMS transportation to its own bona fide residents, there will be no expectation on the part of the individuals receiving the backup EMS transportation that they would have cost-sharing obligations. Therefore, the Requestor's waiver of such obligations for the

isolated instances in which it provides the backup EMS transportation is unlikely to induce the use of those or any other services.

Finally, the underlying nature of the Proposed Arrangement—including, but not limited to, the fact that the waivers will not be routine, the Requestors are local governments engaged in a mutual aid arrangement for backup EMS transportation, and the individuals receiving the waiver will, for all intents and purposes, simply be treated the same as any other bona fide resident in the Requestors' jurisdictions who receives EMS transportation—distinguishes it from arrangements in which a municipality requires a private company to bill “insurance only” as a condition of getting the municipality's EMS transportation business, including Medicare business.

Based on the foregoing and the totality of the facts present in the Proposed Arrangement, we are persuaded that the Proposed Arrangement poses minimal risk of fraud and abuse under the anti-kickback statute. For all the same reasons, we would not impose sanctions under section 1128A(a)(5) of the Act.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that: (i) the Proposed Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) 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 [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 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 [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 by a person or entity other than [names 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 the Requestors 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 the Requestors 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