[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-2006-01

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding the proposed joint recruitment arrangement (the "Proposed Arrangement") among [name redacted] (the "Hospital"), [name redacted] (the "Practice"), and a primary care physician (the "Physician"). Specifically, you seek a determination as to whether the Proposed Arrangement would meet 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. § 411.357(e) if the Physician were required to practice medicine up to eight hours per week in an office of the Practice that is not located in the Hospital's geographic service area and all other elements of the exception are satisfied.

You have 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 have 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 Proposed Arrangement would meet the criteria set forth in the physician recruitment exception of the Act, section 1877(e)(5), and at 42 C.F.R. § 411.357(e). We express no opinion regarding whether the Proposed Arrangement, if effectuated, would comply 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 other than [name redacted], the requestor of this opinion (the "Requestor"), and is further qualified as set forth in section IV below and in 42 C.F.R. §§ 411.370 through 411.389.

I. FACTUAL BACKGROUND

The Hospital is located in [county name redacted], [state name redacted]. The Practice provides services at three locations: [location redacted] ("Town X"), which is located in [county name redacted] ("County A"); [location redacted] ("Town Y"), which is located

in [county name redacted] ("County B"); and [location redacted] ("Town Z"), which is located in [county name redacted] ("County C"). Towns X and Y are located in the Hospital's geographic service area (as defined in 42 C.F.R. § 411.357(e)(2)); Town Z is not, although its residents are served by the Hospital. County A is designated as a primary medical care Health Professional Shortage Area ("HPSA") with respect to its low-income population. Counties B and C are not designated as primary medical care HPSAs.

To address the need for an additional primary care physician, the Hospital and the Practice propose to recruit jointly a new physician into the area.[1] The Hospital and the Practice have entered into an agreement with a recruiting firm to search for a suitable candidate. If the recruiting firm finds a suitable candidate to relocate to the geographic area served by the Hospital, the Hospital and the Practice would each pay one-half of the recruiting firm's fees.[2]

The Proposed Arrangement would provide certain remuneration to induce a Physician to relocate his or her practice to the geographic area served by the Hospital (as defined in 42 C.F.R. § 411.357(e)(2)), which includes County A (including Town X) and County B (including Town Y). Given the remote location of the Hospital, it is anticipated that the Physician either would move his or her practice at least 25 miles or would derive at least 75 percent of revenues from professional services furnished to patients (including hospital inpatients) not seen or treated by the Physician previously. Under the Proposed Arrangement, the Hospital would make the following loans to the Physician directly: (1) a loan for payment of the Physician's moving and relocation expenses (forgivable after one year); (2) a loan equal to the Physician's first year medical malpractice premium not to exceed $10,000 (forgivable over three years); and (3) a loan to repay the Physician's medical school loans (forgivable over three years). The Hospital would provide no other compensation to either the Practice or the Physician in connection with the Proposed Arrangement, and the forgiveness of the loans to the Physician would be based on the Physician meeting certain commitments.[3] In addition, the Physician would spend 80 to 90 percent of his or her time practicing medicine in the Practice's medical offices located in Town X and Town Y, and between four and eight hours per week (10 to 20 percent of his or her time) providing medical services at the Practice's medical office in Town Z, which is not located in the Hospital's geographic service area.

The parties intend to enter into a written agreement, signed by the parties, under which the Physician would not be prohibited from establishing staff privileges at hospitals other than the recruiting Hospital or from referring business to other entities. In addition, other

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[1] An independent consultant engaged by the Hospital concluded that County A was in need of at least one additional primary care physician. We express no opinion regarding the consultant's conclusion.

[2] We express no opinion regarding the legality of the agreement between the Hospital, the Practice, and the recruiting firm.

[3] The Practice intends to pay the Physician on a salaried basis, but his or her income would not be guaranteed by the Hospital.

than practicing 40 hours per week in the Practice's locations, no practice restrictions would be placed on the Physician. The Requestor certified that the Proposed Arrangement would not be conditioned on the Physician's referral of patients to the Hospital and that the remuneration 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 Physician or the Practice (or any physician affiliated with the Practice) or any other business generated between the parties. The parties will maintain for five years records of the actual costs and passed through amounts under the Proposed Arrangement and will make them available to the Secretary of the U.S. Department of Health and Human Services upon request. Finally, the Requestor certified that, based on its independent analysis, the Proposed Arrangement would not violate the Federal anti-kickback statute (section 1128(B)(b) of the Act (42 U.S.C. § 1320a-7b(b)).[4]

II. LEGAL ANALYSIS

A. Law

Under section 1877 of the Act (42 U.S.C. § 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 furnishing the DHS from submitting claims to Medicare, the beneficiary, or any other entity for Medicare DHS that are furnished as a result of a prohibited referral.[5]

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.[6] Social Security Act, § 1877(e)(5); 42 C.F.R. § 411.357(e). The geographic area served by the hospital is the area composed of the lowest number of contiguous zip codes from which the hospital draws at least 75 percent of its inpatients. 42 C.F.R. § 411.357(e)(2).

