



[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: April 23, 2009

Posted: April 30, 2009

[Names and addresses redacted]

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding an arrangement whereby three municipalities reciprocally waive otherwise applicable cost-sharing obligations of individuals residing within each other's borders when providing backup emergency medical services ("EMS") transportation to such individuals (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute grounds for the imposition of sanctions under the civil monetary penalties provision for illegal remuneration 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 Arrangement would not constitute grounds

for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) 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 the Village of [Village and State names redacted]; the Village of [Village and State names redacted]; or the Village of [Village and State 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. 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 the Village of [Village and State names redacted]; the Village of [Village and State names redacted]; and the Village of [Village and State 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

The Village of [Village and State names redacted]; the Village of [Village and State names redacted]; and the Village of [Village and State names redacted] (the “Requestors”), are municipal corporations organized under the laws of the state of [State name redacted]. They are adjacent to each other. Each of the Requestors owns a municipal ambulance service, operated by its fire department, which provides emergency ambulance services within its borders 24 hours a day, seven days a week. The Requestors’ ambulance services do not provide non-emergency ambulance transports. Pursuant to their respective village ordinances, each of the Requestors charges a fee for each use of its emergency ambulance. If a Medicare beneficiary uses the ambulance service, Medicare pays a portion of the fee, and a copayment is owed by the beneficiary. Each Requestor has elected to treat revenues derived from local taxes as payment-in-full of any copayments or deductibles due from insured residents, including residents who are Federal health care program beneficiaries.

The Requestors are parties to a written mutual aid agreement (the “Mutual Aid Agreement”),¹ pursuant to which they provide backup EMS transportation within each other’s boundaries when the vehicles and crews of the home village are otherwise engaged or for any other reason unable adequately to respond to emergency “911” calls. This emergency backup EMS transportation is provided to Federal health care program

¹ No opinion has been sought, and we express no opinion, regarding the Mutual Aid Agreement.

beneficiaries, among others. The backup EMS transportation only involves non-routine, emergency transportation and thus is only provided on an unscheduled and sporadic basis.

Under the Proposed Arrangement, the residents of the Requestors would be billed consistently for ambulance services in their respective home villages, regardless of which Requestor's fire department provides the emergency medical services they receive. When a Requestor would provide backup EMS transportation on behalf of another Requestor, the Requestor providing the transportation would adopt the billing practice of the village in which the transportation was provided.² Thus, the Requestor would bill the transported individual's insurer, but waive the individual's otherwise applicable cost-sharing obligations.

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.

² No opinion has been sought, and we express no opinion, regarding any of the Requestors' billing practices toward their own residents.

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 "transfers of items or services for free or for other than fair market value."

B. Analysis

The Requestors' practice of "insurance only" billing under the Proposed Arrangement may implicate the anti-kickback statute to the extent that it constitutes a limited waiver of Medicare or other Federal health care program cost-sharing obligations. Our concern about potentially abusive waivers of Medicare cost-sharing obligations is longstanding. For example, we have previously stated that providers that routinely waive Medicare cost-sharing obligations 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 under the anti-kickback statute, as well as a violation of the civil monetary penalty prohibition on inducements to beneficiaries, section 1128A(a)(5) of the Act. Notwithstanding, in the circumstances presented in the Proposed Arrangement, the risk of such prohibited remuneration is minimal for several reasons.

First, the Proposed Arrangement does not involve the routine waiver of cost-sharing obligations because the Requestors provide the backup EMS transportation on an unscheduled and sporadic basis. Thus the waivers only occur occasionally.

Second, because the Proposed Arrangement does not involve the provision of routine, non-emergency transportation services, but is instead limited to backup EMS transportation, it does 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 EMS transportation within the geographic limits of the Requestors, nor the treatment the beneficiaries receive or require, is related to the existence of the Proposed Arrangement.

Third, because each Requestor waives cost-sharing obligations when it provides EMS transportation, there is no expectation on the part of the individuals receiving the backup EMS transportation that they would have cost-sharing obligations. Therefore, the

Requestor's waiver of such obligations for the isolated instances in which it provides the backup EMS transportation is unlikely to induce the use of those or any other services.

Finally, the underlying nature of the Proposed Arrangement—including, but not limited to, the fact that the waivers are not routine, the Requestors are local governments engaged in a mutual aid arrangement for backup EMS transportation, and the individuals receiving the waiver are, for all intents and purposes, simply being treated the same as any other individual in the Requestors' jurisdictions who receives EMS transportation—distinguishes it from arrangements in which a municipality requires a private company to bill "insurance only" as a condition of getting the municipality's EMS transportation business, including Medicare business.

Based on the foregoing and the totality of the facts present in the Proposed Arrangement, we are persuaded that the Proposed Arrangement poses 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 Arrangement would not constitute grounds for the imposition of civil monetary penalties under section 1128A(a)(5) of the Act; and (ii) 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 the Village of [Village and State names redacted]; the Village of [Village and State names redacted]; or the Village of [Village and State 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. 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 the Village of [Village and State names redacted]; the Village of [Village and State names redacted]; and the Village of [Village and State 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 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 would not proceed against the Village of [Village and State names redacted]; the Village of [Village and State names redacted]; or the Village of [Village and State 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 would not proceed against the Village of [Village and State names redacted]; the Village of [Village and State names redacted]; or the Village of [Village and State 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