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: June 13, 2012

Posted: June 20, 2012

[Name and address redacted]

Re: OIG Advisory Opinion No. 12-07

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding an exclusive arrangement between a county and an emergency medical services company whereby the company provides emergency ambulance services to county residents (the "Arrangement"). Specifically, you have inquired whether the Arrangement constitutes grounds for the imposition of 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 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 Arrangement does not generate prohibited

remuneration under the anti-kickback statute. Accordingly, the Office of Inspector General ("OIG") will 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 Arrangement. In addition, the OIG will not impose administrative sanctions on [name redacted] under section 1128A(a)(5) of the Act in connection with the Arrangement. This opinion is limited to the 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] (the "Requestor"), a non-profit corporation that provides emergency ambulance services, entered into an exclusive, three-year contract with the County of [county redacted], [state redacted] (the "County") to respond to all calls in the County for emergency medical services ("EMS"). The Requestor does not own, and is not affiliated with, any health care facilities where County residents may be transported under the Arrangement. According to the Requestor, the County awarded it the contract pursuant to an open competitive bidding process consistent with the relevant government contracting laws.[1]

The County is a rural county with a large indigent population and few ambulance services. The County provides EMS to County residents under the auspices of its EMS Board. In 1980, County residents passed a referendum levying a fee per household in order for the County to provide EMS to County residents at no additional cost to them (the "Fee").[2] Currently the Fee is $50 per household per year, regardless of the number of residents per household or whether the residents are insured, uninsured, or indigent.

Under the Arrangement, the Requestor responds to all calls for EMS within the County. The Requestor bills third-party payors, including Medicare and Medicaid, for its services, but does not bill or collect any out-of-pocket costs, including copayments, deductibles, or other billed charges, otherwise owed by County residents who have paid the Fee ("Fee-

[1] We express no opinion, and no opinion has been sought, regarding the bidding process.

[2] The Fee is collected when personal property taxes are collected by the County tax collector.

paying Residents"). The Requestor bills non-County residents and County residents who fail to pay the Fee for services rendered.[3]

The County collects all Fees and remits [amount redacted] per month to the Requestor as payment for amounts owed to the Requestor for EMS rendered to Fee-paying Residents. The Requestor certified that, based on historical data, the amount the County pays it for EMS rendered to Fee-paying Residents equals or exceeds the Fee-paying Residents' out-of-pocket cost obligations.

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.

Section 1128A(a)(5) of the Act provides for the imposition of civil monetary penalties against any person who offers or transfers remuneration to a Medicare or State health

[3] The Requestor may also bill a third-party payor on behalf of these individuals when applicable. The Requestor certified that it performs reasonable collection efforts for all unpaid invoices.

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."

B. Analysis

Under the Arrangement, the Requestor provides EMS within the County on an exclusive basis and does not bill Fee-paying Residents. The Requestor's agreement not to bill Fee-paying Residents potentially constitutes a routine waiver of Medicare Part B cost-sharing amounts, a practice about which we have repeatedly expressed concerns. The coinsurance provisions are an integral component of the Medicare program, and payment of the Medicare coinsurance is required by Federal law. See, e.g., Special Fraud Alert: Routine Waiver of Copayments or Deductibles Under Medicare Part B, 59 Fed. Reg. 65,372, 65,374 (Dec. 9, 1994).

Here, the Requestor certified that, based on historical data, the amount the County pays for EMS rendered to Fee-paying Residents equals or exceeds the Fee-paying Residents' out-of-pocket obligations. Thus, the County effectively assumes the Fee-paying Residents' obligations to the Requestor. Because the County assumes the Fee-paying Residents' obligations to the Requestor, and because the County's payment equals or exceeds the Fee-paying Residents' out-of-pocket obligations for EMS, the Requestor's agreement not to bill Fee-paying Residents does not constitute a routine waiver of coinsurance that would implicate the anti-kickback statute or the CMP.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Arrangement does not generate prohibited remuneration under the anti-kickback statute. Accordingly, the Office of Inspector General ("OIG") will 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 Arrangement. In addition, the OIG will not impose administrative sanctions on [name redacted] under section 1128A(a)(5) of the Act in connection with the Arrangement. This opinion is limited to the 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 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 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 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, 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 that is part of the Arrangement 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,

/Gregory E. Demske/

Gregory E. Demske
Chief Counsel to the Inspector General