



DEPARTMENT OF HEALTH AND HUMAN SERVICES

## OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 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:** September 4, 2012

**Posted:** September 11, 2012

[Name and address redacted]

### **Re: OIG Advisory Opinion No. 12-11**

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding an ambulance supplier's proposal to routinely waive cost-sharing amounts for emergency medical services ("EMS") rendered on a part-time basis (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.

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 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 [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. 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.

## **I. FACTUAL BACKGROUND**

[Name redacted] ("BLS Supplier") provides basic life support ("BLS") ambulance services in [State redacted] (the "State"). The majority of the State's BLS emergency ambulance suppliers are volunteer first aid squads, although other nonprofit and for-profit entities, including BLS Supplier, also provide BLS emergency ambulance services. In the municipalities in BLS Supplier's proposed service area, volunteer first aid squads that provide BLS emergency ambulance services do not typically charge residents for cost-sharing amounts associated with emergency ambulance transports.<sup>1</sup>

When volunteer first aid squads are unable to respond to 911 calls, other BLS ambulance suppliers may provide back-up or part-time emergency transportation services. For example, when the volunteer first aid squad is staffed to respond to 911 calls during specific hours of operation, but is unable to respond to a particular call, the dispatch will switch the call to a back-up BLS supplier that is available to respond. The EMS provided by the back-up BLS supplier in such circumstances is referred to herein as "Back-Up Emergency Ambulance Services." In other instances, a volunteer first aid squad notifies the dispatch in advance that it will be unable to cover certain blocks of time (e.g., 9 a.m. to 5 p.m. on a weekday), and another BLS supplier provides primary coverage during the designated time slots. The EMS provided by the secondary BLS supplier in such circumstances is referred to herein as "Part-Time Emergency Ambulance Services."

Under the Proposed Arrangement, BLS Supplier would enter into agreements with various municipalities to provide Part-Time Emergency Ambulance Services. BLS Supplier would bill Medicare and other third-party insurers for these transports, but would waive all cost-sharing amounts, a practice known as "insurance-only" billing. BLS Supplier certified that the municipalities are requiring it to waive all cost-sharing amounts owed by the municipalities' residents as a condition of providing the Part-Time Emergency Ambulance Services. The municipalities would not pay BLS Supplier the waived cost-sharing amounts on their residents' behalf.

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<sup>1</sup> We have not been asked to opine on, and express no opinion about, the volunteer first aid squads' billing practices for their emergency transports.

## II. LEGAL ANALYSIS

### A. Law

The anti-kickback statute makes it a criminal offense to knowingly and willfully 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. See, e.g., United States v. Borrasi, 639 F.3d 774 (7th Cir. 2011); United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000); United States v. Davis, 132 F.3d 1092 (5th Cir. 1998); United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir. 1985), 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

Our concerns regarding routine waivers of Medicare cost-sharing amounts are 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: Routine Waiver of Copayments or Deductibles Under Medicare Part B, 59 Fed. Reg. 65,372, 65,374 (1994). Such waivers may constitute prohibited remuneration to induce referrals.

Under the Proposed Arrangement, the municipalities would effectuate the routine waiver of cost-sharing amounts by: (1) requiring BLS Supplier to bill residents “insurance only,” and (2) not paying owed cost-sharing amounts on their residents’ behalf. In short, if the municipalities wish to assume cost-sharing obligations owed to an independent ambulance supplier, such as BLS Supplier, for ambulance services provided to their residents on a part-time basis, they must pay the owed amounts. Failure on the part of the

municipalities to make the payments—or to permit BLS Supplier to bill residents for them—implicates the anti-kickback statute.<sup>2</sup>

In its request for an advisory opinion, BLS Supplier noted that in OIG Advisory Opinion 99-1 (January 27, 1999), we reviewed the waiver of copayments and deductibles by an entity that provided Back-Up Emergency Ambulance Services in situations where no volunteer first aid squad was available to respond. In that advisory opinion, we stated that we would not impose sanctions against the requestor in connection with such waivers, under section 1128(b)(7) or section 1128A(a)(7) of the Act. In the arrangement described in that advisory opinion, among other things, the volunteer first aid squad was at all times the primary supplier of BLS emergency ambulance services, and back-up services were provided only in isolated and unanticipated circumstances where the volunteer first aid squad was unavailable (e.g., where the volunteer first aid squad was already preoccupied responding to existing calls in its service area). Here, BLS Supplier would itself be the primary supplier of BLS emergency ambulance services during designated time slots. The Proposed Agreement to provide BLS emergency services on a scheduled basis as the primary supplier of emergency ambulance services, even if part-time, distinguishes the facts of the Proposed Arrangement from those of OIG Advisory Opinion 99-1.

We note that insurance-only billing by municipalities that operate their own emergency ambulance services raises different questions not addressed here. There is an important difference between a municipally-owned ambulance company voluntarily waiving cost-sharing amounts for its own residents and a municipality requiring a private company to bill “insurance only” as a condition of getting the municipality’s part-time EMS business, including Medicare business.<sup>3</sup>

### **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 and that the OIG could potentially 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. 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.

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<sup>2</sup> See OIG Advisory Opinion 01-12 (July 20, 2001).

<sup>3</sup> See Centers for Medicare & Medicaid Services, Medicare Benefit Policy Manual Chapter 16, section 50.3.1; see, e.g., OIG Advisory Opinion 11-13 (September 6, 2011).

#### 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 by a person or entity other than [name redacted] to prove that the person or entity did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.
- 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 (or that provision's application to the Medicaid program at section 1903(s) 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,

/Gregory E. Demske/

Gregory E. Demske  
Chief Counsel to the Inspector General