

[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.]

[name and address redacted]

Re: Advisory Opinion No. CMS-AO-2011-01

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding the proposed physician recruitment arrangement (the Proposed Arrangement) among [name redacted] (the Hospital or the Requestor), [name redacted] (the Practice), and an as yet unidentified physician (the Physician). Specifically, you seek a determination as to whether the Proposed Arrangement meets the requirements of the physician recruitment exception set forth in section 1877(e)(5) of the Social Security Act (the “Act”) and 42 C.F.R. section 411.357(e) if a non-competition provision is included within the Proposed Arrangement.

You certified that all of the information provided in your request, including all supplementary materials and documentation, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties. In issuing this opinion, we relied solely on the facts and information presented to us. We have not undertaken an independent investigation of this information. If material facts have not been disclosed or have been misrepresented, this advisory opinion is without force and effect.

Based on the specific facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the non-competition provision in the Proposed Arrangement meets the criteria set forth at 42 C.F.R. section 411.357(e)(4)(vi). Accordingly, based on your certifications, we conclude that the Proposed Arrangement meets the physician recruitment exception of the Act. We express no opinion regarding whether the Proposed Arrangement complies with any other provision of section 1877 of the Act as it applies to the Hospital or the Practice.

This opinion may not be relied on by any persons or entities other than the Requestor and is further qualified as set forth in section IV below and in 42 C.F.R. sections 411.370 through 411.389.

I. FACTUAL BACKGROUND

The Hospital and the Practice plan to execute the Proposed Arrangement, which will be entered into in order to induce the Physician, a pediatric orthopedic surgeon, to relocate to the Hospital’s geographic service area. The Requestor certified that there is a documented need for a pediatric orthopedic surgeon and the only orthopedic surgeon who practiced in the geographic service area retired and the parties are unaware of other

pediatric orthopedic surgeons who are planning to relocate to the geographic service area. The Proposed Arrangement provides the Physician with an income guarantee loan and a moving expense loan, each with repayment and forgiveness provisions, designed to induce the Physician to relocate to the Hospital's geographic service area in order to meet the community need for pediatric orthopedic surgery services.

The Requestor certified that the Practice regularly imposes non-competition provisions on employed physicians. According to the Requestor, the Practice would not be willing to recruit a physician without a non-competition provision and the Practice determined that a 25-mile practice restriction is reasonable and appropriate in order to protect its investment in new physicians and to appropriately incentivize a recruited physician to stay employed with the Practice.

The non-competition provision restricts the Physician from establishing, operating, or providing professional medical services at any medical office, clinic, or other health care facility at any location within a 25-mile radius of the Hospital for a period of one year following the earlier of the termination or expiration of the Proposed Arrangement. The Requestor certifies that the non-competition agreement would restrict the Physician from practicing at five hospitals located within a 25-mile radius from the Hospital. The Physician would not be restricted from practicing at one hospital that is within the Hospital's geographic service area, but is outside of the 25-mile radius from the Hospital. In addition, there are at least three other hospitals located approximately 35 to 60 miles from the Hospital that take roughly one hour of travel time to arrive via automobile. The Requestor certified that the parties have met all state law requirements for a non-competition provision to be legally enforceable.¹

The Requestor asked whether an impermissible practice restriction would be placed upon the Physician that would prohibit the Proposed Arrangement from meeting the physician recruitment exception set forth at section 1877(e)(5) of the Act and 42 C.F.R. §411.357(e) if a non-competition provision is included within the Proposed Arrangement. Thus, the only issue addressed in this opinion is whether the physician recruitment exception may still be satisfied if the non-competition provision is included within the Proposed Arrangement.

