



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 15, 2013

**Posted:** October 22, 2013

[Name and address redacted]

**Re: OIG Advisory Opinion No. 13-14**

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding a proposal whereby a county would not bill bona fide county residents otherwise applicable cost-sharing amounts due in connection with emergency ambulance services provided by the local fire department and a volunteer rescue company, but would instead use tax revenues to cover the unpaid cost-sharing amounts (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 the Proposed Arrangement would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the Office of Inspector General (“OIG”) would not impose administrative sanctions on [county 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. In addition, the OIG would not impose administrative sanctions on [county name redacted], under section 1128A(a)(5) 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 [county 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**

[County name redacted] (the “County”) is a political subdivision of [state name redacted] (the “State”). The County provides emergency ambulance services through the County’s Coordinated Fire and Rescue System (the “System”), which integrates the operations of the [county name redacted] Department of Fire and Rescue (the “Department”) and several volunteer fire companies and volunteer rescue companies. The System is the exclusive supplier of emergency ambulance services throughout the County. The County Fire and Rescue Chief oversees the general and day-to-day management of the System and coordinates strategy and policy development for the System with the County Fire and EMS Board.

The State code authorizes a locality to provide firefighting and emergency medical services (“EMS”) using a combination of government-employed firefighters and EMS personnel and volunteer companies. A volunteer company that is part of such a combined system is deemed “an instrumentality” of the local government by the State code.<sup>1</sup>

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<sup>1</sup> Section [code cite redacted] of the State code provides, in relevant part:

Any county, city or town may provide fire-fighting and emergency medical services to its citizens by using both government-employed and volunteer company or association firefighters and emergency medical services personnel. If such a system is utilized, the volunteer fire-fighting and emergency medical services companies and associations shall be deemed an instrumentality of the county, city or town, and as

The County purchases the ambulances used by the volunteer companies, pays their costs for insurance premiums, vehicle maintenance, and vehicle fuel, and makes an annual payment to each volunteer company to cover other operating expenses.

The [town name redacted] Volunteer Rescue Squad (the “Rescue Squad”) is a State-based nonprofit corporation that operates a volunteer company that is part of the System. The Rescue Squad has qualified under the County and State codes as a supplier of billable emergency ambulance services. The County bills third party payers, including Federal health care programs, for emergency ambulance services provided by the Department and by the Rescue Squad. Presently, the County bills the recipients of these services for any applicable cost-sharing amounts (e.g., co-payments and deductibles).

Under the Proposed Arrangement, the County would not bill bona fide County residents (“Residents”) who receive emergency ambulance services from either the Department or the Rescue Squad for otherwise applicable cost-sharing amounts. Instead, the County would use tax revenue to cover the otherwise applicable cost-sharing amounts. The County has indicated that it expects that the other two volunteer companies participating in the System may also eventually qualify as suppliers of billable emergency ambulance services under the County and State codes. Should either or both of the other volunteer companies also qualify in this regard, the County would also bill third party payers, including Federal health care programs, but would not bill Residents for their services.<sup>2</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.

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such exempt from suit for damages done incident to providing fire-fighting and emergency medical services to the county, city or town.

<sup>2</sup> The County has provided a brief history of their existing and past arrangements concerning emergency ambulance services. No opinion has been sought, and we express no opinion, regarding any of the County’s existing or past arrangements. This opinion is limited solely to the Proposed Arrangement (i.e., the cost-sharing waiver) and not the parties’ relationship as a whole.

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).<sup>3</sup>

## **B. Analysis**

Under the Proposed Arrangement, the County would not bill Residents for cost-sharing amounts owed for emergency ambulance services provided by either the Department or the Rescue Squad, or by the System's other volunteer companies were they also to qualify as providers of billable 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 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 Copayments or Deductibles Under Medicare Part B, 59 Fed. Reg. 65372, 65374 (Dec. 19, 1994). Such

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<sup>3</sup> The statute contains an exception to the definition of remuneration, not applicable here, for certain waivers of cost-sharing obligations that are not advertised, that are not routine, and that 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.

waivers may constitute prohibited remuneration to induce referrals under the anti-kickback statute, as well as a violation of the civil monetary penalty prohibition against inducements to beneficiaries, section 1128A(a)(5) of the Act.

However, there is a special rule for providers and suppliers that are owned and operated by a state or a political subdivision of a state, such as a municipality or fire department. The Centers for Medicare & Medicaid Services (“CMS”) Medicare Benefit Policy Manual (“BPM”) Chapter 16, section 50.3.1 provides that:

A [state or local government] facility which reduces or waives its charges for patients unable to pay, or charges patients only to the extent of their Medicare and other health insurance coverage, is not viewed as furnishing free services and may therefore receive program payment.

Pub. 100-02 BPM Chap. 16, section 50.3.1 at:

<http://www.cms.hhs.gov/manuals/Downloads/bp102c16.pdf> (formerly Medicare Carrier Manual section 2309.4 and Medicare Intermediary Manual section 3153.3A).

Notwithstanding the use of the term “facility,” CMS has confirmed that this provision would apply to a state or municipal ambulance company that is a Medicare Part B supplier and to waivers of cost-sharing amounts for residents who receive emergency ambulance services. CMS also has confirmed that this provision would apply to situations like the one here, where a local government reduces or waives cost-sharing amounts for services provided to residents by a volunteer rescue company that is funded by, and under state law acts as an instrumentality of, the local government.

We note that this provision of the CMS manual applies only to situations in which the governmental unit or an instrumentality of a governmental unit is the ambulance supplier; it does not apply to contracts with outside ambulance suppliers. For example, where a municipality contracts with an outside ambulance supplier for the provision of services to residents of its service area, the municipality cannot require the ambulance supplier to waive out-of-pocket cost-sharing amounts unless the municipality pays the cost-sharing amounts owed or otherwise makes provisions for the payment of such cost-sharing amounts. *See, e.g.,* OIG Advisory Opinion No. 01-12 (July 20, 2001). There is an important difference between a governmental unit, such as a county or municipality, voluntarily waiving cost-sharing amounts for its own residents and a local government requiring a private company to bill “insurance only” as a condition of getting the locality’s emergency ambulance services business, including Federal health care program business. Lump sum or periodic payments by a governmental unit, on behalf of residents or others, may be permitted if the payments are reasonably calculated to cover the expected uncollected cost-sharing amounts.

Accordingly, because Medicare would not require the County to collect cost-sharing amounts from residents, we would not impose administrative sanctions arising under the

anti-kickback statute on the County in connection with the Proposed Arrangement.<sup>4</sup> Nothing in this advisory opinion would apply to waivers of cost-sharing amounts based on criteria other than residency.

### III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the OIG would not impose administrative sanctions on [county 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. In addition, the OIG would not impose administrative sanctions on [county name redacted], under section 1128A(a)(5) 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 letter or supplemental submissions.

### IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [county 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 [county 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).

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<sup>4</sup> We note that for the same reasons we would not impose sanctions under section 1128A(a)(5) 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 [county 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 [county 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