

**PRESENTED AT**

**29<sup>th</sup> Annual Health Law Conference**

April 6-7, 2017  
Houston, Texas

## **Regulatory and Operational Hot Button Issues**

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# **On-Call Agreements**

Agreements with Subsets of the Medical Staff

Disciplinary Measures and Reports to the National Practitioner Data Bank

Ethical Issues relating to Fair Market Value Assessments



DEPARTMENT OF HEALTH AND HUMAN SERVICES

**OFFICE OF INSPECTOR GENERAL**

WASHINGTON, DC 20201



*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:** October 23, 2012

**Posted:** October 30, 2012

[Name and address redacted]

**Re: OIG Advisory Opinion No. 12-15**

We are writing in response to your request for an advisory opinion regarding an existing arrangement under which a hospital pays a *per diem* fee to physicians for providing on-call coverage for the hospital's emergency department (the "Arrangement").

Specifically, you have inquired whether the Arrangement constitutes 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, the Federal anti-kickback statute.

You have certified that all of the information provided in your request, including all supplemental submissions, 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, although the 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, the Office of Inspector General ("OIG") will 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 Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion 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] (“Requestor”) is a tax-exempt, charitable, not-for-profit hospital located in [city redacted], [state redacted] (the “State”). Requestor operates an emergency department (“ED”) that is open 24 hours per day, 7 days per week. The Requestor certified that approximately 19% of patients seen in the ED receive uncompensated care provided by Requestor and the remaining 81% are beneficiaries of Federal health care programs, or privately insured by other third-party payors.<sup>1</sup>

An independent group of emergency medicine physicians provides basic staffing for the ED. At times, however, the services of specialist physicians are required, and it is necessary to have these physicians on-call. Some specialties, such as obstetrics, have restricted call arrangements, which require the physician to be physically present at Requestor’s facility during call hours.<sup>2</sup> Most specialties are subject to unrestricted call, meaning a physician may be off-site as long as he or she can respond, in-person, to a call on Requestor’s campus within 30 minutes.

Under the Arrangement, Requestor pays a *per diem* fee to specialist physicians (“Participating Physicians”) to provide unrestricted call coverage for the ED. There are currently 130 Participating Physicians. Requestor offers the opportunity to participate in the Arrangement to all specialists on its staff who are subject to unrestricted call.<sup>3</sup>

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<sup>1</sup>The Requestor certified that the percentage of ED patients who receive uncompensated care provided by physicians on Requestor’s medical staff is unknown. We believe it is reasonable to assume, however, that the percentage is similar to the percentage of ED patients who receive uncompensated care from Requestor.

<sup>2</sup>The hospital has separate call arrangements with specialties that provide restricted call. Intensivists, hospitalists, interventional cardiologists, and general surgeons also have separate service arrangements with Requestor. We have not been asked to opine on, nor do we express an opinion about, these ancillary arrangements.

<sup>3</sup>The following specialties participate in the Arrangement: cardiology, otolaryngology, gastroenterology, general dentistry, hematology/oncology, nephrology, neurosurgery,

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First appeared as part of the conference materials for the  
29<sup>th</sup> Annual Health Law Conference session

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