

## **OIG Approves Ambulance Joint Venture, Emphasizes Public Benefit**

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On October 7, 2009, the Office of Inspector General (“OIG”) posted Advisory Opinion 09-17 which addresses the formation of a joint venture among a hospital and three ambulance companies to provide transportation services in a county that includes some medically underserved areas. Despite the fact that the OIG characterized the arrangement as “highly susceptible to fraud and abuse,” the OIG concluded that it would not impose sanctions. In its opinion, the OIG discusses community benefit and provides helpful commentary concerning the types of ambulance arrangements it believes are problematic and those which it believes are “not particularly susceptible to overutilization.” While in the past the OIG has looked favorably on municipal-owned arrangements that serve a public need, this opinion signals that a privately owned arrangement may also receive favorable consideration from the OIG if a community need is met.

### **The Arrangement – Multiple Revenue Sources From Multiple Referral Sources**

Advisory Opinion 09-17 analyzes a newly formed joint venture company that is capitalized and owned in equal shares by four non-profit entities (“Owners”) including a hospital (“Hospital-Owner”) and three ambulance providers. The newly formed entity (“Ambulance Company”) is operated by one of the three owner ambulance providers (“Manager-Owner”) through a management contract (the “Management Agreement”) which at times may refer “overflow” business to the Ambulance Company.<sup>1</sup>

According to the OIG, the Ambulance Company was formed to provide emergency medical services (“EMS”) to County residents through the 911 dispatch system. The County granted a preferred provider EMS contract to the Ambulance Company because of the historical deficiencies and financial failures of the previous companies with whom the County had contracted. Under the EMS contract, the Ambulance Company provides County 911 EMS transports and must seek payment from patients and their insurers, which may include Medicare and Medicaid.

The arrangement also contemplates that the Ambulance Company would supplement the income it earns under the EMS contract by providing scheduled ambulance services to patients of the Hospital-Owner (the “Transport Agreement”). Under the arrangement, Hospital-Owner would treat the Ambulance Company as the non-exclusive preferred provider for discharge services and inter-facility transport services on an “under arrangement” basis with the hospital. Accordingly, if the Ambulance Company provides services as a direct supplier of services, it would bill and collect payment from third-parties, including Medicare Part B. However, if the Ambulance Company provides services “under arrangements” to the Hospital-Owner, the Ambulance Company would bill and collect payment from the Hospital-Owner at fair market value rates. According to the terms of the Transport Agreement, the Ambulance Company receives first priority for a transport where the patient has not requested a specific ambulance service; however, the Ambulance Company must also accept all patients referred under the Transport Agreement, regardless of the patient’s insurance status or ability to pay.

After reciting the structure of the arrangement, at the outset of its analysis, the OIG stated that the arrangement was “highly prone to fraud and abuse because of the multiple streams of remuneration flowing between parties that can make referrals and parties that can profit from those referrals.” However, despite this strong initial statement, the OIG ultimately concluded that the arrangement adequately reduced the risk of fraud and abuse to warrant approval.

### The OIG’s Analysis

The OIG analyzed the arrangement under the anti-kickback statute which 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. In its analysis, the OIG first concluded that the arrangement did not meet the criteria for the small entity investment safe harbor because the Hospital-Owner and the Manager-Owner have a combined interest of 50 percent, thus exceeding the 40 percent permitted by the safe harbor. In its analysis, the OIG focused on the three primary features of the joint venture: (1) the Owners’ return on investment through the equity joint venture; (2) the Transport Agreement; and (3) the Management Agreement.

### *Owners’ Return on Investment*

In its review of the Owners’ return on investment, the OIG concluded that there was “low risk” that the parties would reap returns on investment by improperly exchanging referrals. Significantly, the OIG discussed the fact that the majority of the Ambulance Company’s revenue is generated by the County contract, which is based entirely on EMS calls dispatched through the 911 system rather than referrals generated between the Owners. The OIG explained that even though both the Hospital-Owner and the Manager-Owner refer to the Ambulance Company, these referrals do not appear to come close to reaching the 40 percent threshold as established by the small entity investment safe harbor. The OIG also commented on the fact that revenues were equally distributed in proportion to the Owners’ initial investment and that all Owners bore risk.

It is important to note that in its analysis of the Owners' return on investment, the OIG discussed the public benefit derived from the joint venture and restated its understanding that the joint venture provided "stable and reliable 911 emergency medical transportation services" for County residents.

