DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of Inspector General
Washington, D.C. 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: July 20, 2001

Posted: July 26, 2001

[Name and address redacted]

Re: OIG Advisory Opinion No. 01-10

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion about a political subdivision of a State that owns and operates an ambulance service and that treats the operating revenues received from local taxes as payment of otherwise applicable copayments and deductibles due from the residents (the "Proposed Arrangement"). You have asked 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, or under the civil monetary penalties provision for illegal remuneration to beneficiaries, section 1128A(a)(5) of the Act.

You have certified that all of the information you provided in your request, including all supplementary letters, is true and correct, and constitutes a complete description of the material facts regarding the Proposed Arrangement. 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 would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the Office of Inspector General ("OIG") would not impose administrative sanctions on [name of requestor redacted] (the "Requestor" or "Fire District") 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 the Requestor under section 1128A(a)(5) of the Act in connection with the Proposed Arrangement.

This advisory opinion may not be relied on by any person other than [name of requestor redacted] and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

The Fire District is a political subdivision of the State of [name of state redacted] that provides fire suppression, fire protection, and emergency medical services – specifically advanced and basic life support services – in certain areas of [name of county redacted] County.[1]

Currently, the Fire District provides emergency medical services free of charge to residents of the Fire District ("Residents"). The Fire District bills neither Residents, nor their insurers.[2] By contrast, the Fire District bills individuals residing outside of the Fire District ("Non-residents") and their insurers for emergency medical services provided within the Fire District.

The Fire District now proposes to bill Residents or their insurers, including the Federal health care programs, but only to the extent of their insurance coverage (i.e., no out of

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[1]Pursuant to an ordinance, the Fire District may subcontract the provision of emergency medical services to another entity. However, the Fire District is currently the exclusive provider of emergency medical services for its service area and does not anticipate subcontracting to other entities. For purposes of this advisory opinion, a decision by the Fire District to subcontract the provision of emergency medical services to another entity would be deemed to be a material change in the facts presented and result in this advisory opinion being without force and effect.

[2]The Fire District funds its operations primarily through ad valorem real estate and personal property taxes.

pocket costs) and to treat the revenues received from local taxes as payment of any otherwise applicable copayments and deductibles due from the Residents (i.e., "insurance only" billing).

II. LEGAL ANALYSIS

A. Law

The anti-kickback statute makes it a criminal offense knowingly and wilfully to offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by Federal health care programs. See section 1128B(b) of the Act. Where remuneration is paid purposefully to induce referrals of items or services paid for 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, in cash or in-kind, directly or indirectly, covertly or overtly.

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.

In addition, section 1128A(a)(5) of the Act provides for the imposition of civil monetary penalties against any person who:

> offers or transfers remuneration to any individual eligible for benefits under [Medicare or a State health care program] that such person knows or should know is likely to influence such individual to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, under [Medicare or a State health care program].

See also 65 Fed. Reg. 24400, 24416 (April 26, 2000) (to be codified at 42 C.F.R. § 1003.102(b)(13)). For purposes of section 1128A(a)(5) of the Act, "remuneration" includes, inter alia, the waiver of copayment and deductible amounts (or any part thereof). The statute contains certain exceptions to the definition of remuneration for certain waivers of copayment and deductible amounts that are not advertised, that are not routine, and that are granted to financially needy patients or for which reasonable collection efforts have been made. See section 1128A(i)(6) of the Act.

B. Analysis

The "insurance only" billing under the Proposed Arrangement may implicate the anti-kickback statute to the extent that it constitutes a limited waiver of copayment and deductible amounts. Our concern about potentially abusive waivers of Medicare copayments and deductibles under the anti-kickback statute is longstanding. For example, we have previously stated that providers who routinely waive Medicare copayments or deductibles 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. 65374 (Dec. 19, 1994). Such waivers may constitute prohibited remuneration to induce self-referrals under the anti-kickback statute and a violation of the civil monetary penalty for inducements to beneficiaries.

However, there is a special rule for providers and suppliers that are owned and operated by a State or a political subdivision of a State, such as a municipality or a fire district. CMS Carrier Manual section 2309.4 provides that:

> a [State or local government] facility which reduces or waives its charges for patients unable to pay, or charges patients only to the extent of their Medicare and other health insurance coverage, is not viewed as furnishing free services and may therefore receive program payment.

CMS Carrier Manual section 2309.4; see also CMS Intermediary Manual section 3153.3A. Notwithstanding the use of the term "facility", the Centers for Medicare and Medicaid Services ("CMS") – formerly the Health Care Financing Administration – has confirmed that this provision would apply to a State or municipal ambulance company that is a Medicare Part B supplier.

Accordingly, since the Medicare Program does not require the Fire District (a political subdivision of a State) to collect copayments or deductibles from residents, we would not impose sanctions under the anti-kickback statute or section 1128A(a)(5) of the Act where

the waiver is implemented by the Fire District categorically for bona fide residents of the Fire District. Nothing in this advisory opinion would apply to copayment or deductible waivers based on criteria other than residency.

We note that these provisions of the CMS manuals apply only to situations in which the governmental unit is the ambulance supplier; they do not apply to contracts with outside ambulance suppliers. For example, where a municipality contracts with an outside ambulance supplier for the provision of services to residents of its service area, the municipality cannot require the ambulance supplier to waive out-of-pocket coinsurance amounts unless the municipality pays the coinsurance owed or otherwise makes provisions for the payment of such coinsurance. See OIG Advisory Opinion 01-12 (July 20, 2001). There is an important difference between a municipally owned ambulance company voluntarily waiving copayments for its own residents and a municipality requiring a private company to bill "insurance only" as a condition of getting the municipality's EMS business, including Medicare business. Lump sum or periodic payments by the municipality, on behalf of residents or others, may be permitted if the payments are reasonably calculated to cover the expected uncollected coinsurance obligations.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the OIG would not impose administrative sanctions on [name of requestor 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 [name of requestor redacted] under section 1128A(a)(5) 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 of requestor 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 to this opinion.

- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is herein expressed or implied 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.

- 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, 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,

/s/

D. McCarty Thornton
Chief Counsel to the Inspector General