

APPROVAL: CEO/President
APPROVAL: Board of Directors
APPROVAL: Compliance Committee
COMPLIANCE: All Departments
REFERENCE: Stark II, Phase III, Effective December 4, 2007
REFERENCE: 42 U.S.C. § 1320 a-7b; 42 C.F.R. § 1001.952(a)-(v) Anti-Kickback Statute
REFERENCE: 42 U.S.C. § 1395 nn (e)(3)(5); 42 C.F.R. Parts 411 and 424; "Stark II" and implementing regulations
REFERENCE: AD1.0082 Contracts Administration
REFERENCE: AD1.0119 Fair Market Value
REFERENCE: AD1.0121 General Statement on Agreements With Referral Sources
PREPARER: Legal Services

SCOPE:

This policy applies to Tomball Hospital Authority d/b/a Tomball Regional Hospital ("Tomball, Hospital or TRH") and any other entity or organization in which Tomball or affiliate owns a direct or indirect equity interest of 50% or more.

PURPOSE:

The purpose of this policy is to provide direction regarding the negotiation, execution and recruiting arrangements of physician recruitment/relocation agreements between the Hospital and physicians. The purpose of this policy is to also ensure compliance with the terms of the Corporate Integrity Agreement ("CIA") dated July 23, 2007, and the CIA Amendment dated May 5, 2009, between Tomball Hospital Authority d/b/a Tomball Regional Hospital (the "Hospital") and the Office of the Inspector General ("OIG") of the Department of Health and Human Services.

DEFINITIONS:

1. The following definitions apply to this policy: "Physician" means a duly licensed and authorized doctor of medicine or osteopathy, a doctor of dental surgery or dental medicine, a doctor of podiatric medicine, a doctor of optometry, or a chiropractor.
2. "Focus Arrangement Entity" means any individual or entity that is in a position to make or influence health care business or referrals to the Hospital; or is a physician who is a member of the Hospital's Medical Staff or is an immediate family member of a physician on the Hospital's Medical Staff.
3. "Focus Arrangement" means an agreement between the Hospital and any Focus Arrangement Entity.
4. The "Service area" means the lowest number of contiguous zip codes from which the Hospital draws at least seventy-five percent (75%) of its inpatient discharges during the most recent calendar year for which data is available. If, on the effective date of the recruitment agreement, there is more than one configuration of the lowest number of contiguous zip codes that draw 75 percent of the facility's

- inpatient discharges, the Hospital may select the configuration that it wishes to apply.
5. "Remuneration" means anything of value, including, but not limited to, cash, items or services.
 6. "Established practice" means two or more physicians (including the recruited physician) who practice through a single legal entity, using a common trade name and a common tax identification number. An "established practice" also includes the medical practice that is formed when a physician joins an existing practice of one or more solo practitioners.
 7. "Guarantee" means that component of the recruitment agreement pursuant to which the Hospital agrees, subject to certain allowable expenses and repayment and forgiveness and audit provisions, to guarantee a certain level of net income.
 8. "Guarantee Period" means the period of time during which the Hospital will guarantee the net income of the recruited physician.
 7. "Immediate Family Member" or "member of physician's immediate family" means husband or wife; birth or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of a grandparent or grandchild.
 8. "Collections" means all monthly fees and charges resulting and collected from items or services furnished by or under the direction of a recruited physician regardless of where or to whom such services are provided, and including compensation for all service arrangements. All monies generated as a practicing physician should be reported and exceptions may only be granted once disclosed and approved by Hospital Administration with the assistance of legal counsel.
 9. "Net Income" means the balance remaining after subtracting allowable expenses from collections. Allowable expenses are those that are defined in this recruitment policy.
 10. "Under-served geographic location" determined by one or more of the following (for purposes of this policy only):
 - a. A population to physician ratio in the community that is deficient in the particular specialty (with reference to the applicable ratio set forth by an independent non-interested entity, e.g., AMGA) of the physician being recruited;
 - b. Demand for a particular medical service in the community coupled with a documented lack of availability of the service or long waiting periods for the service, if the physician is being recruited to increase availability of that service;
 - c. Designation of the community (or that portion of the community that the physician is serving) at the time the recruitment agreement is executed as a Health Professional Shortage Area ("HPSA") as defined in 42 C.F.R. 5.1 – 5.4;
 - d. A reasonably expected reduction in the number of physicians of that specialty serving the Hospital's service area due to the anticipated

retirement within the next three (3) year period of physicians presently in the community; or

- e. A documented lack of physicians serving indigent or Medicaid patients within the Hospital's service area, provided that newly recruited physicians commit to serving a substantial number of Medicaid and indigent patients.