II. LEGAL ANALYSIS

A. Law

Under section 1877 of the Act (42 U.S.C. section 1395nn), a physician may not refer a Medicare patient for certain designated health services (DHS) to an entity with which the physician (or an immediate family member of the physician) has a financial relationship, unless an exception applies. Section 1877 of the Act also prohibits the entity from presenting or causing to be presented claims to Medicare (or billing another individual,

¹ CMS has not analyzed or determined whether the non-competition provision meets State or local law requirements.

entity, or third party payor) for Medicare DHS that are furnished as a result of a prohibited referral.²

Both section 1877 of the Act and our regulations set forth an exception for certain remuneration paid by a hospital to induce a physician to relocate his or her medical practice to the geographic area served by the hospital in order to become a member of the hospital's medical staff.³ Social Security Act, section 1877(e)(5); 42 C.F.R. section 411.357(e).

In order to comply with the exception for certain recruitment arrangements, an arrangement must satisfy a number of criteria set forth in our regulation, including the following:

- (i) The arrangement is set out in writing and signed by both parties;
- (ii) The arrangement is not conditioned on the physician's referral of patients to the hospital;
- (iii) The hospital does not determine (directly or indirectly) the amount of remuneration to the physician based on the volume or value of any actual or anticipated referrals by the physician or other business generated between the parties; and
- (iv) The physician is allowed to establish staff privileges at any other hospital(s) and to refer business to any other entities (except as referrals may be restricted under an employment or service contract that complies with section 411.354(d)(4) [42 C.F.R. section 411.354(d)(4)]).

42 C.F.R. section 411.357(e)(1).

In the case of remuneration provided by a hospital to a physician either indirectly through payments made to another physician practice, or directly to a physician who joins a physician practice, the following conditions also must be met:

- (i) The written agreement in paragraph (e)(1) [42 C.F.R. section 411.357(e)(1)] is also signed by the physician practice.

² In 1993, the physician self-referral prohibition was made applicable to the Medicaid program. 42 U.S.C. section 1396b(s).

³ Our regulations provide that a physician is considered to have relocated his or her medical practice if the medical practice was located outside the geographic area served by the hospital and -- (A) The physician moves his or her medical practice at least 25 miles and into the geographical area served by the hospital; or (B) The physician moves his medical practice into the geographical area served by the hospital, and the physician's new medical practice derives at least 75 percent of its revenues from professional services furnished (including hospital patients) not seen or treated by the physician at his or her prior medical practice site during the preceding 3 years, measured on an annual basis (fiscal or calendar years). For the initial "start up" year of the recruited physician's practice, the 75 percent test in the preceding sentence will be satisfied if there is a reasonable expectation that the recruited physician's medical practice for the year will derive at least 75 percent of its revenues from professional services furnished to patients at his or her prior medical practice site during the preceding 3 years. 42 C.F.R. section 411.357(e)(2)(iv).

- (ii) Except for actual costs incurred by the physician practice in recruiting the new physician, the remuneration is passed directly through to or remains with the recruited physician.
- (iii) In the case of an income guarantee of any type made by the hospital to a recruited physician who joins a physician practice, the costs allocated by the physician practice to the recruited physician do not exceed the actual additional incremental costs attributable to the recruited physician. With respect to a physician recruited to join a physician practice located in a rural area or HPSA, if the physician is recruited to replace a physician who, within the previous 12-month period, retired, relocated outside of the geographical area served by the hospital, or died, the costs allocated by the physician practice to the recruited physician do not exceed either –
 - (A) The actual additional incremental costs attributable to the recruited physician; or
 - (B) The lower of a *per capita* allocation or 20 percent of the practice's aggregate costs.
- (iv) Records of the actual costs and the passed-through amounts are maintained for a period of at least 5 years and made available to the Secretary upon request.
- (v) The remuneration from the hospital under the arrangement is not determined in a manner that takes into account (directly or indirectly) the volume or value of any actual or anticipated referrals by the recruited physician or the physician practice (or any physician affiliated with the physician practice) receiving the direct payments from the hospital.
- (vi) The physician practice may not impose on the recruited physician practice restrictions that unreasonably restrict physician's ability to practice medicine in the geographic area served by the hospital.
- (vii) The arrangement does not violate the anti-kickback statute (section 1128B (b) of the Act) or any Federal or State law or regulation governing billing or claims submission.

