



[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 6, 2009

Posted: March 13, 2009

[Name and address redacted]

Re: OIG Advisory Opinion No. 09-01

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding a complimentary local transportation program for friends and family of residents of a skilled nursing facility (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 Federal 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: (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 [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 “Requestor”) is a not-for-profit skilled nursing facility located in [City redacted], [State redacted]. The sole corporate member of the Requestor is [Name redacted], a large, not-for-profit integrated health care system serving the greater [City redacted] metropolitan area.

The Requestor proposes to offer complimentary local transportation for friends and families of its residents to its nursing facility under the Proposed Arrangement. According to the Requestor, its facility is not easily accessible by public transportation for family and friends living within its primary historical service area, especially those living in [City redacted], [State redacted]. The Requestor’s facility is separated from part of its primary historical service area by the [Name redacted] Bridge, which requires a \$9.00 toll. The Requestor will provide the transportation in a van it owns that will be driven by an employee of the Requestor. The Requestor will only transport friends and family of Requestor’s residents and will pick up and drop off passengers at designated public locations within the Requestor’s primary historical service area. Transportation will only be provided to and from the designated public locations and the Requestor’s premises.¹

The Proposed Arrangement will be offered uniformly to all of Requestor’s residents, regardless of a resident’s income level, a resident’s source of payment for Requestor’s services, or the level of care provided to the resident. The Requestor will not charge passengers or any third party payor for the transportation. It will not claim the costs of the transportation directly or indirectly on any Federal health care program cost report, or

¹ The Requestor will attempt to accommodate requests for door-to-door transportation if a transportation recipient is unable to get to a designated pick-up location because of disability.

claim, or otherwise shift them to any Federal health care program. The Requestor anticipates that the aggregate value of the transportation services to the families and friends of residents may exceed \$50 on an annual basis.

The Requestor will only advertise the Proposed Arrangement within its primary service area. The Requestor will inform local hospital discharge planners about the availability of the Proposed Arrangement. The Requestor has certified that it will only place advertisements within a few community newspapers² and in handbooks and/or written materials provided to patients by discharge planners at hospitals located within Requestor's primary service area. The Requestor also will inform residents about the Proposed Arrangement.

Finally, the Requestor certified that it will operate the Proposed Arrangement in accordance with a written policy setting forth the operational requirements of the Proposed Arrangement.

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

²The Requestor will advertise the Proposed Arrangement in the [Newspaper name redacted] and three local community [City redacted] newspapers. The Requestor will not advertise the Proposed Arrangement through radio or television media outlets.

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 (the “CMP”) 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.” The OIG has previously taken the position that “incentives that are only nominal in value are not prohibited by the statute,” and has interpreted “nominal value to be no more than \$10 per item, or \$50 in the aggregate on an annual basis.” 65 F.R. 24400, 24410 – 24411 (April 26, 2000) (preamble to the final rule on the CMP). In addition, in the Conference Committee report accompanying the enactment of section 1128A(a)(5), Congress expressed its intent that, with respect to allowable remuneration, the statute should not preclude the provision of items and services of nominal value, including complimentary local transportation services. (See H. R. Conf. Rep. No. 104-736, at 255 (1996) reprinted in 1996 U.S.C.C.A.N. 1990, 2069).

B. General Observations

The following general observations are relevant in analyzing arrangements where providers or suppliers³ offer free transportation to potential sources of Federal health care program business, including beneficiaries who self-refer.⁴

Many arrangements involving free transportation have important and beneficial effects on patient care, especially where such arrangements are narrowly tailored to address issues

³ For purposes of this opinion, when we use the term “provider” it shall mean providers and/or suppliers that furnish items or services payable by Federal health care programs.

⁴ See also OIG Supplemental Compliance Program Guidance for Hospitals, 70 F.R. 4858, 4867 (January 31, 2005), available at <http://oig.hhs.gov/fraud/docs/complianceguidance/012705HospSupplementalGuidance.pdf>; OIG Letter Clarifying the Provision of Complimentary Local Transportation for Program Beneficiaries, available at <http://oig.hhs.gov/fraud/docs/alertsandbulletins/LocalTransportation.pdf>.

of financial need, limited transportation resources, treatment compliance, or safety. Free transportation services are also sometimes an integral part of fraudulent or abusive schemes that lead to inappropriate steering of patients, overutilization, and the provision of medically unnecessary services. Examples of potentially abusive arrangements involving free transportation services include:

- Providers offering out-of-state patients free transportation to receive services at their facilities;
- Van drivers soliciting, and offering free transportation services to, Medicaid patients for health care providers who compensate the drivers on a per patient or per service basis;
- Providers offering residents of nursing facilities and other congregate care facilities free transportation services to and from their offices for services of questionable necessity;
- Providers offering patients free limousine services;
- Hospitals or other providers offering patients free ambulance services without making individual determinations of financial need; and
- Hospitals or other providers inducing referrals from physicians by offering the physicians' patients free transportation to the physicians' offices or to a facility where the physician furnishes services.