In the Hospital's geographic area, only Waller County may be deemed an under-served geographic location subject to a change in definition or failure to meet said criteria.

POLICY:

1. The recruitment of physicians to practice in the Hospital's geographic area is appropriate in certain circumstances to:
 - a. Add physicians in an under-served geographic location (as defined in the Definitions Section); or
 - b. Increase physician coverage where there is a shortage in the Hospital's service area.
2. A recruitment agreement may be considered when a physician is being recruited to join the Hospital's Medical Staff and meets other requirements of this policy. If a physician is already a member of the Hospital's Medical Staff, the Hospital cannot offer a recruitment agreement to that physician. Any special circumstance must be considered and approved by Hospital Administration with assistance from legal counsel.
3. Physician recruitment agreements are not appropriate to:
 - a. Retain a physician currently on the Medical Staff (i.e. retention agreements); or
 - b. Provide additional compensation to established Medical Staff members.
4. Under no circumstances are recruiting agreements to be tied expressly, by implication, or by "private understanding" to Hospital utilization.

PROCEDURE:

Community Need Assessment:

At least every three years, the Hospital shall engage an independent third party to prepare a written assessment that identifies medical specialties for which community need exists in the Hospital's service area based on objective third party data and criteria that are consistent with generally accepted methodologies for determining community need. The community need assessment should be incorporated into the strategic plan of the Board of Directors and only physicians that fall within the Board approved strategic plan should be recruited unless special authorization is approved by the Board.

Essential Conditions Before Recruitment:

All physician recruitment candidates must satisfy three (3) essential conditions prior to document execution:

- 1) Physician is starting a practice in the Hospital's service area; and
- 2) Physician is not currently a member of the Hospital's Medical Staff and agrees to apply and become a member of the medical staff after the recruitment agreement is executed; and

- 3) At least one of the following is true:
- a. The physician is (or will be upon the commencement of the payments under the recruitment agreement) in his or her first year of medical practice, including residents and post-resident fellows; or
 - b. The Physician has been employed full-time for at least the immediate previous two years with no independent practice outside of that employment by any one of the following:
 - i. A Federal or State bureau of prisons or similar operating correctional facility
 - ii. The Department of Defense or Department of Veterans Affairs to serve active or veteran military personnel
 - iii. Facilities of the Indian Health Service who serve patients who receive medical care exclusively through the Indian Health Service; or
 - c. The physician does not currently practice in the Hospital's service area. To meet this condition, either:
 - i. The physician's previous medical practice must move at least twenty-five (25) miles to within the Hospital's service area; or
 - ii. The physician establishes a new practice to which he or she derives at least seventy-five percent (75%) of his or her revenues from patients not seen or treated by the physician at his or her prior medical practice site during the preceding three (3) years, measured on an annual basis (fiscal or calendar year); for the initial "start up" year (the first twelve calendar months) of a recruited physician's practice, the seventy-five percent (75%) test will be satisfied if there is a reasonable expectation that the recruited physician's practice for the year will derive at least seventy-five percent (75%) of its revenues from patients not seen or treated by the physician at his or her prior medical practice site during the preceding three (3) years. In the event a special circumstance is to be considered, it must be approved in advance by Hospital Administration with guidance from legal counsel to ensure it is permissible by law.

If Hospital is relying on subsection (b), then the Hospital must document the basis of its conclusion that the recruited physician is reasonably expected to derive at least seventy-five percent (75%) of his or her revenues from new patients.

Physician Recruitment Agreement Requirements:

The hospital shall confirm that the proposed recruitment will meet all of the following terms to be set forth in a recruitment agreement:

