American Hospital Association

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July 23, 2004

Leslie Norwalk
Acting Deputy Administrator and Chief Operating Officer
Centers for Medicare and Medicaid Services
7500 Security Boulevard, Room C5-26-16
Baltimore, MD 21244

RE: Stark Physician Self Referral Regulation

Dear Ms. Norwalk:

The AHA is very disappointed in the Centers for Medicare & Medicaid Services' (CMS) decision to require existing physician recruitment arrangements to come into compliance with the new provisions in the Interim Final Rule for Physician Self Referral (Stark II regulations), which take effect July 26. This policy would impose new restrictions midstream on physician contracts that hospitals entered into in good faith and in reliance on the existing law at the time. Neither the rule nor the FAQ issued on July 14 acknowledge the impediments CMS' decision will create for hospitals in meeting community needs and the potential disruption it will create in current physician-patient relationships. Recruitment arrangements that predate the new rule should be governed by the law that existed at the time they were entered into and permitted to run their course.

Hospitals recruit physicians to meet the health care needs of their communities. Hospitals often are the first to recognize a shortage of needed physicians or specialties. They see this through formal community needs assessments and their everyday experiences serving patients – the number of patients seeking primary care at the emergency departments; lack of on-call coverage in certain specialties; delays for patients in getting appointments for on-going care; and limits on the number of Medicaid or indigent patients that physicians accept in their practices.

One of the tools hospitals use to recruit needed physicians is to assist them in becoming part of a group practice and to provide financial support in their first few years of practice. In today's environment, the predominant practice setting for physicians is a group practice. A group, rather than solo practice, offers the recruited physician mentoring, professional education, back-up coverage and economies of scale. As part of a practice, the physician recruit is expected to bear a pro-rata share of the expenses associated with the group practice (such as rent, support personnel, computers, etc.). In addition, the physician group often sets limits on the ability of the recruit to leave and start a competing practice nearby.

As the June 24 AHA comment letter sets out in more detail, the new rule will prohibit recruiting to communities for which recruitment is permitted today. Hospitals are being told that they may not continue their relationships with physicians recruited to and serving patients in the community unless the group practices agree to change the obligations they impose on the recruit that are typical for the group members. Requiring groups to renegotiate, amend or terminate their agreements with the recruit would be highly disruptive and problematic.

Hospitals may not be party to agreements between groups and recruited physicians, and therefore have limited ability to affect (or even to know the details of) those arrangements. Many of the existing noncompete provisions contain certain "safeguards." For instance, many noncompete provisions include reasonable geographic limits associated with the practice restrictions. Also, some of the arrangements require the group to reimburse the hospital for payments made under income guarantee provisions in instances where a group exercises the noncompete. In cases where groups decline to revise their agreements to comply with the new regulatory requirements, recruited physicians could be left with a substantial debt that they could not have foreseen. The breach of trust that would result between physicians in the group and the hospital would work against the cooperative relationships necessary in meeting the needs of a community.

The new definition of a hospital's service area also should not apply to existing arrangements. In some rural and outreach communities where physicians have relocated, the hospital will have to require that the physician relocate closer to the hospital, but away from the community, or terminate the arrangement. Neither of these would be good for the community.

The statute has included an exception for hospital recruitment of physicians since it was enacted. Neither the statute nor the previous regulations have included the limitations in the interim final rule. Nor is it correct for CMS to suggest that allowing recruitment into a group is an "expansion" of the current law. "Remuneration" is defined in the statute to include any remuneration provided "directly or indirectly." The 1995 and 1998 regulations have followed a similar approach in the recruitment exception, referring to "remuneration provided by a hospital to recruit a physician." The federal government has long been aware of the broad use of these arrangements. For example, in the preamble to a 1999 anti-kickback law regulation, the Office of Inspector General stated, "We are aware that an increasing amount of physician recruitment is being conducted through joint arrangements between hospitals and group practices or solo practitioners. Typically, these arrangements involve payments from hospitals to group practices or solo practitioners to assist the group practice or solo practitioner in recruiting a new physician . . . these arrangements can be efficient and cost effective means of recruiting needed practitioners to an underserved community. Moreover, many new practitioners prefer joining an existing group practice to starting a solo practice." (64 Fed. Reg. 63544 (Nov. 19, 1999)).

In our June 24 comment letter we requested that CMS take steps to ensure that existing arrangements entered in good faith reliance on the statute and prior CMS guidance are not disrupted. In related discussions we have provided CMS the opportunity to hear directly from hospitals about the burden created and the effect on community care. We continue to urge that CMS take steps to prevent the disruption of care in communities. Again, recruitment

arrangements that predate the new rule should be governed by the law that existed at the time they were entered into and permitted to run their course.

Sincerely,

Rick Pollack
Executive Vice President

Cc: Herb Kuhn