



[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 21, 2008

Posted: October 29, 2008

[Names and addresses redacted]

Re: OIG Advisory Opinion No. 08-18

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding a proposal whereby a medical center that provides emergency medical services transportation in a county would not bill bona fide county residents otherwise applicable cost-sharing amounts for such transportation, but would instead accept payment from the county for such cost-sharing amounts from a fund consisting of tax revenue derived from a special millage (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, the Federal anti-kickback statute, or under the civil monetary penalties provision for illegal remuneration to beneficiaries at section 1128A(a)(5) 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 while 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. In addition, the OIG would not impose administrative sanctions on [names 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.

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] (the “County”) is a legal subdivision of the State of [state name redacted] and [name redacted] (the “Medical Center”) is a [state name redacted] nonprofit corporation that operates a general acute care hospital in the city of [city and state names redacted] and provides ambulance services. The County and the Medical Center are currently parties to an arrangement whereby the Medical Center provides emergency medical services (“EMS”) transportation in the County.¹ Under the Proposed Arrangement, the Medical Center would not bill bona fide County residents (the “Residents”) who receive EMS transportation from the Medical Center for otherwise applicable cost-sharing amounts (e.g., co-payments and deductibles). Instead, the County would pay the otherwise applicable cost-sharing amounts to the Medical Center from tax revenue derived from a special millage and designated by the County to a fund (the “Fund”). The County and the Medical Center have certified that the tax revenue designated to the Fund in each fiscal year would reasonably approximate the annual total cost-sharing obligations of the Residents in each fiscal year.

¹ The County and the Medical Center have provided a brief history of their existing and past arrangements concerning EMS transportation. No opinion has been sought, and we express no opinion, regarding any of the County’s existing or past arrangements with the Medical Center. This opinion is limited solely to the Proposed Arrangement, i.e., the cost-sharing subsidy, and not the parties’ relationship as a whole.

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.

Section 1128A(a)(5) of the Act provides for the imposition of civil monetary penalties against any person who gives something of value 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).²

² 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.

B. Analysis

Under the Proposed Arrangement, the Medical Center would not bill the Residents for cost-sharing amounts owed for EMS transportation. 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.

However, in the Proposed Arrangement, the County would effectively assume the cost-sharing obligations owed to the Medical Center for the Residents. The County's Fund appears calculated reasonably to approximate the Residents' uncollected cost-sharing obligations in connection with their use of EMS transportation. Because the Fund would reasonably approximate the cost-sharing obligations and because the County would collect from, and pay cost-sharing amounts on behalf of, the Residents, the Proposed Arrangement's non-billing of the Residents would not constitute a routine waiver of coinsurance that would implicate the anti-kickback statute. For these reasons, we would not impose administrative sanctions arising under the anti-kickback statute on the County or the Medical Center in connection with the Proposed Arrangement.³ 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 while 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. In addition, the OIG would not impose administrative sanctions on [names 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.

³ We note for the same reasons we would not impose sanctions under section 1128A(a)(5) of the Act.

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 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 [names 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 [names 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,

/Lewis Morris/

Lewis Morris
Chief Counsel to the Inspector General