

OIG Issues Advisory Opinion on Ambulance Joint Venture

The Office of Inspector General (“OIG”) of the United States Department of Health and Human Services recently issued an Advisory Opinion regarding a joint venture to form an ambulance company for the purpose of bidding on a Request For Proposal (“RFP”) from a county’s Emergency Medical Authority (the “EMA”). In Advisory Opinion 09-17, the OIG concluded that although the joint venture is highly prone to fraud and abuse because of the multiple streams of remuneration flowing between the parties that can make referrals, it would not impose administrative sanctions under the Anti-Kickback Statute against either the ambulance company or its owners.

BACKGROUND

The Ambulance Company in Advisory Opinion 09-17 was formed as the result of a joint venture between three non-profit ambulance companies and a non-profit hospital. The four “Owners” each possess a twenty-five percent interest in the Ambulance Company. The following is a breakdown of the four Owners:

- **Owner A:** Owner A is a non-profit ambulance company that is a subsidiary of a regional non-profit healthcare system. Owner A provides ambulance services in the county and the surrounding area. Owner A’s hospital parent company makes no referrals to the Ambulance Company.
- **Owner B:** Owner B is a non-profit ambulance service that provides ambulance services for its parent non-profit charitable healthcare system. Owner B also provides rehabilitation and community health services in the community. Neither Owner B, nor its parent company, own hospitals or nursing homes in locations where the Ambulance Company is licensed to operate. Furthermore, neither Owner B nor its parent company makes any referrals to the Ambulance Company.
- **Owner-Manager:** The Owner-Manager is a charitable non-profit ambulance company that provides medical transportation services and medical transportation dispatch services in several counties, including the county where the Ambulance Company is located. The Owner-Manager provides management services to the Ambulance Company under a contract. The Owner-Manager does not generally make referrals to the Ambulance Company, but may do so in emergency situations

where the Ambulance Company has the closest ambulance to an area outside the county that the Owner-Manager is under contract to cover.

- **Owner-Hospital:** The Owner-Hospital is a non-profit community hospital located in the county. The Owner-Hospital does not own, operate or provide ambulance services. The Owner-Hospital does contract with the Ambulance Company for transportation services.

The owners formed the Ambulance Company for the specific purpose of bidding on an RFP from the county's EMA. The county's EMA contracts with a single EMS provider on behalf of participating local municipalities to provide EMS controlled through its 911 dispatching system. The EMA selected the Ambulance Company from several bidders as its EMS provider. Pursuant to the terms of the EMA contract, the county's dispatchers treat the Ambulance Company as the preferred ambulance provider. The Ambulance Company's sole compensation under the EMA contract consists of payments from patients and their insurers, including Medicare and Medicaid. The EMA contract does not cover non-EMS transports.

OIG ANALYSIS

The Ambulance Company requested an Advisory Opinion from the OIG as to whether the joint venture constitutes grounds for the imposition of sanctions under the Social Security Act (1128(b)(7); 1128A(a)(7)) for violating the Anti-Kickback Statute. The Anti-Kickback Statute makes it a criminal offense to knowingly and willfully offer, pay, solicit or receive any remuneration to induce or reward a party for referrals of items or services reimbursable by a Federal healthcare program. In undertaking its analysis in Advisory Opinion 09-17, the OIG acknowledged that it has had longstanding concerns about problematic joint venture arrangements between those in a position to refer business, and those furnishing items or services which are payable under a Federal healthcare program. Further, the OIG noted that joint venture arrangements raise concerns under the Anti-Kickback Statute because they pose a risk that income from the venture may be payment for referrals to the venture or to the co-investors.

In its analysis, the OIG felt there were three inter-related features of the joint venture that warranted closer examination for risks: the Owners' return on investment through the equity joint venture; a Transport Agreement the Ambulance Company had with the Owner-Hospital in which the Owner-Hospital agreed to contact the Ambulance Company and give it first opportunity to provide patient transport services where a transport is required ; and the Management Agreement between the Ambulance Company and the Owner-Manager, pursuant to which the Owner-Manager provides management and operations, services, systems and personnel for the Ambulance Company. Based upon several factors, the OIG concluded that it would not impose administrative sanctions under the Anti-Kickback Statute as a result of this joint venture. The following sets forth several of the factors the OIG used to support its conclusion that it would not impose administrative sanctions as a result of the joint venture.

1. **Return on Investment:**

The OIG concluded that there was a low risk that the Owners' returns on investment were in exchange for making referrals to their co-investors or the Ambulance Company. First, the substantial majority of the Ambulance Company's revenue derives from the EMA contract, which consists solely of EMS calls dispatched to the county's 911 system. No Owner has the ability to control the frequency or volume of 911 emergency calls. Second, the arrangement promotes a public benefit in facilitating more stable and reliable 911 emergency medical transportation services for residents of the county. Third, the arrangement does not appear to operate primarily on referrals from the Owners. As the Owner-Hospital's and Owner-Manager's referrals to the Ambulance Company contributed only a small percentage of the Ambulance Company's total net revenue in 2008. Furthermore, the Ambulance Company makes distributions to the Owners strictly in proportion to each Owner's twenty-five percent ownership interest and capital contribution. Finally, the Ambulance Company is an equity joint venture in which each Owner has assumed genuine business risk by committing financial resources. As a result, this distinguishes the Ambulance Company from joint ventures where a joint venturer makes little or no financial investment, but instead provides substantial referrals.

2. **Transport Agreement:**

Although the OIG noted that the Transport Agreement merits "careful scrutiny", there were several reasons why the Transport Agreement did not appear to pose an undue risk of fraud and abuse. First, there appeared to be no substantial risk of "swapping" in the arrangement. (Swapping occurs where a provider of services "under arrangement" to a hospital offers discounts on business for which the hospital must bill, in exchange for the hospital's referral of Medicare business for which the provider may directly bill Medicare.) Second, the Transport Agreement does not present a significant risk of over-utilization.

3. **Management Agreement:**

The OIG concluded that the Management Agreement in its role in the overall joint venture poses an acceptably low level of risk. First, there is little risk that the management fee is a disguised method of payment to the Owner-Manager for referrals to the Ambulance Company. As the Owner-Manager directly operates transport services outside the county, any transport services it refers to the Ambulance Company come at its own expense. While the Owner-Manager may, in limited emergency situations, refer transports to the Ambulance Company, the Owner-Manager has a strong financial incentive against doing so, which substantially lowers the risk that the management fee is a disguised kickback. Second, the Ambulance Company certified that the management fee is set at fair market value. Finally, although the Management Agreement does not fit within the safe harbor for personal services and management contracts as the compensation is not set in advance (the compensation is a set percentage of the Ambulance Company's gross revenues), the Management Agreement appears to

satisfy all other conditions of the safe harbor for personal services and management contracts.

CONCLUSION

Advisory Opinion 09-17 serves as a reminder to ambulance services that they must proceed cautiously when entering into joint venture arrangements with potential referral sources. The OIG emphasized that although it concluded it would not impose administrative sanctions for this joint venture, “a similar arrangement with different facts and circumstances might lead to a different conclusion.”

If you have any questions or concerns regarding this Advisory Opinion or joint ventures between ambulance service providers and potential referral sources, please do not hesitate to contact Mark C. Rogers, Esq., (781-794-1600, mrogers@therogerslawfirm.com) in the Health Care Practice Group at The Rogers Law Firm.



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