



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:** August 14, 2013

**Posted:** August 21, 2013

[Name and address redacted]

**Re: OIG Advisory Opinion No. 13-11**

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding two proposed arrangements involving the provision of emergency medical services (“EMS”) for the [township redacted], [state redacted]. Under the first arrangement, a basic life support (“BLS”) ambulance supplier (“BLS Supplier”) would not bill bona fide township residents for otherwise applicable emergency ambulance cost-sharing amounts, but would instead accept payment from the township for such cost-sharing amounts (“Proposed Arrangement A”). Under the second arrangement, BLS Supplier would waive otherwise applicable cost-sharing amounts when providing backup emergency ambulance services to certain patients pursuant to mutual aid partnerships with towns in the surrounding area (“Proposed Arrangement B”). We refer to Proposed Arrangement A and Proposed Arrangement B collectively as the “Proposed Arrangements.” Specifically, you have inquired whether the Proposed Arrangements 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 Arrangements would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) although the Proposed Arrangements 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 Arrangements. This opinion is limited to the Proposed Arrangements 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 [township redacted] (the “Township”) is a legal subdivision of [state redacted], and BLS Supplier is an independent, nonprofit corporation that currently operates as a volunteer first aid squad. BLS Supplier is the only supplier of BLS emergency ambulance services for the Township.<sup>1</sup> BLS Supplier currently provides EMS free of charge by relying on donations and grants from local residents, businesses, and the Township.

Under Proposed Arrangement A, BLS Supplier would begin billing for emergency ambulance services, but would not bill bona fide Township residents (the “Residents”), some of whom are Federal health care program beneficiaries, for otherwise applicable cost-sharing amounts (e.g., co-payments and deductibles). Instead, the Township would use tax revenue to make an annual donation to BLS Supplier in an amount that is an

---

<sup>1</sup> BLS Supplier has provided a brief history of its longstanding operation as the sole first aid squad for the Township in connection with its request for an advisory opinion. No opinion has been sought, and we express no opinion, regarding any of BLS Supplier’s existing or past arrangements with the Township. This opinion is limited solely to the Proposed Arrangements, i.e., the cost-sharing subsidy and mutual aid cost-sharing waivers, and not the parties’ relationship as a whole.

actuarially sound estimate of the Residents' waived cost-sharing amounts for emergency ambulance services rendered in a given year.

Proposed Arrangement B, meanwhile, relates to mutual aid emergency ambulance assistance. BLS Supplier provides mutual aid emergency ambulance assistance to, and receives such assistance from, other EMS suppliers in surrounding towns (the "Mutual Aid Partners"). When providing EMS to residents of their respective towns, some of the Mutual Aid Partners operate on a volunteer basis and provide services free of charge, and some engage in "insurance-only" billing, whereby they waive otherwise applicable cost-sharing obligations for residents of their respective towns.<sup>2</sup> In limited circumstances, BLS Supplier responds to 911 emergency calls and provides backup EMS within another Mutual Aid Partner's town when such mutual aid is needed to address an emergency. The backup emergency ambulance service involves only non-routine, emergency transportation, and thus is provided only on an unscheduled and sporadic basis.

Under Proposed Arrangement B, BLS Supplier would engage in "insurance-only" billing, whereby it would waive otherwise applicable cost-sharing obligations, when providing backup emergency ambulance services for residents of towns where the applicable Mutual Aid Partner either provides EMS free of charge or engages in "insurance-only" billing.

## 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

---

<sup>2</sup> BLS Supplier has not asked for an opinion about, and we express no opinion regarding, any of the Mutual Aid Partners' billing practices for services provided to patients in their respective towns.

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**

The Proposed Arrangements implicate the anti-kickback statute because, under each Proposed Arrangement and as explained more fully below, BLS Supplier 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 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., Special Fraud Alert, 59 Fed. Reg. 65372, 65374 (Dec. 19, 1994). Such waivers may constitute prohibited remuneration to induce referrals. It is in this context that we consider each Proposed Arrangement in turn.

---

<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, 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.

## **1. Proposed Arrangement A**

Under Proposed Arrangement A, the Township would effectively assume the cost-sharing obligations owed to BLS Supplier for its 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 would use the Residents' tax revenues to finance the annual donation, and that payment to BLS Supplier would reasonably approximate the Residents' uncollected cost-sharing obligations, the non-billing of Residents for cost-sharing amounts under Proposed Arrangement A would not constitute a routine waiver that would implicate the anti-kickback statute. Accordingly, we would not impose administrative sanctions arising under the anti-kickback statute on BLS Supplier in connection with Proposed Arrangement A. Nothing in this advisory opinion would apply to waivers of cost-sharing amounts based on criteria other than residency.

## **2. Proposed Arrangement B**

Similarly, we find that Proposed Arrangement B would not involve the routine waiver of cost-sharing obligations because BLS Supplier provides backup EMS on an unscheduled and sporadic basis. Thus, the waivers would occur only occasionally. Because Proposed Arrangement B would not involve the provision of routine ambulance services, but would instead be limited to backup emergency ambulance services, it would 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 emergency ambulance services within the towns of the Mutual Aid Partners, nor the treatment the beneficiaries receive or require, would be related to the existence of Proposed Arrangement B.

Importantly, Proposed Arrangement B is limited to towns where the applicable Mutual Aid Partner is either providing EMS at no charge or waiving cost-sharing obligations for local residents; in these circumstances, there is no expectation on the part of the individuals receiving the backup EMS that they would have cost-sharing obligations. Therefore, BLS Supplier's waiver of such obligations for the isolated instances in which it provides the backup EMS is unlikely to induce the use of those or any other services.

The individuals receiving the waiver under Proposed Arrangement B would, for all intents and purposes, simply be treated the same as any other resident in the Mutual Aid Partner's town who receives EMS transportation. This is distinguishable from arrangements in which a town requires a private company to bill "insurance only" as a condition of getting the town's EMS transportation business, including Medicare business.

Based on the foregoing and the totality of the facts present in the Proposed Arrangements, we are persuaded that the Proposed Arrangements would pose 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 Arrangements would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) although the Proposed Arrangements 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 Arrangements. This opinion is limited to the Proposed Arrangements 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 Arrangements, 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 Arrangements 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 Arrangements 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 Arrangements 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