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

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[4] We express no opinion regarding the Proposed Arrangement's compliance with the Federal anti-kickback statute.

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

[6] Our regulations provide that a physician is considered to have relocated his or her medical practice if: (1) the physician moves his or her medical practice at least 25 miles; or (2) the physician's new medical practice derives at least 75 percent of its revenues from professional services furnished to patients not seen or treated by the physician at his or her prior medical practice site during the preceding three years. 42 C.F.R. § 411.357(e)(2).

following: (1) the recruitment arrangement is set out in writing and signed by the parties, including the party to whom the payments are made directly; (2) the arrangement is not conditioned on the physician's referral of patients to the hospital; (3) the remuneration from the hospital 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 by the physician practice (or any physician affiliated with the physician practice) receiving the direct payments or any other business generated between the parties; and (4) the recruited physician is allowed to establish staff privileges at other hospitals and to refer business to any other entities. 42 C.F.R. § 411.357(e)(1). In cases where a hospital is providing remuneration to a physician either indirectly through payments made to another physician or physician practice, or directly to a physician who joins a physician practice, the following conditions also must be met: (1) the written agreement is signed by the party to whom the payments are directly made; (2) except for actual costs incurred by the physician or the physician practice, the remuneration is passed directly through to or remains with the physician; (3) in arrangements involving an income guarantee by the hospital, the overhead costs allocated by the physician or physician practice do not exceed the actual additional incremental costs attributable to the recruited physician; (4) records of the actual costs and the passed through amounts must be maintained for a period of five years; (5) the remuneration from the hospital 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; (6) the physician practice does not impose additional practice restrictions on the recruited physician other than conditions related to quality of care; and (7) the arrangement does not violate the Federal 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. § 411.357(e)(4).

B. Analysis

As described in section I of this opinion, the Requestor has certified that the Proposed Arrangement meets all of the conditions of the physician recruitment exception set forth in section 1877(e)(5) of the Act and at 42 C.F.R. § 411.357(e). However, the Requestor raised a key issue that requires our consideration; that is, whether a physician has relocated his or her medical practice to the geographic area served by a hospital if the physician spends 10 to 20 percent of his or her time practicing medicine outside of the geographic area served by the hospital.

Under the Proposed Arrangement, the Hospital and the Practice would recruit jointly a Physician to fill the need for a primary care physician in County A (which is located in the geographic area served by the Hospital). The Proposed Arrangement provides certain remuneration to induce the Physician to relocate his or her medical practice to the Hospital's geographic service area in order to become a member of the Hospital's medical staff. The recruited Physician would spend some, but no more than 10 to 20 percent, of his or her time providing medical services to patients at a Practice location in Town Z, which, although served by the Hospital, is not within the boundary of the

geographic area served by the Hospital as defined at 42 C.F.R. § 411.357(e)(2). There is no explicit requirement in the physician recruitment exception of the Act (section 1877(e)(5)) or at 42 C.F.R. § 411.357(e) that the recruited Physician spend 100 percent of his or her medical practice time in the geographic area served by the Hospital; however, we caution that we may reach a different conclusion if the time spent by the recruited physician outside of the geographic service area would be more substantial than under the Proposed Arrangement.[7]

III. CONCLUSION

Based on the specific facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, if effectuated, the Proposed Arrangement among the Hospital, the Practice, and the Physician would meet the criteria set forth in the physician recruitment exception of the Act, section 1877(e)(5), and at 42 C.F.R. § 411.357(e). We have not considered, nor do we express an opinion about, any other relationship between the Hospital, the Practice, and/or any other entity.

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 1128(B)(b) of the Act (42 U.S.C. § 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, modify, or terminate this opinion.

[7] We reiterate that we did not undertake an independent evaluation as to whether the Proposed Arrangement would be in compliance with the Federal anti-kickback statute. If, in fact, the Proposed Arrangement would be in violation of the Federal anti-kickback statute, this opinion is without effect.

- 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. §§ 411.370 through 411.389.

Sincerely,

Herb B. Kuhn, Director
Center for Medicare Management