42 C.F.R. section 411.357(e)(4).

The Requestor seeks an opinion regarding whether their non-competition provision satisfies 42 C.F.R. section 411.357(e)(4)(vi). The Requestor certified that all other elements of the physician recruitment exception set forth in section 1877(e)(5) of the Act and 42 C.F.R. section 411.357(e) have been met.

B. Analysis

As stated above, the physician recruitment exception requires that the physician practice not impose additional practice restrictions on the recruited physician other than the conditions related to quality of care. 42 C.F.R. section 411.357(e)(4)(vi). In the preamble to our Phase II rulemaking, we concluded that a non-competition provision may not be placed on a recruited physician. 69 Fed. Reg. 16094, 16096-97 (Mar. 26, 2004). In response to comments on that rulemaking, we revised our policy and concluded in

Phase III rulemaking that non-competition provisions should not be categorically prohibited from recruitment arrangements. We stated:

Upon review of the comments, however, we are persuaded that categorically prohibiting physician practices from imposing non-compete provisions may have the unintended effect of making it more difficult for hospitals to recruit physicians. We are concerned that physician practices and individual physicians may be unable or reluctant to hire additional physician, regardless of the receipt of financial assistance from hospitals, unless they are able to impose a limited, reasonable non-compete clause. Therefore, we are amending section 411.357(e)(4)(vi) [42 C.F.R. section 411.357(e)(4)(vi)] to state that physicians and physician practices, may not impose on the recruited physician any practice restrictions that unreasonably restrict the recruited physician's ability to practice medicine in the geographic area served by the hospital. Although we are not *per se* conditioning payment for DHS on compliance with State and local laws regarding non-compete agreements, we believe that any practice restrictions or conditions that do not comply with applicable State and local law run a significant risk of being considered unreasonable.

72 FR 51054 (Sept. 5, 2007).

In the present case, we evaluated several factors to determine whether the non-competition provision imposes practice restrictions that unreasonably restrict the Physician's ability to practice medicine in the geographic area served by the Hospital. First, the time period restriction of one year was reasonable. Second, the distance requirement of 25 miles was reasonable based on the geographic area served by the Hospital. Third, even with the time period and distance restrictions, the Physician would still be permitted to practice at certain hospitals both within and outside of the Hospital's geographic service area within the one year time period. Finally, we also considered the Requestor's certification that the non-competition provision complies with applicable State and local laws. Based on the totality of these evaluated factors, we conclude that this non-competition provision does not unreasonably restrict the Physician's ability to practice medicine.

III. CONCLUSION

Based on the specific facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the non-competition provision in the Proposed Arrangement does not impose practice restrictions that unreasonably restrict a recruited physician's ability to practice medicine in your geographic area.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to the Requestor of this opinion. This advisory opinion has no application to, and cannot be relied upon by, any other individual or entity.
- This advisory opinion may not be introduced into evidence in any matter involving an entity or individual that is not a requestor of this opinion.
- This advisory opinion is applicable only to the statutory and regulatory provisions specifically noted above. No opinion is expressed or implied herein with respect to the application of any other Federal, State, or local statute, rule, regulation, ordinance, or other law that may be applicable to the Practice or the Requestor, including without limitation, the Federal anti-kickback statute, section 1128B(b) of the Act (42 U.S.C. section 1320a-7b(b)).
- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services. The Centers for Medicare & Medicaid Services reserve the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, rescind or revoke this opinion.
- This advisory opinion is limited in scope to the specific arrangement described in this letter and has no applicability to other arrangements, even those which appear similar in nature or scope.
- No opinion is expressed herein regarding the liability of any party under the False Claims Act or other legal authorities for any improper billing, claims submission, cost reporting, or related conduct.

This opinion is also subject to any additional limitations set forth at 42 C.F.R. section 411.370 through section 411.389.

Sincerely,

Jonathan D. Blum
Deputy Administrator & Director
Center for Medicare

cc: [name redacted]