



DEPARTMENT OF HEALTH AND HUMAN SERVICES

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**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:** August 7, 2018

**Posted:** August 14, 2018

[Names and addresses redacted]

**Re: OIG Advisory Opinion No. 18-08**

Dear Gentlemen:

We are writing in response to your request for an advisory opinion regarding a proposal by certain government-operated fire departments and fire protection districts to enter into a mutual aid agreement to provide backup emergency ambulance services and to bill for such services according to the billing practices in the jurisdiction where such services are rendered (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**

[Name redacted] (“Fire Department 1”), [name redacted] (“Fire Department 2”), [name redacted] (“Fire Department 3”), [name redacted] (“Fire Department 4”), [name redacted] (“Fire Department 5”), and [name redacted] (“Fire Department 6”) (collectively, “Requestors” or the “Fire Departments”) are fire departments or fire protection districts located in [county and state redacted], and organized under [state redacted] law. Each Fire Department owns and operates an ambulance service that serves its respective jurisdiction.<sup>1</sup> All six Fire Departments charge ambulance user fees to patients other than Federal health care program beneficiaries. The ambulance user fees are separate from any cost-sharing amounts patients may owe in connection with insurance coverage and are determined by fee schedules that vary by Fire Department.

Funding for emergency ambulance services comes from each Fire Department’s general budget. Ambulance user fees fund a small percentage of each Fire Department’s general budget, and except in Fire Department 1, local taxes fund the majority of each Fire Department’s general budget.<sup>2</sup> All of the Fire Departments bill patients’ insurers, including Federal health care programs, when furnishing emergency ambulance services to insured patients. However, Fire Departments 1, 2, 3, and 4 bill both residents and

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<sup>1</sup> In addition to providing emergency ambulance services to individuals in its jurisdiction, Fire Department 1 also serves individuals in unincorporated surrounding areas through an intergovernmental agreement (the “IGA”).

<sup>2</sup> A majority of Fire Department 1’s general budget is funded from both local taxes and revenues generated under the IGA.

nonresidents<sup>3</sup> for applicable cost-sharing amounts for the emergency ambulance services they provide in their respective jurisdictions, whereas Fire Departments 5 and 6 bill only nonresidents for such cost-sharing amounts. Fire Departments 5 and 6 treat revenue from local taxes as payment in full for any cost-sharing amounts their respective residents may owe.<sup>4</sup>

Under the Proposed Arrangement, the Fire Departments would enter into a mutual aid agreement to provide backup emergency ambulance services within adjoining Fire Departments' jurisdictions when the adjoining Fire Departments temporarily exhaust their emergency response resources. The Fire Departments therefore would provide backup emergency ambulance services only on an as-needed, unscheduled basis. Fire Departments requesting backup emergency ambulance services would provide no financial remuneration to the Fire Departments providing the backup emergency ambulance services, and the mutual aid agreement would not relate in any way to the number of Federal health care program beneficiaries receiving backup emergency ambulance services or the Federal health care program reimbursement for such services.

Fire Departments providing backup emergency ambulance services would bill patients according to the billing practices of the Fire Departments in whose jurisdictions they rendered the services, including billing or waiving cost-sharing amounts and, where applicable, billing ambulance user fees based on the local Fire Department's fee schedule. For example, if Fire Department 1 were to provide backup emergency ambulance services in Fire Department 5's jurisdiction to a resident of such jurisdiction, Fire Department 1 would not attempt to collect the individual's otherwise applicable cost-sharing amount for the services, even though Fire Department 1 would have attempted to collect the cost-sharing amount for those same services if it provided them within its own jurisdiction. Additionally, if the patient was not a Federal health care program beneficiary, then Fire Department 1 would bill the patient for the applicable ambulance user fee set forth in Fire Department 5's fee schedule.

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<sup>3</sup> "Nonresidents" are individuals who initiate and receive emergency ambulance services in a Fire Department's jurisdiction in which they do not reside.

<sup>4</sup> This opinion is limited to Requestors' billing practices for emergency ambulance services provided pursuant to the proposed mutual aid agreement. Requestors have not asked us to opine on, and we offer no opinion regarding, the Fire Departments' billing practices for emergency ambulance services provided within their respective jurisdictions. In analyzing the Proposed Arrangement, we have relied on Requestors' certifications that each Fire Department's billing practices with respect to emergency ambulance services provided in its jurisdiction comply with all applicable laws.

## 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. Nagelvoort, 856 F.3d 1117 (7th Cir. 2017); 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 \$100,000, imprisonment up to ten 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 (the “Beneficiary Inducements CMP”) 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 the Beneficiary Inducements CMP as including “the waiver of coinsurance and deductible amounts (or any part thereof).”

## **B. Analysis**

The Proposed Arrangement would implicate the anti-kickback statute because Requestors would not bill certain patients, some of whom are Federal health care program beneficiaries, for cost-sharing amounts owed for emergency ambulance services. Our concern about potentially abusive waivers of Medicare cost-sharing amounts under the anti-kickback statute is longstanding. For example, we previously have stated that providers and suppliers 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., Publication of OIG Special Fraud Alerts, 59 Fed. Reg. 65,372, 65,374-75 (Dec. 19, 1994). Such waivers may constitute prohibited remuneration to induce referrals. Notwithstanding our concern about potentially abusive waivers, we conclude for the combination of the following reasons that the Proposed Arrangement presents a low risk of fraud and abuse under the anti-kickback statute.

First, under the Proposed Arrangement, the Fire Departments would provide backup emergency ambulance services to adjoining Fire Departments only when the adjoining Fire Departments exhaust their emergency ambulance response resources. Requestors' agreement to provide backup emergency ambulance services to adjoining Fire Departments would not relate in any way to the number of Federal health care program beneficiaries receiving backup emergency ambulance services or the Federal health care program reimbursement for such services. Therefore, the Proposed Arrangement would not take into account the volume or value of Federal health care program referrals or other business generated among the Fire Departments.

Second, the Proposed Arrangement would be unlikely either to increase utilization of emergency ambulance services or to increase costs to the Federal health care programs. Responding Fire Departments would follow the billing practices of the Fire Departments in whose jurisdictions they rendered the backup emergency ambulance services, and not their own billing practices, when billing the individuals to whom they provided emergency ambulance services. Because individuals within a particular Fire Department's jurisdiction would be treated the same, for billing purposes, regardless of which Fire Department provided emergency ambulance services, we believe that responding Fire Departments' waivers of cost-sharing amounts would be unlikely to influence the demand for emergency ambulance services.

Additionally, the Proposed Arrangement would not implicate the Beneficiary Inducements CMP. Because the Fire Departments providing the backup emergency ambulance services would follow the billing practices of the Fire Departments in whose jurisdictions they rendered the services and not their own billing practices, the waiver of cost-sharing amounts by certain Fire Departments under the Proposed Arrangement would not influence individuals to receive emergency ambulance services from a particular ambulance supplier.

### 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 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 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,

/Robert K. DeConti/

Robert K. DeConti  
Assistant Inspector General for Legal Affairs