

Date Issued -- April 20, 2000

[Name and address redacted]

Dear [Name redacted]:

Thank you for your letter regarding certain suspect discounting arrangements involving ambulance companies and hospitals and skilled nursing facilities. In your letter, you assert that unscrupulous ambulance providers continue to enter into these arrangements with hospitals and nursing homes and urge this Office to take enforcement action. In the meanwhile, you also ask that we issue a special fraud alert to warn hospitals and nursing homes that these practices are suspect.

Specifically, the American Ambulance Association is concerned with arrangements involving ambulance companies that give hospitals and nursing facilities deep discounts for business that the facilities pay for out of their own pockets, in return for the referral of more lucrative Medicare Part B business for which the ambulance companies receive direct reimbursement. As you know, these arrangements raise potential issues under both the Federal health care program anti-kickback statute, section 1128B(b) of the Social Security Act (the "Act"), and the exclusion authority relating to charges to the Medicare or Medicaid programs that are substantially in excess of a provider or supplier's usual charges, section 1128(b)(6)(A) of the Act. These generic issues were the subject of OIG Advisory Opinions 99-2 and 99-13.

With respect to enforcement, the absence of publicized litigation should not be construed as an absence of enforcement activity. Investigations are not generally public, even to the target, and typically take a significant amount of time. Moreover, some health care fraud cases begin as *qui tam* lawsuits; such lawsuits are filed under seal to protect the relator's identity. Please be advised that various instances of the type of conduct discussed in your letter are being examined. Providers that mistake the absence of visible enforcement as a green light to engage in such pricing arrangements do so at their own jeopardy.

With respect to the issuance of a special fraud alert, we do not believe a special fraud alert would have any significant additional deterrent effect at this time. OIG Advisory Opinions 99-2 and 99-13 have already received broad dissemination throughout the health care industry. Although the opinions are only binding on the requesting parties, the same analytical framework laid out in the opinions would apply to arrangements between hospitals and ambulance providers. Hospitals, nursing homes, and ambulance companies ignore the learning of those opinions at their own peril.

OIG advisory opinions, special fraud alerts, and similar guidance sometimes identify certain practices as "suspect" in relation to the Federal health care program anti-kickback statute. We think there may be some misunderstanding as to the import of this identification. First, such designation is based on our assessment that the practice itself is some evidence of a violation. Second, the designation serves as fair warning to the health care industry that they participate in such activities at their own risk. However, these practices are not *per se* violations of the anti-kickback statute; the statute is a criminal statute and requires proof beyond a reasonable doubt that the parties had unlawful intent. In other words, it is not only what the parties did, but why they did it, that is crucial to a prosecution. Our guidance identifies the types of practices that we believe potentially violate the statute if there is improper intent.

In both Advisory Opinions 99-2 and 99-13, our concern was that the proposed conduct potentially involved purposeful discounting of private pay business to induce the referral of Federal health care program business prohibited conduct under the Federal anti-kickback statute. An anti-kickback statute violation is not determined by the size of the discount; rather, a violation arises if the discount whatever its size is implicitly or explicitly tied to referrals of Federal business. Nevertheless, the size of a discount may provide evidence of intent. Accordingly, the opinions identified two pricing benchmarks below which we believe discounts raise anti-kickback concerns. However, discount arrangements below those benchmarks are not illegal *per se*, but only "suspect" in the sense that they may merit further investigation depending on the facts and circumstances presented. For example, we recognize that there are reasons why a company might agree to sell services below its average fully loaded costs. Notwithstanding, we think that pricing arrangements that couple the referral of Medicare business that is reimbursed above the provider's average fully loaded costs with charges for private business that are below the provider's average fully loaded costs raise significant concerns.

We also want to reiterate that section 1128(b)(6)(A), which permits exclusion of providers that submit claims to Medicare or Medicaid for amounts substantially in excess of the provider's usual charges, is not a blanket prohibition on discounts to private pay customers. Section 1128(b)(6)(A) addresses a much narrower issue—tiered pricing structures that set one price for Medicare or Medicaid and a substantially lower price for most other customers. Given the statutory language, we do not believe that the section 1128(b)(6)(A) is implicated unless a provider's charge to Medicare is substantially in excess of its median non-Medicare/Medicaid charge. In other words, a provider need not even worry about section 1128(b)(6)(A), unless it is discounting close to half of its non-Medicare/Medicaid business. In addition, the statute contains an explicit exception permitting a charge differential where "the Secretary finds there is good cause" for the disparate treatment. Within these parameters, providers are free to negotiate discounts, so long as the discounts are not tied to unlawful referrals of Federal health care program business.

Finally, if you have any specific information regarding improper arrangements between specific ambulance companies and hospitals or nursing homes, we encourage you to provide such information to our Office of Investigations.

Sincerely,

/s/

D. McCarty Thornton
Chief Counsel to the Inspector General