[*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: August 4, 2004

Posted: August 11, 2004

[name and address redacted]

Re: OIG Advisory Opinion No. 04-10

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding [county name redacted] County's proposed exclusive arrangement for emergency ambulance services, with payment by the second responder to the first responder for the first responder's services (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.

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 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, but that 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 letter 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 "County"), a political subdivision of the State of [State name redacted], operates fire and emergency response systems that provide "first responder" services for fire, rescue, and medical emergencies. The County's fire rescue units respond to 911 and other emergency calls, provide first responder services, and, in most cases, call in a second responder (also called a "transport unit") to provide ambulance transportation services to a destination determined by the County fire rescue unit.[1] The County states that it has made a policy decision to organize its emergency response system in a way that concentrates its rescue services on first responder emergencies and minimizes resources spent on secondary response work, even though providing ambulance transportation and billing for the ambulance services would generate additional revenue for the County.

Under the Centers for Medicare & Medicaid Services's ("CMS's") payment regulations, Medicare pays for ambulance services in one payment to the entity that furnished the transportation, with the expectation that suppliers furnishing services other than the transport will look to the transporting supplier for payment for such other services.[2] Similarly, under [State name redacted]'s Medicaid program, payment is made to the entity that furnishes the emergency ambulance transportation, and there is no separate payment for first responder services.

---

[1]A County fire rescue unit can decide to transport a patient itself based on factors set forth in the County's protocols, such as the patient's condition and the distance to the intended transport location. According to the County, its fire rescue units rarely transport patients; most patients are transported by the second responder. If a County fire rescue unit transports a patient, the County will bill the applicable payor for the ambulance services.

[2]See, 67 FR 9100, 9113-9114 (Feb. 27, 2002).

On December 23, 2002, the County issued an invitation to bid ("ITB") seeking an ambulance company to provide second responder services for the County in connection with its emergency response system. When the second responder is dispatched, it will be expected to pay the County an amount established through competitive bidding for the County's first responder services and the County's other costs associated with providing comprehensive emergency response services, including dispatching and providing access to second responder services on a County-wide basis.[3] (The term "first responder services" is used in this opinion to include these other activities.) The County has certified that it is employing an open competitive bidding process consistent with relevant government contracting laws.[4] The County plans to award an exclusive two-year contract, with an option for the County to renew the contract for an additional two years, to the bidder that will reimburse the County the highest per-response amount for first responder services. Under the Proposed Arrangement, the second responder will be required to respond to dispatches for ambulance transportation services and pay the County on a per-response basis for the provision of first responder services.[5] The second responder will be able to bill applicable payors, including Medicare and Medicaid, for the

---

[3]As is currently the case, municipal fire rescue systems located within the County will have the option to use the second responder services that will be provided pursuant to the ITB. The County states that by contracting with a second responder for the entire County, it provides a second responder safety net for all County citizens. According to the County, the municipalities typically provide the transportation services to obtain the additional revenue associated with providing such services. The County has represented that it bears the cost of providing this safety net to protect all County residents when a municipal fire rescue service does not have the capacity to transport a patient and, therefore, requests a second responder to transport the patient.

[4]We express no opinion regarding the bidding process. The County has disclosed that the ITB addresses other County needs for ambulance and medical transport services unrelated to the second responder services for the emergency response system. The County has certified that bidding on each category of services under the ITB is completely separate from the other categories and that consideration of bids for one category of services will not be related to the consideration of bids for any other category of services. No opinion has been sought, and we express no opinion, regarding the portion of the ITB applicable to services other than emergency response-related second responder services for County and municipal emergency response systems.

[5]The County suspended the ITB in May, 2003 and has deferred implementation of the Proposed Arrangement pending receipt of an advisory opinion from the OIG.

ambulance services, retain all collections, and, thus, be at risk for nonpayment. The nonpayment rate is expected to be substantial. The County has certified that it expects the payments it will receive from the second responder will be less than the costs of the County's first responder services.

