



## Physician Hoopsters Revisited

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by John S. Hoff

In the January/February *Oncology Issues*, I described the agreement that the IRS had entered into with Hermann Hospital in Houston, Tex., relating to retention agreements between the hospital and certain of its physicians. Although that agreement technically does not apply to other hospitals, it reflects the attitude with which the IRS approaches recruitment of physicians by not-for-profit hospitals.

The IRS has recently announced a proposed revenue ruling to provide general guidance that would be applicable to all not-for-profit hospitals. While the IRS may claim that the revenue ruling will provide guidance for hospitals and physicians, unfortunately that is not the case.

The proposed revenue ruling is at the same time both begrudging and of little assistance in the real world. As is typical when an agency is sanctioning rather than condemning something (and as is also the case with safe harbor rules under the fraud and abuse prohibitions), the announcement only approves conduct about which there could not be much doubt in the first place.

The proposed revenue ruling discusses five situations. Four of the five are found to be permissible; one is not. The analysis is so simplistic

and the factual scenarios so loaded that the reader will know what the result is in each case just from a recitation of the facts.

In each case there is a written agreement between the physician and the hospital, negotiated at arms-length and approved by the hospital's board. The other facts vary slightly:

1. A rural hospital located in a health professional shortage area for primary care physicians recruits a primary care doctor from outside the area. It pays the physicians a one-time bonus of \$5,000, pays the malpractice premium for one year, provides office space in a building owned by the hospital for three years at below market rent, gives start-up financial assistance (on commercially reasonable terms), and guarantees the physician's home mortgage.

2. A hospital located in an economically depressed inner city area determines that there is a shortage of pediatricians. It recruits a pediatrician from outside the service area who agrees to treat a "reasonable number" of Medicaid patients. In exchange, the hospital pays for moving expenses and guarantees practice income for three years on commercially reasonable terms.

3. A hospital is located in an economically depressed inner city area. It has conducted a community-needs assessment. This indicates that indigent patients are having difficulty getting access to care because of a shortage of obstetricians willing to treat Medicaid and charity care

patients. The hospital recruits an obstetrician who is currently on its medical staff to provide those services. The obstetrician agrees to care for a "reasonable" number of these patients in exchange for the hospital's agreement to pay one year's premium on his malpractice insurance.

4. A hospital is located in a city. It currently operates a NICU with four perinatologists. Two are moving to other areas. The hospital finds a replacement who is currently practicing in the same city but at another hospital. The hospital recruits the physician to join its staff and provides NICU coverage in exchange for a guarantee of the physician's private practice income for three years. The guarantee is properly documented and bears commercially reasonable terms.

5. A hospital has been found guilty in a court of law of violating the fraud and abuse statute for providing recruitment incentives that constitute payments for referrals.

The IRS does not discuss the fraud and abuse issues raised in the first four scenarios. The fifth is just a conclusory statement of violation.

It is obvious which of these situations the IRS is willing to accept as consistent with Section 501(c)(3) and which it believes is violative.

The proposed revenue ruling demonstrates how far removed the IRS is from the realities of the roiling marketplace and does not indicate much of a change in the mind set underlying the Hermann Hospital agreement. ■

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