

OIG Issues Advisory Opinion Regarding On-Call Compensation

In an Advisory Opinion (09-05) recently released by the Office of the Inspector General (OIG) on May 21, 2009, the OIG stated that a certain hospital's on-call compensation proposal ("*Proposed Arrangement*") which provided compensation for care delivered to uninsured patients did not violate the Anti-Kickback statute as the compensation was at *Fair Market Value* and the hospital created sufficient safeguards to prevent fraud and abuse.¹

The *Proposed Arrangement* involved a 400-bed, not-for-profit hospital that is the sole provider of acute care services in its county and state. The hospital's bylaws required all physicians to provide on-call coverage on a rotating basis; however the hospital had no policy in place to compensate physicians for care provided to patients without insurance. Physicians at the hospital have reported that on-call coverage disrupts their personal lives and creates a medical liability (due to the lack of a prior relationship with the patient). Consequently, many physicians have reduced on-call coverage to the minimum hospital requirements, thereby creating periods of time in which the hospital has no on-call coverage.²

In response to the insufficient on-call coverage, the hospital created the *Proposed Agreement*. Physicians who participate in the *Proposed Agreement* must be a member of the hospital's medical staff; sign a letter of agreement with the hospital; and, agree to provide at least one-week of on-call coverage each year on a rotating basis with other members of the medical staff. The *Proposed Arrangement* seeks to compensate physicians for services rendered to "*eligible patients*" (e.g., patients who are not insured and not eligible for Medicaid or other state healthcare insurance program). After providing care to "*eligible patients*," the on-call physician will submit a claim form to the hospital's patient financial services office, thereby waiving his third-party billing and collection rights. Upon receipt of the form, the hospital's accounting department would determine whether the patient is eligible for state-funded healthcare programs. If the patient is eligible for state-funded care, the claim form will be returned to the physician in order to bill the state healthcare entity. If the patient is ineligible, the physician will receive a flat fee based on the services rendered.³

In determining physician compensation for on-call services, the hospital utilized a valuation methodology which considered patient acuity levels in the emergency department; average length of stay; and, physician time commitment for a particular service. The methodology also blended fees from public, private, and self-payers to determine a flat rate at Fair Market Value. Using the valuation methodology, the hospital was able to create a flat fee paid to physicians for the following on-call services provided to "*eligible patients*": (1) emergency consultations; (2) care delivered to patients admitted from the emergency department; (3) surgical procedures performed on patients admitted from the emergency department; and, (4) endoscopy procedures performed on patients admitted from the emergency department.⁴

In its review of the *Proposed Arrangement*, the OIG stated that the compensation was at Fair Market Value and did not take into account the volume or value of referrals. The OIG also indicated that the *Proposed Arrangement* should be protected under the *personal services and management* safe harbor of the Anti-Kickback statute.

In 2007, the OIG approved an on-call compensation arrangement under the *personal services and management* safe harbor in 2007 (Advisory Opinion 07-10).⁵ While the current *Proposed Arrangement* does not fit all seven of the requirements of the personal services and management safe harbor because it does not have an aggregate amount of compensation set in advance, the OIG examined the *Proposed Arrangement* "*taking into account the totality of facts and circumstances*," and found that the *Proposed Arrangement* provided little risk for fraud and abuse because payment amounts are at Fair Market Value; all physicians are eligible and provide coverage equally on a rotating basis (thereby reducing the potential to give more coverage to physicians who provide more referrals); and, the *Proposed Arrangement* provides a legitimate solution to a growing physician coverage problem at the hospital. Given its safeguards, the OIG stated that such an arrangement would be protected under the *personal services and management* safe harbor of the Anti-Kickback statute.⁶

Significantly, while the Advisory Opinion demonstrates the OIG's recognition of hospitals difficulty in obtaining on-call coverage, the Opinion calls into question

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compensation arrangements that compensate physicians simply for being available, warning that compensation for “*lost opportunity*,” regardless of whether or not services are actually provided, may place hospitals’ at risk for fraud and subsequent scrutiny from the OIG. Although the opinion does not explicitly state that on-call compensation arrangements *must* be structured in this manner that accounts for on-call services actually provided by the physicians, the OIG’s warning may cause hospitals’ to reconsider current arrangements that pay physicians for on-call availability in order to prevent future scrutiny by the OIG.⁷

¹ “OIG Advisory Opinion No. 09-05,” Office of the Inspector General, Department of Health and Human Services, May 21, 2009, p. 1, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2009/AdvOpn09-05.pdf> (Accessed 6/1/09)

² “OIG Advisory Opinion No. 09-05,” Office of the Inspector General, Department of Health and Human Services, May 21, 2009, p. 2-3,

<http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2009/AdvOpn09-05.pdf> (Accessed 6/1/09)

³ “OIG Advisory Opinion No. 09-05,” Office of the Inspector General, Department of Health and Human Services, May 21, 2009, p. 4, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2009/AdvOpn09-05.pdf> (Accessed 6/1/09)

⁴ “OIG Advisory Opinion No. 09-05,” Office of the Inspector General, Department of Health and Human Services, May 21, 2009, p. 5, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2009/AdvOpn09-05.pdf> (Accessed 6/1/09)

⁵ “OIG Advisory Opinion No. 07-10,” Office of the Inspector General, Department of Health and Human Services, September 27, 2007, p. 5, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2007/AdvOpn07-10A.pdf> (Accessed 6/1/09)

⁶ “OIG Advisory Opinion No. 09-05,” Office of the Inspector General, Department of Health and Human Services, May 21, 2009, p. 6-11, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2009/AdvOpn09-05.pdf> (Accessed 6/1/09)

⁷ “OIG’s Advisory Opinion on On-Call Payments OKs Arrangement for Treatment of Uninsured,” By Peyton M. Sturges, Bureau of National Affairs’ Health Law Report, 18 HLR 683, May 28, 2009,



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