- a. The arrangement shall be evidenced by a written recruitment agreement signed and dated by all parties. There shall be no oral or implied understandings that are not incorporated in the written agreement. The Two-Party Recruitment agreement template shall be used when the relocating physician will be a solo practitioner. The Three Party Recruitment agreement template shall be used when the physician joins an established practice in any capacity.
- b. The recruitment agreement shall not be conditioned on the recruited physician (or, in three party agreements, the recruited physician, the established practice or any individual or entity affiliated with the established practice) making referrals (actual or anticipated) to the Hospital or being in a position to make or influence referrals or otherwise generating business for the hospital provided, however, that the recruitment agreement shall require that the recruited physician obtain and maintain medical staff privileges at the Hospital and maintains a full time practice in the Hospital's defined Stark service area.
- c. The remuneration provided by the Hospital shall not vary (or be adjusted or renegotiated) in any manner based on the volume or value of any actual or anticipated referral by the recruited physician (or, in three party agreements, the relocating physician, the established practice or any individual or entity affiliated with the established practice) or other business generated between or among the parties. The remuneration shall be specifically permitted by and consistent with the remuneration limits and shall not directly or indirectly benefit any individual or entity in a position to make or influence patient referrals (actual or anticipated) to, or otherwise generate business for, the Hospital.
- d. The recruited physician (or, in three party agreements, the recruited physician or any other physician affiliated with the established practice) shall not be restricted from establishing staff privileges at any other hospital or facility, or referring patients to or utilizing the services of, or otherwise generating business for any other hospital or facility.
- e. The guarantee period shall generally last one year, but may extend to three years if (1) the recruited physician is not joining an established practice; (2) the recruited physician is an obstetrician/gynecologist; or (3) the recruited physician is in a particular specialty that is not currently providing services in the service area, or (4) the physician is highly specialized and practicing in a subspecialty that will require two years to establish a sufficient referral base.
- f. In the recruitment agreement, the recruited physician (or, in three party agreements, the recruited physician and the established practice) shall represent and warrant that he or she (or it) expects that the recruited physician's new medical practice will, in each year of the guarantee period, derive at least 75 percent of its revenues from professional services furnished to patients (including hospital inpatients) not seen or treated by the recruited physician at his or her prior medical practice site during the preceding three years and he or she (or it) expects that the recruited physician's new medical

practice will, in each year of the guarantee period, derive at least 75 percent of its revenues from professional services furnished to patients (including hospital inpatients) residing in the Hospital's service area..

- g. The material terms of the agreement shall not be renegotiated, renewed, extended or amended after the agreement is executed by all of the parties. Should a revision be needed, such as a modification of the start date due to circumstances that are outside of the physician's control or possibly an exception as provided in the restrictive covenant, it must first be approved by Hospital Administration and written Legal Services.
- h. The recruitment agreement shall require the recruited physician (or, in three party agreements, the recruited physician and the established practice) to treat federal health care program patients in a nondiscriminatory manner.
- i. The recruitment agreement shall include the following additional provision if the recruited physician is joining an established practice:
The recruited physician shall join the established practice in any capacity.
- j. The recruitment agreement will require the physician and the established practice, if applicable, to abide by Tomball's compliance obligations. Specifically, the physician and established practice will be required to have received, read, understood and abide by Tomball's Code of Conduct. The parties to the recruitment agreement shall comply with Tomball's Compliance Program and Tomball's policies and procedures related to the Anti-Kickback Statute and the Stark Law. Further, the parties to the recruitment agreement shall certify that they shall not violate the Anti-Kickback Statute and/or the Stark Law.
- k. A physician recruitment agreement is considered a Focus Arrangement and shall contain any other applicable provisions.

Permitted Financial Agreements:

Guarantee Addenda: The physician recruitment agreement may provide for a net income guarantee, which should reflect the current market rate for a particular specialty and expire after a set time period (i.e., ordinarily one [1] year, but in no event to exceed three [3] years) [the "Guarantee Period"]. At the end of the Guarantee Period, a repayment obligation (the "Account Balance") may exist under the terms of the agreement. The Account Balance will represent the cumulative monthly total of any funds advanced due to a shortfall in meeting net income, the "Total Advanced Funds" and any documented monthly excess over the net income guaranteed known as the "Carry Forward Balance". The Total Advanced Funds will be all funds advanced by the Hospital to meet the minimum net income guarantee established in the agreement. The Carry Forward Balance is the remaining balance of Hospital advances over the income guarantee. The Carry Forward Balance should be repaid in full within 60 days after receipt of the reconciliation report, without interest (as an incentive to prompt repayment). The total of the Guarantee Period and the

repayment or forgiveness (see below) period should not exceed six (6) years:

Forgiveness: The contract may provide for the forgiveness of the Account Balance, over a predetermined period (generally three (3) years, if the Support Period is one [1] year), if the physician remains in the community, abides by the medical staff bylaws and maintains medical staff privileges at the Hospital. Forgiveness shall be on the basis of 1/36th (if three [3] years is the forgiveness period) of the Account Balance for each month where all conditions are fulfilled. In certain circumstances, however, a period of forgiveness less than three (3) years may be appropriate and must be approved in advance by the President/CEO and the Legal Services Department. The Account Balance forgiveness feature should be used consistently by the Hospital for similar situations and under no circumstances should it be based upon the volume or value of any referrals by the referring physician.

