



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: October 6, 2014

Posted: October 14, 2014

[Name and address redacted]

Re: OIG Advisory Opinion No. 14-09

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding an existing arrangement under which a township uses tax revenues to cover out-of-pocket amounts owed for basic life support (“BLS”) emergency ambulance services received by local residents (the “Arrangement”). Specifically, you have inquired whether the Arrangement constitutes 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 Arrangement does not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) although 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

[Township name] (the “Township”) is a legal subdivision of [State name], and [name redacted] (the “BLS Supplier”) is an independent, nonprofit corporation that operates as a volunteer ambulance squad. The BLS Supplier is the approved supplier of BLS emergency ambulance services for the Township.¹ The BLS Supplier requested this advisory opinion.

The BLS Supplier bills third party payors for BLS emergency ambulance services it renders within the Township. It does not bill *bona fide* Township residents (“Residents”) for: (1) otherwise applicable copayment and deductible amounts, including amounts owed by Federal health care program beneficiaries, and (2) amounts owed by uninsured or underinsured individuals (collectively, the “Out-of-Pocket Amounts”). Instead, the Township uses tax revenue to pay an annual stipend to the BLS Supplier in an amount that reasonably approximates the Out-of-Pocket Amounts for BLS emergency ambulance services that the BLS Supplier renders to Residents in a given year.

¹ The BLS Supplier has provided a brief history of its longstanding relationship with the Township in connection with its request for an advisory opinion. No opinion has been sought, and we express no opinion, regarding any of the BLS Supplier’s past arrangements with the Township. This opinion is limited solely to the Arrangement, *i.e.*, the subsidy for residents’ out-of-pocket amounts for BLS emergency ambulance services, and not the parties’ relationship as a whole.

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.

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, inter alia, the waiver of cost-sharing obligations (or any part thereof).²

B. Analysis

Under the Arrangement, the BLS Supplier does not bill Residents, some of whom are Federal health care program beneficiaries, for cost-sharing amounts owed for BLS emergency ambulance services. Our concern about potentially abusive waivers of Medicare cost-sharing amounts under the anti-kickback statute is longstanding. For example, we have previously stated that providers that routinely waive Medicare cost-sharing amounts for reasons unrelated to individualized, good faith assessments of financial hardship may be held liable under the anti-kickback statute. See, e.g., OIG Special Fraud Alert on Routine Waiver of Medicare Part B Copayments and Deductibles, 59 Fed. Reg. 65372, 65374 (Dec. 19, 1994). Such waivers may constitute prohibited remuneration to induce referrals, as well as a violation of the civil monetary prohibition against inducements to beneficiaries.

Under the Arrangement, the Township effectively assumes responsibility for all Out-of-Pocket Amounts owed to the BLS Supplier for Residents. As we state in the OIG Compliance Program Guidance for Ambulance Suppliers:

A city or other political subdivision of a state (e.g., fire district, county, or parish) may not require a contracting ambulance supplier to waive copayments for residents, but it may pay uncollected, out-of-pocket copayments on behalf of its residents. Such payments may be made through lump sum or periodic payments, if the aggregate payments reasonably approximate the otherwise uncollected cost-sharing amounts.

68 Fed. Reg. 14245, 14253 (Mar. 24, 2003). Because the Township pays the BLS Supplier an annual stipend that the BLS Supplier has certified reasonably approximates Out-of-Pocket Amounts for Residents, the non-billing of Residents for cost-sharing amounts under the Arrangement does not constitute a routine waiver that implicates the anti-kickback statute. Accordingly, we will not impose administrative sanctions arising under the anti-kickback statute on the BLS Supplier in connection with the Arrangement. For the same reason, we will not impose sanctions under 1128A(a)(5) of the Act.

² The statute contains an exception to the definition of remuneration, not applicable here, for certain waivers of cost-sharing obligations that are not advertised, are not routine, and are made on the basis of individual determinations of financial need or for which reasonable collection efforts have been made. Section 1128A(i)(6) 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 Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) although 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 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 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 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 that is part of the 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