### ***Transport Agreement***

Next, the OIG analyzed the Transport Agreement and determined that it did not find indicia of prohibited "swapping"<sup>2</sup> or that the arrangement promoted overutilization. In its analysis, the OIG found a number of factors favorable to the agreement including: (1) the Hospital-Owner pays fair market value for transports provided by the Ambulance Company and the Ambulance Company must transport all patients, regardless of the payor; (2) the agreement is non-exclusive; (3) the agreement protects patient choice; and (4) the Hospital-Owner bears the risk of billing and collecting from third-party payors and patients and must pay the Ambulance Company regardless of whether it is able to collect payment. Additionally, the OIG stated that the type of services provided by the Transport Agreement do not lend themselves to a high risk of overutilization.

### ***Management Agreement***

The OIG evaluated the Management Agreement and concluded that despite the fact that the agreement did not meet the safe harbor for personal services, the agreement had little risk of abuse. The OIG stated that although the Manager-Owner has the ability to refer transports to the Ambulance Company, there is little risk that the Management Arrangement is a guise for paying the Manager-Owner for referrals. Since the Manager-Owner operates its own ambulance transportation company, the OIG recognized that any referral to the Ambulance Company is a lost opportunity for the Manager-Owner's company to directly provide and bill for those services.

### ***Lessons Learned***

The OIG ultimately concluded that it would not impose sanctions under the anti-kickback statute. As with other Advisory Opinions, the OIG cautions that this opinion only applies to the specific parties to the arrangement. In addition, the OIG states that "similar arrangements with different facts and circumstances could be highly prone to fraud and abuse and thus lead us to a different conclusion."

Nonetheless, some of the OIG's analysis bears examination for application to other potential arrangements. First, in light of the municipality's frustration and inability to provide effective 911 services, the OIG seemed to appreciate that while the arrangement was not perfect, the parties had developed safeguards and that the underlying purpose of the arrangement is to promote public benefit. Granting deference to arrangements that serve a compelling public interest is not a novel concept. Administrative agencies that regulate and safeguard the Federal Health Program have historically been more lenient in their interpretation of the fraud and abuse rules when the providers are addressing a specific, tangible public interest, such as rural health providers, providers and suppliers in health professional shortage areas/medically underserved areas and municipal entities.

Second, it is worth noting the OIG's comments pertaining to the types of medical transportation relationships it finds problematic and those it does not. For example, the OIG did not believe that discharge transport services and inter-facility transports were particularly susceptible to overutilization because they are "performed only once, and inter-facility transports entail a pre-arranged third-party destination." At the same time, the OIG discusses the risk inherent in "under arrangements" between hospitals and medical transport companies in the context of improper swapping practices. The analysis of whether an arrangement is a "swapping" arrangement typically centers on whether the contracted "under arrangement" rate is fair market value. However, in the Advisory Opinion, the OIG went a step further and provided helpful guidance on other factors that decrease risk, namely that the arrangement was non-exclusive, preserved patient choice and provided services to all patients, including the uninsured.

Third, the OIG recognized that the safeguards inherent in the arrangements forced the parties to act as rational consumers. For example, the OIG noted that the hospital bore the financial risk of overutilization in the Part A "under arrangements" context and as a prudent consumer would insist that the rates it pays be fair market value. Similarly, it found that the Manager-Owner would not likely refer to the Ambulance Company in order to increase its own compensation because providing and billing the services itself is more lucrative than diverting the referral to the Ambulance Company.

This opinion may appear to be at odds with prior opinions, especially given the fact that the joint venture involved self-referrals and multiple streams of revenue between the parties. However, this is not to say that the OIG departed from its prior guidance. Rather, it suggests that arrangements that do not meet a safe harbor, but otherwise include appropriate safeguards and provide a tangible public benefit, may receive more deference by the OIG than those that do not.

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<sup>1</sup> Under the Management Agreement, the Manager-Owner provides management services (e.g., management, personnel to operate the Ambulance Company’s ambulances, rate setting, dispatch, maintenance, repair and replacement of ambulances, etc.) to the Ambulance Company for a percentage of the Ambulance Company’s gross revenues, which the Ambulance Company certifies reflects fair market value.

<sup>2</sup> In swapping arrangements, an ambulance provider of services “under arrangements” offers discounts to a hospital for services the hospital bills under Medicare Part A; in return, the hospital gives Medicare referrals to the provider.