Determination of Net Income Guarantee Amount: For those recruited physicians entering into a solo practice, the dollar amount of the net income guarantee may include the commercially reasonable, market cost of overhead and operating expenses for the recruited physician. These expenses may include support staff salary and benefits, office and equipment rental and expenses (i.e., only those expenses that are deductible by the physician as business expenses). For physicians joining an established practice, only those incrementally new expenses that are attributable to the new physician's monthly practice will be allowed. A monthly expense cap will be agreed and noted within all recruitment agreements. Physician recruitment agreements cannot include direct payment by the Hospital to a third party for ordinary operating expenses, and office or equipment rentals cannot be paid directly by the Hospital to a third party (however, such expenses may be included in the net income guarantee amount). Before committing to an income guarantee, Hospital Administration will verify that the reasonably expected income level is fair market value for a physician of the recruited specialty and that number will be used in the calculations utilized to compute the net income guarantee. Guaranteeing net income or the payment of expenses in excess of that which can be reasonably expected in the community may be construed as payments for other items, such as referrals to the Hospital.

Reimbursement for Non-Recurring Expenses: The physician recruitment agreement may provide for the reimbursement of other types of reasonable non-recurring expenses, including start-up marketing expenses, relocation assistance (both office and household, including temporary housing not to exceed sixty (60) days unless otherwise

approved and assistance with the purchase and/or sale of a residence), and reasonable moving expenses. Although recruited physicians will not be Hospital employees, all payments for such items should be on a basis consistent with the Accounting Department policy for the payment/reimbursement of expenses for the relocation of similarly compensated employees. If such incentives are offered, the overall recruitment package must still be reasonable and prudent.

Additional/Different Incentives: In certain circumstances, it may be necessary to offer a recruit additional or different incentives to relocate. Examples of items occasionally requested include repayment of student loans (in this instance, repayment will be paid directly to the lender) or signing bonuses in addition to the relocation assistance offered as a part of the standard relocation assistance offered as a part of the standard recruitment package. The offering of these other items to a recruited physician will be market driven and necessary to compete legitimately with other institutions or to provide comparable assistance as in the case of recruitment to rural or physician shortage areas. The assistance that may be provided in this category must be approved by the President/CEO, CFO, and the Legal Services Department. Such assistance shall not be offered to a recruit until such prior approval is obtained. If such incentives are offered, the overall recruitment package must still be reasonable and prudent.

Advances: Up to two (2) months support may be advanced to the physician prior to the commencement of the recruitment agreement. If such an advance is to be made, the advance must: (1) be included in the physician recruitment agreement; and (2) otherwise be documented in writing and signed by the parties, including a promise to repay in full within 30 days of the hospital's request if the candidate is not granted privileges or does not begin practice in accordance with the recruitment agreement.

Total Amount: The total financial compensation offered to any individual physician should not exceed the minimum amount required to induce the physician to relocate their practice to the Service area of the Hospital and to join the Hospital's Medical Staff after consideration of all relevant variables. Relevant variables include but are not limited to the facility's location and community, the physician's demonstrated skills and the physician's personal interest in the location.

Recruitment into an Established Practice: Frequently, physicians will seek to join or be employed by an established practice, and in connection with joining the established practice, assign the rights to payment under the recruitment agreement to the established practice. However, the Office of Inspector General ("OIG") has expressed a concern that recruitment arrangements into established practices can result in the established practice receiving inappropriate benefits from the Hospital. Therefore, the Hospital must take the necessary steps to ensure that the recruited physician only receives those benefits necessary to induce the physician to practice in the community and such benefits do not

inappropriately benefit physicians or medical practices already in the community. Thus, if a recruited physician is joining an established practice either contemporaneously with the execution of the recruiting agreement, or subsequent to relocation within the community, the following conditions must be met:

