



[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: June 11, 2010

Posted: June 18, 2010

[Name and address redacted]

Re: OIG Advisory Opinion No. 10-09

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding a proposal by a state and county health services district to transfer funds to the county in which it operates a hospital to support construction of a new communications and emergency operations center (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 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 is limited to the Proposed Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

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] (“Requestor”) is a health services district in [county redacted] (the “County”), [state redacted], formed by County ordinance pursuant to authority granted by [state code citation redacted]. Requestor is a political subdivision of both the County and [state redacted] operating under the authority of [state redacted]. Requestor operates an acute care hospital (the “Hospital”) whose patients include Federal health care program beneficiaries.¹ The Hospital is the only hospital in the County; however, there are three other hospitals within ten miles of the Hospital. Pursuant to [state redacted] Code and County ordinance, the Hospital is managed by Requestor’s board of twenty-one directors, twenty of whom are appointed by the County Council.

The County operates an Emergency Medical Services (“EMS”) transport service that responds to emergency 9-1-1 calls and picks up patients with emergency medical conditions for transport to hospitals. The County EMS transport service makes transport decisions based on and consistent with the mandatory Trauma Field Triage Decision Scheme, which was approved by [state agency redacted]. Pursuant to County EMS procedures and practice, if a patient’s case does not fall within the Trauma Field Triage Decision Scheme, County EMS personnel allow the patient to decide where to be taken. If the patient expresses no preference, the patient is transported to the nearest provider. In most cases the Hospital will be the closest hospital to patients calling the EMS transport service from within the County.

The County also operates an emergency operations center, which receives and handles all police, fire, and medical emergency calls in the County. When the operations center

¹ Requestor, through its affiliates, operates a County-wide health care network but it does not have an ownership interest in any ambulance service.

receives a call relating to a medical emergency, it dispatches a County EMS ambulance or a subcontracted ambulance.

The County is considering constructing a new \$7.5 million communications and emergency operations center (the “New Operations Center”) to house the functions of the existing emergency operations center as well as general County communications capabilities. The County is vulnerable to significant weather events, including hurricanes and tornadoes. Under the Proposed Arrangement, Requestor would fund \$2.5 million of the cost of the New Operations Center, an amount that the County informed Requestor represents the portion of the cost to harden the structure to withstand both Category 5 hurricanes and Level 5 tornadoes. Requestor would provide funding in five equal grants over a five-year period.

Requestor states that the New Operations Center offers potential benefits, such as: integrated emergency management, including better disaster intelligence information sharing between Requestor and the operations center; upgraded emergency communications equipment and connections; and the ability of the County to participate in the National Disaster Medical System, meaning that Requestor could accept patients from outside of the area in the event of a significant regional or national emergency.

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. 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

A monetary grant by an entity that operates a hospital to an entity that provides EMS ambulance services that may take patients to that hospital implicates the anti-kickback statute, if an intent to induce referrals of services or other business for which payment may be made under a Federal health care program is present. Notwithstanding this fact, we conclude that a number of factors, in combination, would be present in the Proposed Arrangement to mitigate the risk of Federal health care program fraud or abuse, while providing significant benefits to the community.

First, the Proposed Arrangement contemplates a series of grants to the County from a related governmental entity that is itself a political subdivision of the County, amounting to an intra-governmental shifting of resources that are already part of the public fisc. Both parties play a role in the delivery of healthcare in the County: Requestor is a health services district operating a public hospital in accordance with County ordinance and State law; the County manages the delivery of EMS transport services. Governmental entities acting within the scope of their authority should have sufficient flexibility to organize EMS transport services for their constituents.

Second, the putative prohibited remuneration, *i.e.*, the \$2.5 million in grants, will inure to the public, and not private, benefit. One of the core evils addressed by kickback and bribery statutes, whether involving public or private business, is the abuse of a position of trust, such as the ability to award contracts or business on behalf of a principal for personal financial gain. Here, Requestor's grant will inure to the County's citizens in the form of improved emergency services.

Third, the Proposed Arrangement presents little risk of overutilization, steering, or increased costs to any Federal health care program. The frequency and volume of 9-1-1 emergency calls are inherently unpredictable, and the number of patients requiring EMS transport services therefore will be unrelated to the grant. The risk of steering is low: 9-1-1 dispatched emergency transports in the County are governed by a State-approved protocol; when a case does not fall within the protocol, County EMS procedures and practice allow the patient to decide where to be taken, or, in cases where the patient expresses no preference, dictate that the patient be taken to the nearest provider. For these reasons, the Proposed Arrangement presents a low risk of inappropriate steering or increased costs to any Federal health care program.

Finally, the Proposed Arrangement promises to offer significant benefits to the residents of the County. In addition to financing the New Operations Center, which would be able to withstand both Category 5 hurricanes and Level 5 tornadoes, Requestor has certified that the Proposed Arrangement would integrate emergency management between Requestor and the operations center, improve disaster intelligence information sharing between Requestor and the operations center, and provide upgraded emergency communications equipment and connections.

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 [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 is limited to the Proposed Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

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 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