



Posted: January 15, 2003

[Name and address redacted]

Re: Malpractice Insurance Assistance

Dear [Name redacted]:

I am responding to your December 17, 2002 letter to the Inspector General regarding certain proposed arrangements that [name redacted] wishes to implement to provide temporary assistance in obtaining professional liability insurance to physicians on its hospitals' medical staffs in West Virginia, Nevada, Florida, and Texas. [Name redacted] believes that these arrangements must be implemented immediately to forestall disruption in the provision of medical services in these states. Your letter asks the Office of the Inspector General ("OIG") to confirm that implementation of these arrangements would not be viewed as violations of the anti-kickback or Stark II statutes, sections 1128B(b) and 1877 of the Social Security Act, respectively.

As you know, the OIG historically has been concerned that malpractice premium subsidies paid to, or on behalf of, potential referral sources, including hospital medical staff, may be suspect under the anti-kickback statute. At the same time, the OIG has established a safe harbor for malpractice premium subsidies provided to persons providing obstetrical care in primary health care shortage areas. See 42 CFR § 1001.952(o). Depending on the circumstances, malpractice premium support could also fit into the employee or physician recruitment safe harbors at 42 CFR §§ 1001.952(i) and (n). The OIG has further recognized that a payment practice that does not fall within the ambit of a safe harbor does not necessarily violate the anti-kickback statute.

We are aware of the current disruption in the medical malpractice liability insurance markets in some states. In particular, we appreciate the potential serious effects on federal health care beneficiaries' access to, and on the quality of, medical care if physicians curtail or cease practicing as a result of increased costs or access to malpractice insurance. You may be assured that we will take these considerations into account in evaluating temporary financial arrangements designed to help assure continued access to care and will exercise our enforcement discretion accordingly.

With respect to the proposed arrangements described in your letter, we note that, as represented, they contain a number of safeguards. First, the arrangements will be provided on an interim basis for a fixed period in states experiencing severe access or affordability problems, although they may be extended if, at the end of the period there is a continuing

disruption in a state's malpractice insurance market – an event over which [name redacted] has no control. Second, in the states where assistance is offered, only current active medical staff (or physicians joining the medical staff who are new to the locality or have been in practice for less than one year) will be eligible. Third, the criteria for receiving assistance will not be related to the volume or value of referrals or other business generated. Fourth, each physician receiving assistance will pay at least as much as he or she currently pays for malpractice insurance. Fifth, participating physicians will be required to perform services for [name redacted] and give up certain litigation rights. You have represented that the value of such services and relinquished rights will be equal to the fair market value of the insurance assistance. Sixth, insurance assistance will be available regardless of the location at which the physicians provide services, including, but not limited to, other hospitals.

Notwithstanding, a determination with respect to any particular arrangement would require an evaluation of the totality of specific facts and circumstances. We cannot provide you with an opinion about your proposed arrangements except in accordance with the regulatory requirements for advisory opinions. The procedure for requesting an advisory opinion can be found in the Code of Federal Regulations at 42 C.F.R. Part 1008 or on our webpage at <http://oig.hhs.gov/fraud/advisoryopinions.html>.

Finally, the OIG only has limited jurisdiction with respect to both the anti-kickback and the Stark II statutes. The United States Department of Justice has independent jurisdiction over the anti-kickback statute, and the Centers for Medicare and Medicaid Services has primary jurisdiction with respect to the Stark II statute. Accordingly, we are forwarding your letter to them and suggest that you contact them directly to solicit their views.

I hope this information is helpful.

Sincerely,

/s/

Lewis Morris
Chief Counsel to the Inspector General

cc: Department of Justice
Centers for Medicare and Medicaid Services