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## OIG Issues Advisory Opinion No. 09-05 Approving a Hospital's Proposal to Compensate Physicians for On-Call Services

On May 14, 2009, the Department of Health and Human Services, Office of Inspector General ("OIG") issued Advisory Opinion No. 09-05 (the "Advisory Opinion") regarding a hospital's proposal to compensate physicians for on-call services on behalf of the hospital's uninsured patients ("Proposed Arrangement"). Based on the facts and circumstances, the OIG concluded that while the Proposed Arrangement could potentially generate prohibited remuneration under the federal Anti-Kickback Statute, if the requisite intent were present, the OIG would neither exclude the hospital from federal healthcare program participation nor impose civil monetary penalties and other administrative sanctions in connection with the Proposed Arrangement.

The hospital requesting the Advisory Opinion (the "Hospital") is a non-profit, 400-bed general hospital. The Hospital receives funds from a state agency that participates in a Federal matching-funds program for those providing a disproportionate share of uncompensated services to the indigent and uninsured ("State Program").

The Hospital's Medical Staff Bylaws require all active staff to provide on-

call coverage for the Hospital's Emergency Department. However, the Hospital reports that most physicians dislike performing on-call coverage for a number of reasons, including disruption to their professional and personal lives, and increased medical liability and risk of medical malpractice claims, and have cut back on-call coverage to the minimum required under the Medical Staff Bylaws. This has created a shortage in specialists on-call.

As a result, the Hospital has developed a new on-call policy ("Policy") that permits participating physicians to submit claims to the Hospital for payment for services rendered to indigent and uninsured patients presenting to the Hospital's Emergency Department. The Policy has the following components:

- The Policy will only cover individuals ("Eligible Patients") who have no sponsoring insurance plan and must eventually qualify for the State Program.
- Participating physicians must be active members of the Hospital's Medical Staff.
- Participating physicians must sign a letter agreement in which they agree: (i) to comply with Hospital policies; (ii) to respond timely to



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requests for on-call coverage services; (iii) to evaluate the patient in person; (iv) to provide appropriate evaluation and care; and (v) to follow the required claim request process.

- Participating physicians must provide on-call coverage as part of the Hospital's organized on-call schedule.
- Participating physicians agree to waive all rights to bill or collect against any third party payer or the Eligible Patient.
- After the Hospital reviews a claim for reimbursement, if another payer source (including Medicaid) is identified and made available to the Eligible Patient, the participating physician must seek payment from the payer source.
- If a claim for compensation is approved and the Eligible Patient qualifies under the Policy, a participating physician will be paid a fair market value flat fee based on the type of service provided (emergency consultation, inpatient care and management, surgical procedure, and endoscopy procedures).

In its analysis of the Proposed Arrangement, the OIG first found that, although the federal Anti-Kickback Statute's personal services and management contracts safe harbor could potentially apply, the Proposed Arrangement did not meet the safe harbor's requirement that the aggregate amount of compensation be set in advance. Next, the OIG concluded that the Proposed Arrangement presented a low risk of fraud and abuse for the following reasons:

- The Hospital certified that the payments are fair market value for services rendered, without regard to referrals or other business generated between the parties. No "lost opportunity" payments will be made and payments are only for

tangible services actually provided by physicians.

- The Proposed Arrangement is offered uniformly to all physicians and imposes tangible requirements.
- The Hospital has a legitimate rationale for the Policy based on its need for specialists on-call.
- The Proposed Arrangement promotes an obvious public benefit in facilitating better emergency on-call and related uncompensated care physician services at the Hospital, and in allowing the Hospital to continue to participate in the State Program.

In summary, the Advisory Opinion adds to the general guidance provided by the OIG in its Advisory Opinion 07-10 (issued on September 27, 2007) on a hospital's ability to offer payment for on-call coverage services. Together, the Advisory Opinion and Advisory Opinion 07-10 present a clearer roadmap for on-call coverage payment arrangements which may minimize the risk of non-compliance and liability under the federal Anti-Kickback Statute.

Briefly, in Advisory Opinion 07-10, the OIG approved a nonprofit medical center's proposal to pay physicians to provide ED on-call coverage and otherwise uncompensated inpatient follow-up care for patients coming to the ED, despite the potential for the arrangement to violate the federal Anti-Kickback Statute. OIG pointed out a number of factors that are relevant to on-call arrangements generally, such as: (i) there are legitimate reasons for on-call coverage compensation; and (ii) compensation must be fair market value in an arm's length transaction for necessary services and not determined in a manner that takes into account the volume or value of referrals or other business generated. In Advisory Opinion 07-10, the OIG also provided examples of problematic compensation structures



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that might disguise kickback payments, including: (a) “lost opportunity” payments; (b) payments to physicians for no identifiable services; (c) aggregate payments that are disproportionately high compared to a physician’s regular practice income; or (d) the on-call physician being compensated for services for which he/she receives separate reimbursement from insurers or patients.

Finally, it is also important to note, that as with all OIG advisory opinions, the Advisory Opinion is only legally

binding on the requesting entity and neither the Advisory Opinion nor Advisory Opinion 07-10, expresses any opinion on compliance with the federal physician self-referral law. For more information about the on-call coverage payment arrangements and the federal Anti-Kickback Statute, please contact Jim Daniel or Harold Han at (804)967-9604, or by email [jdaniel@hdjn.com](mailto:jdaniel@hdjn.com) or [hhan@hdjn.com](mailto:hhan@hdjn.com). Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm’s website at [www.hdjn.com](http://www.hdjn.com).

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