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## The Office of the Inspector General (“OIG”) Advisory Opinion 07-10: The OIG Rules Favorably on Hospital Program to Pay Physicians for On-Call and Indigent Care Services

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**O**n September 27, 2007, the U.S. Department of Health and Human Services, Office of Inspector General (OIG) posted Advisory Opinion 07-10, the first advisory opinion addressing a hospital’s payment to physicians for providing on-call and indigent care services. This is an area of concern for the OIG, who noted in the opinion that “[t]here is a substantial risk that improperly structured payments for on-call coverage could be used to disguise unlawful remuneration.” Often, the arrangements do not fit within the requirements of the “personal services and management contracts” safe harbor (42 C.F.R. §1001.952(d)) because the compensation is not set in advance, thus making it difficult to know whether on-call compensation arrangements are in compliance with the Federal anti-kickback statute.

The opinion noted that the key issue in regard to the legality of compensation for on-call coverage is whether the compensation is (i) fair market value in an arm’s length transaction for actual and necessary services; and (ii) not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties. The OIG identified on-call payment arrangements that they consider to be “problematic”:

(i) payments that compensate for “lost opportunity” instead of reflecting bona fide lost income;

(ii) payments that compensate physicians for no identifiable services;

(iii) aggregate on-call payments that are

disproportionately high compared to the physician’s regular medical practice income;

(iv) payments that compensate the physician for professional services for which the physician also receives compensation from other sources, such as insurance.

Factors that the OIG considered to be favorable (i.e., presenting a low risk of fraud and abuse) in the on-call program they evaluated included:

(i) the payments were fair market value, taking into consideration such factors as the specialty of the physician, the likelihood that he or she will have to respond on call, the likelihood that he or she will have to provide uncompensated treatment, the physician’s obligation to provide ongoing inpatient care, and the requirement to provide other quantifiable services to the hospital;

(ii) the hospital had a legitimate, unmet need for on-call coverage and physician services to those unable to pay;

(iii) the on-call program included other features to minimize the risk of fraud and abuse, including: it was offered uniformly to all physicians in the relevant specialties; monthly call obligations were divided as equally as possible; physicians must provide inpatient follow-up care to any patient seen while on-call, regardless of ability to pay; physicians are required to document their services in the medical records; and all costs for the program are absorbed by the hospital and do not accrue to Federal health care programs.

Akerman Senterfitt recommends that all hospitals providing compensation to physicians for on-call coverage evaluate their compensation programs in light of the factors identified by the OIG and consider implementing changes to the programs if problem areas are discovered. The members of Akerman’s Health Care Practice Group are skilled in this type of evaluation and stand ready to assist.

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