DEPARTMENT OF HEALTH AND HUMAN SERVICES **Office of Inspector General**

Washington, D.C. 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: March 7, 2007

Posted: March 14, 2007

[Name and address redacted]

Re: OIG Advisory Opinion No. 07-02

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding a hospital's proposal to subsidize the cost of ambulance transportation for patients transported to the hospital from outside the hospital's local area (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for 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 anti-kickback statute.

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 constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act. We also conclude that the Proposed Arrangement could potentially generate prohibited remuneration

under the anti-kickback statute, and that the Office of Inspector General ("OIG") could potentially impose administrative sanctions 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. Any definitive conclusion regarding the existence of an anti-kickback violation requires a determination of the parties' intent, which determination is beyond the scope of the advisory opinion process.

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.

1. FACTUAL BACKGROUND

[Name redacted] ("Requestor") is an integrated nonprofit health care system that includes [name redacted] (the "Hospital") as one of its subsidiaries. The Hospital is a [number redacted]-bed acute care hospital that employs almost 3,000 full-time employees and has more than 1,000 physicians on its medical staff. Requestor has certified that the Hospital is recognized as a leader in cardiovascular services.

From time to time, patients are transferred by ambulance to the Hospital from hospitals outside the Hospital's local area. Requestor has certified that, historically, claims for such transportation services were generally paid by the local Medicare carrier. However, the Medicare carrier began refusing to pay the full amount of these claims, citing Medicare requirements that provide for local ambulance transportation only, except where

non-local transportation is necessary to take the patient to the "nearest institution with appropriate facilities."[1]

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[1]The Medicare Benefit Policy Manual (CMS-Pub. 100-02) provides, at Chapter 10, section 10.3, in relevant part:

> The Destination.– . . . As a general rule, only local transportation by ambulance is covered, and therefore, only mileage to the nearest appropriate facility equipped to treat the patient is covered. However, if two or more facilities that meet the destination requirements can treat the patient appropriately and the locality (see Section 10.3.6 below) of each facility encompasses the place where the ambulance transportation of the patient began, then the full mileage to any one of the facilities to which the beneficiary is taken is covered. Because all duly licensed hospitals and SNFs [skilled nursing facilities] are presumed to be appropriate sources of health care, only in exceptional situations where the ambulance transportation originates beyond the locality of the institution to which the beneficiary was transported, may full payment for mileage be considered, and then, only if the evidence clearly establishes that the destination institution was the nearest one with appropriate facilities under the particular circumstance (see Section 10.3.6 below).
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> 10.3.5. Locality.– The term "locality" with respect to ambulance service means the service area surrounding the institution from which the individuals normally come or are expected to come for hospital or skilled nursing services.
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> EXAMPLE: Mr. A becomes ill at home and requires ambulance service to the hospital. The small community in which he lives has a 35-bed hospital. Two large metropolitan hospitals are located some distance from Mr. A's community but they regularly provide hospital services to the community's residents. The community is within the "locality" of the metropolitan hospitals and direct ambulance service to either of these (as well as the local community hospital) is covered.
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> 10.3.6. Appropriate Facilities.– The term "appropriate facilities" means that the institution is generally equipped to provide the needed hospital or skilled nursing care for the illness or injury involved. . . . The fact that a more distant institution is better equipped, either qualitatively or quantitatively, to care for the patient does not warrant a finding that a closer institution does not have "appropriate facilities." Such a finding is warranted, however, if the beneficiary's condition requires a higher level of trauma care or other specialized service available only at the more distant hospital.

As a result, Requestor reports that patients have been receiving bills from their ambulance suppliers for the uncovered portion of non-local ambulance trips to the Hospital (the "excess mileage"). According to Requestor, this has prompted patient complaints and a disinclination on the part of physicians to order or recommend the transfer of patients to the Hospital if excess mileage charges may result.

The Hospital is exploring the Proposed Arrangement, under which it would contract with various air and ground ambulance suppliers to transport patients to the Hospital from hospitals located outside its locality. The Hospital would pay the ambulance suppliers a negotiated fee for the ambulance services[2] and submit claims for reimbursement directly to third-party payors, including Medicare and Medicaid. Under the Proposed Arrangement, the Hospital would absorb any costs beyond those reimbursed by Medicare and other payors.[3] The Hospital anticipates that most of the patients affected would have cardiac-related conditions, but the Proposed Arrangement would not be limited to cardiac patients, nor would it be based on individual determinations of financial need. The Hospital would not advertise the availability of the subsidized ambulance services to patients.

II. LEGAL ANALYSIS

A. Law

Section 1128A(a)(5) of the Act (the "CMP") provides for the imposition of civil monetary penalties against any person who gives something of value to a Medicare or Medicaid program 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 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 section 1128A(a)(5) as including "the waiver of coinsurance and deductible amounts (or any part thereof) and transfers of items or services for free or for other than fair market value."

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[2]We have not been asked about, and express no opinion regarding, any agreement between the Hospital and an ambulance supplier entered into to effectuate the Proposed Arrangement.

[3]Thus, in addition to absorbing any differential between the cost of local transportation and the cost of transportation to the Hospital, the Hospital would also absorb the cost-sharing portion of the ambulance expense that the patient would owe if the transportation were billed by the ambulance supplier.

The statute contains several specific exceptions, none of which are potentially applicable here.

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

For the following reasons, we conclude that the Proposed Arrangement would potentially violate the anti-kickback statute and the CMP.

First, the payment or subsidy of an expense that would ordinarily be borne by a patient constitutes remuneration to the patient. This is true whether the expense is the additional cost of non-local transportation (e.g., excess mileage charges) or the patient's cost-sharing obligation.

Second, the Proposed Arrangement is likely to influence patients to order or receive items or services reimbursable by Medicare or Medicaid. The Proposed Arrangement may influence the initial and subsequent choice of the Hospital for hospital services. For example, many of the patients who benefit from the Proposed Arrangement will be cardiac patients, who are likely to develop ongoing relationships with a hospital provider. The Proposed Arrangement may also influence patients to choose the Hospital's ambulance suppliers over other suppliers, whether for initial or future ambulance transports. The fact that the subsidized

ambulance services are not advertised directly to patients is not a meaningful safeguard; the availability of the reduced cost services will be known to patients' physicians, who may serve as indirect channels of information dissemination in these circumstances. Moreover, the Proposed Arrangement may operate in conjunction with advertising of the Hospital's inpatient and outpatient services to influence the choice of provider. The Requestor acknowledges that subsidizing patients' costs of ambulance transportation is likely to generate business for the Hospital, including Federal health care program business; indeed, that is the point of the Proposed Arrangement.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement may constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act. We also conclude that the Proposed Arrangement could potentially generate prohibited remuneration under the anti-kickback statute and that the OIG could potentially impose administrative sanctions on the Requestor or the Hospital 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. Any definitive conclusion regarding the existence of an anti-kickback violation requires a determination of the parties' intent, which determination is beyond the scope of the advisory opinion process.

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 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.

Sincerely,

/s/

Lewis Morris
Chief Counsel to the Inspector General