On October 30, 2012, the OIG posted an important advisory opinion related to a tax-exempt hospital’s per diem payments to physicians for providing on-call ED coverage (the Arrangement). In Advisory Opinion 12-15 (Ad. Op. 12-15), the OIG concluded that it would not impose CMPs or administrative sanctions against the hospital under the Anti-Kickback Statute (AKS) because the Arrangement presented a low risk of fraud and abuse.

Under the Arrangement, participating physicians—consisting of 130 specialists—each enter into a written agreement with the hospital to provide unrestricted call coverage for the ED. The physicians are allowed to be off-site during their call coverage, but they agree to respond within 30 minutes of a call. In addition, the physicians agree to (i) provide inpatient care and follow-up care in their office practices for ED patients they admit, (ii) promptly prepare medical records, and (iii) participate in medical staff committee appointments, all regardless of an ED patient’s insurance status or ability to pay. The hospital offers this Arrangement to all specialists on its staff, subject to unrestricted call coverage. The hospital implemented this Arrangement after physicians had expressed concern with regard to the burden posed by their provision of call.

The hospital certified to the OIG that it annually analyzes each specialty’s call burden to calculate per diem compensation. Factors in this analysis include: (1) the likely number of days per month a specialty’s physicians would be called; (2) the likely number of patients to be seen per call day; and (3) the likely number of patients requiring inpatient and follow-up care. Using these projections, the hospital calculates an annual call coverage payment per specialty, and then divides that amount by 365 to create the specialty’s per diem fee. The hospital also engages an independent consultant who certifies that the per diem fee is commercially reasonable and consistent with fair market value, without taking into account volume or value of referrals. The hospital confirmed to the OIG that the per diem payment is applied uniformly across each specialty, without taking into account a specific physician’s referrals.
In its review of the Arrangement, the OIG acknowledged the rapid growth of paid call coverage arrangements and the difficulties that some hospitals face in providing on-call physician services without compensating for such on-call coverage. On the other hand, the OIG cautioned that improper payments for on-call coverage could be used to disguise unlawful remuneration under the AKS. Ultimately, the OIG’s “key inquiry” is whether a physician’s compensation is “fair market value in an arms-length transaction for actual and necessary services,” and not based on the volume or value of referrals.

By way of example, the OIG identified four problematic compensation structures that hospitals should avoid in on-call arrangements:

(A) making “lost opportunity” payments that do not reflect *bona fide* lost income;
(B) compensating physicians when no “identifiable services are provided”;
(C) on-call payments that are “disproportionately high” as compared to a physician’s normal income; and
(D) compensating physicians for services for which they receive separate reimbursement.

The OIG did not elaborate further on these improper compensation structures. It is clear, however, that each of these structures violates the OIG’s FMV and “arms-length” standards.

The OIG noted that the AKS safe harbor for personal services and management contracts would not apply to this Arrangement because the aggregate compensation and work schedule for each physician is not set in advance in his/her written agreement. So, the OIG analyzed the totality of the Arrangement’s facts and circumstances. In the end, a combination of five factors led the OIG to conclude that this Arrangement presents a low risk of fraud and abuse:

1. **FMV Payments.** The hospital certified that the compensation is commercially reasonable, consistent with FMV, and does not take into account the volume or value of referrals. Further, the hospital specifically tailors the per diem payments for each specialty.

2. **Annual and Uniform Payments.** The hospital calculates and apportions the payments in advance each year, and uniformly administers the Arrangement among physicians.

3. **Actual Services Provided.** Physicians provide actual and necessary services for which they are not otherwise compensated. While some physicians may receive separate compensation from an insurer for some ED services, the OIG noted that the per diem payment is the only payment available to physicians for uninsured patients—which is a significant amount of care that the physicians provide.

4. **Offered to All.** The hospital offers the Arrangement to all specialists who are required to provide unrestricted call coverage under the hospital’s bylaws. Moreover, the method of scheduling call coverage is uniform within each specialty.
5. **Hospital Pays.** No costs of the Arrangement accrue to federal healthcare programs.

While the findings of Ad. Op. 12-15 can only be relied upon by the hospital requesting the Opinion, these factors provide guidance for hospitals that are considering and structuring paid call coverage arrangements. This Opinion also shows the close scrutiny that the OIG continues to give to on-call compensation arrangements to ensure that such arrangements are not vehicles to disguise payments for referrals.