

## OIG Issues Advisory Opinion on Free Transportation

On March 6, 2009, the Office of Inspector General of the U.S. Department of Health & Human Services (OIG) issued Advisory Opinion 09-01 (Advisory Opinion), which approves a complimentary local transportation program (Proposed Arrangement) for friends and families of residents of a skilled nursing facility, subject to certain conditions. The Advisory Opinion is significant because it expands the circumstances in which the OIG has previously approved the provision of free transportation by Medicare providers or suppliers (collectively, Providers). Previously, in Advisory Opinion 00-7, issued in November 2000, and in a clarifying letter issued in December 2002, the OIG approved programs in which hospitals or hospital-owned surgery centers offered free transportation services to certain patients or their accompanying or visiting family members, subject to certain conditions. The OIG also issued a Special Advisory Bulletin in August 2002, in which it indicated that it was considering a new exception to the Civil Monetary Penalties Law, 42 U.S.C. Section 1320a-7a (CMP Law), for complimentary local transportation under specified circumstances. However, the OIG has never proposed such an exception and has not published any further guidance on the issue of free transportation since 2002.

### Factual Background

The requestor of the Advisory Opinion (Requestor) operates a nonprofit skilled nursing facility (Facility) that is part of a large, nonprofit integrated health care system serving a metropolitan area. In contrast to the prior situations prompting responsive OIG guidance, the Requestor proposed to offer free local transportation only for friends and family members of Facility residents. The Requestor represented that the Facility is not easily accessible by public transportation for people living within its primary historical service area, part of which is separated from the Facility by a bridge requiring a \$9 toll. The Requestor proposed to provide the free transportation in a van that it owns, to be driven by the Requestor's employee. The van will pick up and drop off passengers at designated public locations within the Requestor's primary historical service area, except that door-to-door transportation would be provided as needed for disabled friends or family members.

The Proposed Arrangement will be offered uniformly to friends and family members of all of the Requestor's residents, regardless of income level, source of payment, or the level of care provided to the resident. In contrast to prior arrangements approved by the OIG, the Requestor anticipates that the aggregate value of the transportation services may exceed \$50 per resident on an annual basis. The Requestor will only advertise the Proposed Arrangement within its primary service area. It will do so by placing ads in four newspapers and in handbooks and/or written materials provided to patients by local hospital discharge planners, who also will be informed regarding the program. The Proposed Arrangement will be operated in accordance with a written policy.

### Legal Analysis

The OIG began its legal analysis with some general observations about arrangements wherein Providers offer free transportation to beneficiaries or potential sources of federal health care program business. The OIG observed that while some free transportation arrangements have important beneficial effects on patient care, such arrangements, if not properly structured, may be used as fraudulent or abusive schemes that lead to inappropriate steering of patients, overutilization, and the provision of medically unnecessary services. As examples of such potentially abusive arrangements, the OIG cited, among other arrangements:

- Free transportation offered to out-of-state patients
- Free transportation offered to Medicaid patients by van drivers who are compensated by Providers on a per-patient or per-service basis for bringing the patients to the Providers' facilities
- Free limousine services
- Free ambulance services offered by Providers without making individualized determinations of financial need
- Hospitals or other Providers inducing referrals from physicians by offering the physicians' patients free transportation to the physicians' offices

**Key Factors.** Noting the potential for abuse, the OIG stated that each free or below fair market value transportation arrangement must be evaluated on a case-by-case basis. The OIG then identified several analytical factors it considers in determining whether arrangements involving free transportation services will be viewed as problematic or of lesser concern. These factors include, but are not limited to, whether:

- Transportation is offered to patients based on criteria related to referrals such as diagnosis, condition, or treatment
- Luxury or specialized transportation such as limousines, airline travel, or ambulance transport is involved

- The geographic area covered by the program is limited to the Provider's historical service area, or includes longer distance transports offered to beneficiaries residing outside of that area, in which case the program might be used to expand the Provider's historical service area
- The program is necessary due to a lack of other means of affordable public transportation or other alternatives
- Marketing or advertising is used, which creates a greater risk that the arrangement is being offered as an inducement for referrals
- Transportation is limited to trips to or from the offering Provider's premises, or whether transports are offered to a different Provider's site as a possible inducement for referrals from the latter Provider to the offering Provider
- Treatment of the costs of the free transportation are borne by the Provider and not shifted to federal health care programs
- The program is being used by a Provider of federally reimbursable services to gain access to beneficiaries for whom medically unnecessary services are rendered, such as Medicare or Medicaid mills that provide free transportation to attract patients

**The Proposed Arrangement.** The OIG then analyzed the Proposed Arrangement based on the foregoing factors and found that, under the specific facts and circumstances as described by the Requestor, the OIG would not take any enforcement action. The OIG noted that the Proposed Arrangement did not present the usual circumstances involving free transportation because the passengers would be friends and families of nursing home residents, rather than patients obtaining treatment. Nonetheless, the arrangement potentially implicates the Anti-Kickback Statute and the CMP Law as it pertains to beneficiary inducement because some of the transportation would be provided to members of a resident's household. Further, the economic benefit to the resident in the form of savings on household transportation costs could potentially exceed \$50 on an annual basis.

However, the OIG nevertheless allowed the arrangement for a number of reasons. The OIG noted, among other things, that

- The Proposed Arrangement would not selectively limit eligibility to target populations
- The type of transportation would be reasonable and would only be offered locally
- The Proposed Arrangement would be advertised only on a limited basis, in a manner consistent with the limited nature of the local transportation
- The availability of local public transportation in the Requestor's service area is limited, and access to the Facility is further inhibited by an expensive toll bridge
- The Proposed Arrangement would be consistent with the Requestor's mission of providing residents with quality care in a residential setting, with increased companionship resulting from access to resident's friends and families
- The cost of transportation would not be claimed directly or indirectly on any federal health care program cost report

For the foregoing reasons, the OIG concluded that: (1) the Proposed Arrangement would not constitute grounds for imposition of civil monetary penalties, and (2) although the Proposed Arrangement could implicate the Anti-Kickback Statute if the requisite intent to induce or reward federal referrals were present, the OIG would not impose administrative sanctions on the Requestor.

The Advisory Opinion, coming nearly seven years after the OIG's most recent public pronouncements on the issue of free transportation, provides welcome guidance to nursing homes seeking to improve the quality of life for their residents through free transportation programs consistent with the conditions described in the Advisory Opinion. As is the case with all advisory opinions, the OIG cautions that it may only be relied upon by the Requestor and other parties to the Proposed Arrangement. While the Advisory Opinion indicates specific points of concern for the OIG that should obviously be avoided, entities considering offering free or reduced-cost transportation must still consider potential enforcement risks. These entities should consider developing policies and procedures and implementing training and monitoring to assist in managing both these risks as well as the ancillary legal risks associated with the provision of any free transportation services program. The Advisory Opinion can be found at <http://oig.hhs.gov/fraud/docs/advisoryopinions/2009/AdvOpn09-01.pdf>.

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