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: May 21, 2003

Posted: May 28, 2003

[name and address redacted]

Re: OIG Advisory Opinion No. 03-11

Dear [name redacted]:

We are writing in response to your request for an advisory opinion concerning an ambulance company's collection of a fixed annual subscription fee in lieu of Medicare Part B cost-sharing amounts from its members (the "Arrangement"). Specifically, you have asked whether the 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 at section 1128A(a)(5) of the Act.

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 the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce or reward referrals were present, but that the Office of Inspector General ("OIG") would not impose administrative sanctions on [name redacted] under section 1128A(a)(5) of the Act or under section 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 Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any other agreements or any other arrangements disclosed or referenced in your request letter or supplemental submissions.

This opinion may not be relied on by any persons other than [name redacted] (the "Requestor"), 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

The Requestor is a nonprofit corporation that provides emergency ambulance services. The Requestor has operated since 1963 on a subscription basis and has two classes of subsribers: individuals who pay an annual $20 subscription fee and businesses that pay annual subscription fees proportionate to their size ($30 for those with fewer than 12 employees; $50 for those with 12 or more employees).

The Requestor does not collect Medicare Part B cost-sharing amounts from its subscribers (other than supplemental insurance coverage of the subscriber's obligations), but does collect such balances from non-subscribers through its contracted billing agent.

The Requestor has certified that the subscription revenues collected from its subscribers currently exceed, in the aggregate, the cost-sharing amounts waived for all subscribers, and that the subscription revenues collected from all subscribing Medicare Part B beneficiaries currently exceed, in the aggregate, the cost-sharing amounts waived for the subscribing Part B beneficiaries.

II. 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 federal health care programs. 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, 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.

III. LEGAL ANALYSIS

The Arrangement may implicate the anti-kickback statute to the extent that it might be construed as a routine waiver of Medicare Part B cost-sharing amounts. In evaluating the risk, the threshold concern is whether, in the aggregate, (i) the subscription fees collected from subscribers reasonably approximate the amounts that the subscribers would expect to spend for cost-sharing amounts over the period covered by the subscription agreement, *or* (ii) the amounts collected from subscribing Medicare Part B beneficiaries reasonably approximate the amounts that the subscribing Medicare Part B beneficiaries would expect to spend for cost-sharing amounts. If the subscription amounts are not actuarially or historically reasonable in comparison to the uncollected cost-sharing amounts under one of the two alternatives noted above, then we would view the subscription plan as a potentially illegal practice to disguise the routine waiver of Medicare Part B cost-sharing amounts.

In this case, the subscription amounts collected by the Requestor from participating Medicare beneficiaries in the aggregate exceed the amounts that the Medicare Part B beneficiaries would be expected to spend for Medicare Part B cost-sharing over the period covered by the subscription agreement. Accordingly, we would not subject the Arrangement to administrative sanctions under the anti-kickback statute or section 1128A(a)(5) of the Act.

IV. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce or reward referrals were present, but that the OIG would not impose administrative sanctions on [name redacted] under section 1128A(a)(5) of the Act or 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 Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any other agreements or any other arrangements disclosed or referenced in your request letter or supplemental submissions.

V. 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, 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 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 will not proceed against [name redacted] with respect to any action that is part of the 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 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 [name 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,

/s/

Lewis Morris
Chief Counsel to the Inspector General