



*[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:** September 18, 2006

**Posted:** September 25, 2006

[Name and address redacted]

**Re: OIG Advisory Opinion No. 06-12**

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding a municipality's exclusive contract arrangement for non-emergency inter-facility ambulance transport services (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (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.

You have certified that all of the information provided in your request, including all supplementary letters, 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 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, but that 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 Arrangement.

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**

[Name redacted] (the “City”), administers a Protective Services Division comprised of its Fire and Police Departments, which operates an advanced and basic life support emergency medical transport service within the City’s boundary. The City owns and operates its own response vehicles. The Police and Fire Departments are dispatched through a comprehensive emergency and non-emergency dispatch system. Presently, the City does not provide non-emergency inter-facility transport services. Rather, local providers make their own arrangements for such transport and do not use the City’s dispatch system.

As an adjunct to the City’s current emergency medical transport services, the City is considering the Proposed Arrangement under which it would offer non-emergency inter-facility transport services. The City believes that by regulating this service, it can improve the quality of commercial, non-emergency inter-facility medical transport, which would in turn improve the quality of health care services in the City. The City would adopt an ordinance that would make it the exclusive dispatcher and provider of non-emergency medical transport services to or from a healthcare facility, provided that the transport originates within the City’s boundary. The City has received a Certificate of Public Need and Necessity from the relevant county for a non-emergency patient transport license, and the City has certified that it has the legal authority under State and local law to implement the Proposed Arrangement.

The ordinance would also authorize the City to execute an exclusive contract with a medical transport service provider (the “Franchisee”). The City would choose the Franchisee by means of an open procurement process.<sup>1</sup> The City and Franchisee would execute an exclusive franchise agreement (the “Agreement”), under which the Franchisee would be required to respond to all dispatch calls for non-emergency inter-facility transports from the City’s dispatch system, regardless of whether the person needing transport had insurance coverage to pay for the service.

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<sup>1</sup>According to the City, neither State nor local laws require that the City competitively procure this type of service; however, the City has certified that it will do so.

The ordinance would establish a schedule of user fees and charges that would apply to services rendered by the Franchisee. The Franchisee would bill and collect from patients and insurers, including Medicare and Medicaid. Under the Agreement, the services could not be provided on an “insurance only” billing basis, and the Franchisee would have to make a reasonable effort to collect on any cost-sharing amounts or other amounts not actually reimbursed under a patient’s applicable insurance coverage.

The City wishes to undertake the Proposed Arrangement as a pilot program; therefore, the Agreement with the Franchisee would not exceed three years. The Agreement would require the Franchisee to pay a flat fee of \$50,000 per year for each of the three years that the Agreement would be in effect. There would be no other remuneration directly or indirectly from the Franchisee to the City. The City has certified that the annual fee would partially offset the costs to the City of operating that portion of dispatch services and other shared resources of the Protective Services Division solely attributable to the Franchisee’s services, and would reimburse the City for the expense of monitoring and supervising the performance of the Franchisee and for other expenses that the City would incur solely with respect to the Franchisee’s service. The annual fee would not be based on the actual amount of revenue received by the Franchisee for City-related services, nor would it be based on the number of dispatches made.

## II. LEGAL ANALYSIS

### A. Law

The anti-kickback statute makes it a criminal offense knowingly and willfully to 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. United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir.), 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.

## **B. Analysis**

“Pay to play” arrangements, like the one contemplated in the Proposed Arrangement, clearly implicate the anti-kickback statute. The payment of a \$50,000 annual fee to the City for the opportunity to be the exclusive provider of non-emergency inter-facility transport services, the cost of some of which would be payable by a Federal health care program, fits squarely within the language of the anti-kickback statute. Depending on the intent of the parties, the Proposed Arrangement could violate the statute. Notwithstanding, we conclude that a number of factors are present in the Proposed Arrangement that mitigate the risk of Federal health care program fraud or abuse.

First, the Proposed Arrangement would be one part of the City’s comprehensive regulatory scheme to manage the delivery of medical transport services, including both emergency and non-emergency medical transport services. The City has certified that it is a valid governmental entity that has the legal authority under State and local law to become the exclusive provider of non-emergency inter-facility transport services in the City. The City will procure such services pursuant to an open and competitive process. Thus, as with the exercise of any similar municipal power, the City will ultimately be responsible for the quality of the services delivered and accountable to the public through the political process. Municipalities should have sufficient flexibility to organize local medical transport services in an efficient and economical manner.

Second, the City has certified that the annual \$50,000 fee will only partially offset the actual costs of the City’s operation of dispatch services and other shared resources of the Fire Department and Police Department attributable to the Franchisee’s services, and the expense of monitoring and supervising the performance of the Franchisee. As a result, the Franchisee will not be overpaying the source of the referrals, which is the typical anti-kickback concern.<sup>2</sup> Moreover, it is reasonable to expect that the City would seek reimbursement for services it provides to the Franchisee (e.g., dispatch services).

Third, the annual fee will not be tied directly or indirectly to the volume or value of referrals between the parties. The amount of the annual fee will be the same over the course of the three year contract, regardless of the volume or value of business that accrues to the Franchisee. Moreover, the fee will be the same regardless of which medical transport service

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<sup>2</sup>The City would not receive any additional value for its citizens in the form of foregone patient cost-sharing amounts either, since the Franchisee will be required to collect copayments from all the patients it transports, including residents of the City.

provider the City chooses, and there will be no other remuneration offered or paid by the Franchisee to the City.

Fourth, the Agreement's exclusivity should not have an adverse impact on competition. The City has certified that it will employ an open and competitive procurement process. Furthermore, we believe that it is within the City's discretion to conclude that, for administrative and system efficiencies, the Agreement should be awarded to one medical transport service provider pursuant to an open and competitive bidding process.

Fifth, the putative prohibited remuneration (e.g., the City's receipt of the \$50,000 annual fee) inures to the public, and not private, benefit. One of the core evils addressed by kickback and bribery statutes, whether involving public or private business, is the abuse of a position of trust, such as the ability to award contracts or business on behalf of a principal for personal financial gain. Here, having determined that the Proposed Arrangement will improve the quality of health care services in the City, the City will ensure that the public receives the financial benefit of the Proposed Arrangement by arranging for it to receive some reimbursement for the new costs of dispatch and other expenses related to non-emergency inter-facility transports. Moreover, the Proposed Arrangement's requirement that the Franchisee respond to all dispatch calls without regard to whether the person needing the transport has insurance coverage to pay for the service also inures to the public benefit by ensuring that uninsured patients have ready access to non-emergency medical transportation.

Finally, although arrangements for non-emergency transports can give rise to patient steering concerns, we believe the risk of steering is low here. As compared with emergency transports, where circumstances typically dictate that the patient be taken to the nearest provider, the relative lack of exigency in non-emergency transports can create an opportunity to steer patients to a provider favored by the medical transport service provider. Here, however, the non-emergency transports are inter-facility transports, pursuant to which patients would be predestined for a particular facility before the transport is initiated. Under these circumstances, the opportunity for ambulance operators to exercise discretion over the destination of the transport, or otherwise attempt to persuade patients to choose a particular destination, is substantially limited.

In light of these factors, the Proposed Arrangement poses minimal risk of Federal health care program fraud or abuse.

### **III. CONCLUSION**

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that 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, but that 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 Arrangement.

### **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 in any matter involving an entity or individual that is not a requestor of this opinion.
- 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.
- 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 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 [name redacted] with respect to any action 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,

/s/

Lewis Morris  
Chief Counsel to the Inspector General