Given their potential for abuse, arrangements involving free or below fair market value transportation services must be evaluated on a case-by-case basis. We have identified several analytical factors to consider, including, but not limited to, the following:

- **Transportation offered in a manner related to referrals.** Selective criteria related to the volume or value of Federal health care program business are suspect. Examples of suspect criteria include the selection of passengers based upon a diagnosis, condition, or treatment that might result in lucrative revenues to the offeror or selection based on a patient's insurance coverage.
- **Luxury or specialized transportation.** Luxury or specialized transportation, such as limousines, airline tickets, or ambulance transports, raise greater concerns because such transports are more valuable to the recipient and therefore more likely to be an improper inducement.

- **Geographic area for transportation.** Local transportation services are typically less valuable to the recipient than longer-distance transports. Free transportation services offered to beneficiaries residing outside an offeror's primary service area are subject to abuse, particularly if the free transportation is used to expand the provider's historical service area. For example, "leap-frog" arrangements that provide free or subsidized transportation to beneficiaries traveling from outside the provider's local area, potentially bypassing other providers that could provide services for the beneficiary, are problematic.
- **Availability of other means of transportation.** When examining free transportation services, we consider whether services are offered in areas lacking public transportation or areas without affordable alternatives. Free local transportation arrangements in areas lacking affordable alternative transportation are less likely to be vehicles for generating referrals.
- **Marketing or advertising.** When a free transportation arrangement is marketed or advertised, there is greater risk that the arrangement is being offered as an inducement for referrals.
- **Transportation destination.** Free transportation provided to or from the offeror's premises may be appropriate based on the totality of the facts and circumstances. However, free transportation of beneficiaries to a different provider raises concerns. The transportation could be an inducement for referrals from the provider to the offeror of the transportation.
- **Treatment of the costs of the free transportation.** Costs of free transportation should be borne by the provider of the transportation. Arrangements that shift costs to Federal health care programs are suspect.
- **Other characteristics that raise concerns.** Where the offeror of the free transportation is also a provider that will provide Federally payable items and services to passengers, there is increased risk that the provider could be using free transportation services to gain access to beneficiaries, potentially to provide services that are unnecessary or inappropriate. For example, we have a long-standing concern about Medicare and Medicaid mills that provide free transportation to attract patients.

These factors are not exclusive. No one factor is necessarily determinative or probative of whether an arrangement violates the applicable statutes. We analyze these factors, as well as other relevant concerns, in assessing the level of fraud and abuse risk presented by a complimentary transportation arrangement.

C. Analysis of the Proposed Arrangement

The Proposed Arrangement, whereby the Requestor will provide free local transportation to friends and families of its nursing home residents, does not present the usual circumstances involving free transportation where the passengers are patients obtaining treatment. Nonetheless, the Proposed Arrangement potentially implicates the anti-kickback statute and the CMP prohibiting inducements to Medicare and Medicaid beneficiaries, because some of the transportation will be provided to members of a resident's household. This may result in an actual or expected economic benefit to the resident in the form of savings on household transportation costs.⁵ The value of the transportation per household may exceed \$50 on an annual basis. However, for a combination of the following reasons, we would not subject the Requestor to administrative sanctions under the CMP or the anti-kickback statute in connection with the Proposed Arrangement.

First, the Proposed Arrangement will not involve transportation: (i) for Requestor's residents to obtain Federally-payable items or services from the Requestor, its affiliates or any other provider; or (ii) for the benefit of Requestor's referral sources, such as physicians or other providers.

Second, the Proposed Arrangement will not selectively limit eligibility to targeted populations of Federal health care program beneficiaries. Friends and families of all of Requestor's residents will be able to utilize the transportation services uniformly.

Third, the type of transportation under the Proposed Arrangement will be reasonable. Transportation offered will not include expensive transports such as limousines. The service will be provided by a van owned by the Requestor and driven by an employee of the Requestor.

Fourth, the Proposed Arrangement will only be offered locally.

Fifth, The Requestor will only advertise the Proposed Arrangement locally. The Requestor will only advertise within a few community newspapers and through handbooks and/or written materials provided to patients by discharge planners at local hospitals. The Requestor will also notify residents. This marketing will be reasonably limited and conducted in a manner consistent with the limited nature of the local transportation the Requestor will provide.

⁵ The likelihood that the Proposed Arrangement might induce a passenger to choose the Requestor as his or her Medicare or Medicaid nursing facility in the future is too speculative to constitute an impermissible inducement here.

Sixth, the Requestor certified that the availability of local public transportation is limited. The Requestor's separation from part of its primary service area by a toll bridge further limits transportation options.

Seventh, the Proposed Arrangement will be consistent with the Requestor's mission as a nursing home to provide residents with quality care in a residential setting through increased companionship resulting from access to residents' friends and families.

Finally, the cost of the transportation will not be claimed directly or indirectly on any Federal health care program cost report or claim or otherwise shifted to any Federal health care program.

Therefore, for a combination of all of these reasons, we would not subject the Requestor to sanctions in connection with the CMP or the anti-kickback statute for the Proposed Arrangement.

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 Requestor 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 the Requestor 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 the Requestor 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