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.), 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

The Proposed Arrangement implicates the anti-kickback statute, as the County is soliciting payment for first responder services in exchange for an exclusive contract to provide nearly all emergency secondary response ambulance transportation services in the County (i.e., all emergency transports other than when a County or municipal fire rescue unit transports the patient), some of which will be reimburseable under the Federal health care programs.

Notwithstanding, based on the combination of the following factors, we conclude that the OIG would not subject the Proposed Arrangement to sanctions arising under the anti-kickback statute pursuant to sections 1128(b)(7) or 1128A(a)(7) of the Act.

First, the per-response fees are only one part of a comprehensive regulatory scheme by the County to manage the delivery of emergency medical services ("EMS"), including both first responder and second responder services. The Proposed Arrangement was established by a valid governmental entity legally empowered to regulate the provision of EMS in the County. The organization of a local emergency medical transportation system, including a local government's decision whether to provide EMS directly or indirectly through the selection of a private provider, is within the police powers traditionally delegated to local government. As with the exercise of any police power, the local government is ultimately responsible for the quality of the services delivered and is accountable to the public through the political process. Counties and municipalities should have sufficient flexibility to organize local emergency medical transport systems efficiently and economically. As noted, the County has made a policy decision to focus the resources of its emergency response system on first responder emergencies, even though providing ambulance transportation and billing for the ambulance services would generate additional revenue for the County.

Second, the County expects the per-response fees to be only partial compensation for the actual costs of the County's delivery of first responder services (including dispatch services). As such, the winning bidder will not be overpaying the source of referrals – the typical anti-kickback statute concern. Moreover, because the Medicare program expressly contemplates that suppliers furnishing services other than the transport would look to the transporting supplier for payment for these other services, it is reasonable to expect that the County would seek reimbursement for its services from the second responder that is submitting the claims.

Third, although the aggregate payment to the County necessarily varies with the volume of referrals from the County, in the context of emergency response services and in consideration of the unique facts of the Proposed Arrangement, we do not believe that the per-response fees pose an increased risk of overutilization or increased costs to the Federal health care programs. In addition, the exclusivity of the contract will not increase Federal health care program costs. Neither the number of Federal health care program beneficiaries requiring emergency response transport in the County, nor the treatment these beneficiaries will require or receive at a hospital, is related to or affected by the system of payment between the ambulance company and the County. Furthermore, we believe that it is within the County's discretion to conclude that, for administrative and

system efficiencies and risk spreading, the contract should be awarded to one ambulance company.

Fourth, the contract exclusivity will not have an adverse impact on competition. The County is employing an open, competitive bidding process consistent with the relevant government contracting laws. Public policy favors open and legitimate price competition.

Fifth, the putative prohibited remuneration (i.e., the County's receipt of the per-response fees) inures to the public, not private, benefit. One of the core evils addressed by kickback or 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, the public receives the financial benefit of the Proposed Arrangement by getting the best possible reimbursement for County expenditures on first responder services. Moreover, the County gets secondary responder services for indigent and uninsured patients, services for which the ambulance company bears the risk of nonpayment.

In light of the specific circumstances presented, we would not impose sanctions arising under the anti-kickback statute in connection with the Proposed Arrangement.

Our determination not to impose sanctions in connection with the Proposed Arrangement derives from the particular facts presented. In the instant case, we might have reached a different conclusion if, by way of example only, any of the following factors had been present:

- there was a fundamental change in the delivery of first and second responder services, such as, for example, the County did not currently provide first responder services and decided to do so as a result of an offer by an ambulance company to pay for such services;

- the Proposed Arrangement was the result of a unilateral solicitation by an ambulance company to become an exclusive second responder for the County, rather than an open, competitive bidding process initiated by the County; or

- core components of the Proposed Arrangement were initiated by a bidder, rather than the County.

Any one of these or other factors may have resulted in a different outcome in this opinion.

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, if the requisite intent to induce or reward referrals of Federal health care program business were present, but that 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 letter 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 County 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 the County 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