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## OIG Advisory Opinion 7-10: A Panacea for the On-Call Conundrum?

The Department of Health and Human Services Office of Inspector General (OIG) has issued a long-awaited favorable advisory opinion approving a hospital paying physicians for providing on-call coverage. Will this cure a hospital's headache caused by the need for patient care in the emergency room and physicians' lack of coverage, or will the criteria prescribed by the OIG be too restrictive for most situations?

The first advisory opinion directly affecting a hospital's payment to physicians for on-call coverage was issued by the OIG in Advisory Opinion 7-10. As with any advisory opinion it is limited to the facts presented, but the commentary provided by the OIG in this favorable opinion may prove useful to many other hospitals facing the same dilemma.

The hospital obtaining the advisory opinion is tax-exempt and operates an emergency department that accepts all patients irrespective of their ability to pay. Uncompensated care was the crux of the issue as nearly 25 percent of the patients presenting themselves to the emergency department had no form of health insurance, private or governmental, and did not have the ability to pay. Approximately 10 percent of the emergency department patients were admitted as inpatients. Hence, approximately 2.5 percent of the emergency department patients ended up being indigent inpatients. Although the advisory opinion was issued to a tax-exempt hospital, the underlying principles should likewise apply to for-profit hospitals.

As a result of these demographics, the hospital was faced with an increasing burden of providing both adequate emergency and follow-up care to patients. For some physician specialties, care was unavailable. This shortage of physicians interfered with meeting the health care needs of its community, resulting in some patients being subjected to costly and inefficient transfers to other hospitals, and also raising Emergency Medical Treatment and Active Labor Act (EMTALA) concerns.

To deal with the growing problem, the hospital formed an ad hoc committee comprised of members of its board, physicians, and hospital management. The committee recommended a

solution, taking into account the needs of patients, the hospital, and physicians. These recommendations were implemented as part of a financial arrangement (Arrangement) with physicians, and the subject of the OIG's favorable advisor opinion.

## Details of the Arrangement — No Free Lunch

All of the physicians on the hospital's medical staff are eligible to participate in the Arrangement. At the beginning of each month, a call schedule is developed treating each physician in each particular specialty as equally as possible. In the event an emergency patient is admitted as an inpatient, the physician providing the emergency consult must continue to treat that patient during his or her hospital stay irrespective of the patient's ability to pay.

All participating physicians must respond to the emergency department within a reasonable timeframe. The hospital monitors the response time, and the physicians must adjust their work and lifestyle choices accordingly. In addition, the physicians must collaborate with the hospital's care management and risk management programs, and are obligated to document the medical records in a timely manner. Physicians who do not adhere to these standards will have their payments suspended and, ultimately, the Arrangement will be terminated.

## Fair Market Value

The hospital retained a nationally recognized consultant (Consultant) to review the fair market value issues. Of course, the OIG did not (and will not) opine as to fair market value but the Consultant did so and the OIG's opinion set forth the Consultant's methodology. The Consultant combined publicly available and proprietary data from "dozens of medical facilities"; developed payment benchmarks; and then compared the payment benchmarks to the amounts being paid under the Arrangement. As a result, the Consultant's opinion concluded that the payments made under the Arrangement were at fair market value.

## Facts Noted by the OIG

In determining that the Arrangement "presents a low risk of fraud and abuse" the OIG noted the following:

- The hospital certified that the payments under the Arrangement were consistent with fair market value for the actual services needed, and were provided without regard to referrals or other business between the parties.
- The payments were made on a per diem basis, taking into account the likelihood of a physician (a) being called to the emergency room, and (b) performing uncompensated inpatient care.
- Each physician was required to provide 18 days of uncompensated on-call coverage annually.
- All physicians in a given specialty were paid the same per diem rate except weekends, which were paid at a higher per diem. Holiday per diem rates were not specifically addressed.
- Prior to entering into the Arrangement, the emergency department was understaffed, and the medical needs of patients were not met.
- The opportunity to participate in the Arrangement was offered to all physicians in a given specialty, and the on-call schedule was developed as equally as possible.
- Physicians were not allowed to "cherry-pick" patients with adequate insurance.
- Since inception of the Arrangement the hospital has experienced greater efficiency in the emergency department, improved on-call performance, and greater overall patient satisfaction.
- Any costs of the Arrangement are absorbed by the hospital and do not accrue to a federal health care program.

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Finally, the OIG stressed that nothing in the advisory opinion should be construed as requiring hospitals to pay for on-call coverage and, in fact, such arrangements should be scrutinized closely as similar payments have historically represented “little more than illicit payments for referrals.”

As is typically the case, many questions remain unanswered. For example, the OIG's opinion did not specifically address the situation of a hospital in a more affluent area not being able to provide on-call care due to the physicians unwillingness to provide coverage. Likewise, the advisory opinion does not specifically address for-profit institutions. Nevertheless, in certain circumstances, both tax-exempt and for-profit hospitals are now in a position to solve the vexing problem of on-call coverage with the benefit of guidance.