- a. The recruited physician must be eligible for recruitment under at least one of the three (3) essential conditions to this policy (See Essential Conditions Before Recruitment);
- b. The recruitment arrangement must be undertaken for legitimate reasons and not for the benefit of the established practice;
- c. The physician recruitment agreement is also signed by the established practice if the payments are directly or jointly made to the established practice;
- d. Except for actual costs incurred (i.e. incremental expenses) by the established practice in supporting the monthly operational needs of the new physician, the remuneration is passed directly through to or remains with the recruited physician;
- e. Before committing to a net income guarantee, the Hospital will verify the actual salary and benefits via MGMA, AMGA or other nationally recognized physician salary survey to be paid to the recruited physician reasonably by the established practice and that number will be used in the calculations utilized to compute the net income guarantee;
- f. The costs allocated by the established practice to the recruited physician must not exceed the actual additional incremental costs attributable to the recruited physician as verifiable on a monthly basis;
- g. Records of the actual costs are maintained for a period of at least six (6) years and made available to the Secretary of Health and Human Services upon request;
- h. The remuneration from the Hospital per the physician recruitment agreement will not be 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 established practice (or any physician affiliated with the established practice) receiving the direct payments from the Hospital;
- i. The established practice may not impose additional unreasonable practice restrictions on the recruited physician other than conditions related to quality of care. A reasonable non-compete provision or non-solicitation provision may be agreed upon by the established practice on the recruited physician. Practice restrictions are permitted, but may not "unreasonably restrict" the recruited physician's ability to practice medicine in the geographic areas served by the Hospital; and
- j. The physician recruitment agreement does not violate the federal Anti-Kickback Statute, Stark Law or any federal or state law or regulation governing billing or claims submission.

4. **Physician Recruitment Agreement Checklist:** The President/CEO or his designee, CFO and/or Legal Services Department of the Hospital must certify and complete the Physician Recruitment Compliance Verification Checklist with respect to each physician recruitment agreement that:
- a. The physician being recruited satisfies at least one of the three required conditions;
 - b. The terms of the agreement are commercially reasonable and at fair market value;
 - c. There is a community and/or Hospital need for the recruitment; and
 - d. Except as disclosed in the Checklist, there are no other agreements (oral or written) with the physician and the Hospital.

If the Hospital is recruiting to address a Hospital need and not a community need, then the recruiting rationale and supporting documentation must be submitted to and approved by the Legal Services Department in advance of any offer being made to the recruited physician.

See Attachment "A", Physician Recruitment Compliance Verification Checklist Form.

The President/CEO must approve the terms of the agreement and confirm that the contract is commercially reasonable. Physician recruitment will be approved by a Board Resolution based on a community net need from an independent, third party assessment or shall be granted on a case by case basis within a reasonable period prior to an offer being signed by the CEO.

5. **Recruitment Expense Reimbursement:** Occasionally, in the process of recruiting a potential physician candidate, the potential referral source incurs certain expenses, such as the cost of travel for an interview. The Hospital may reimburse those pre-approved expenses incurred as long as the potential referral source executes a Letter Agreement prior to the reimbursement of those expenses. Likewise, the Hospital may agree to reimburse a recruiter for their fees, even if the candidate brought to the Hospital's attention by the recruiter opts to join an existing practice, but without entering into a recruitment agreement with the Hospital. As a prerequisite, the recruitment firm must have been in business for five or more years and have a contractual relationship in place with the Hospital prior to a candidate being introduced to an established practice. Should an established practice contact a candidate through a recruiter without first gaining Hospital approval, the Hospital is not obligated to pay the recruiter fee. See General Statement on Agreements With Referral Sources, AD1.0121.

ENFORCEMENT:

Failure to adhere to the terms of this policy will be referred to the Hospital's Compliance Officer or his designee, the Legal Services Department and/or the appropriate administrator and shall result in appropriate human resources action up to and including termination as decided by the Hospital CEO. Failure to adhere to the terms of this policy will also be a factor in determining individual performance evaluations.

ATTACHMENT "A"
Checklist

TOMBALL REGIONAL HOSPITAL
PHYSICIAN RECRUITMENT COMPLIANCE
VERIFICATION CHECKLIST

Name of Physician

Specialty

Title of Contract

Term of Contract

PURPOSE: This checklist must be completed in its entirety prior to any disbursement to a physician or a physician group for the recruitment of a physician to the Tomball Regional Hospital ("Hospital") service area. Once completed, this form will be maintained in the Physician Recruitment Agreement file in the Legal Services Department.

1. Documented need for physician in designated specialty area in the Hospital's service area. The Hospital's service area is defined as smallest number of contiguous zip codes from which the Hospital draws at least seventy-five (75) percent of its inpatients.

Need can be established by:

- a. Physician census in service area (to include ALL physicians, not only physicians on the Hospital's Medical Staff), inadequate to treat patient population in service area;
- b. Documented extended wait times for patients to obtain appointments with physician(s) in designated specialty area; or
- c. Inadequate number of physicians in designated specialty area treating Medicare/Medicaid patient population in the Hospital's service area.

2. Board Resolution acknowledging need and approving recruitment of physician in designated specialty area has been approved or adopted.
3. Recruited physician must be one of the following:
- a. A new physician in practice one (1) year or less;
 - b. Moving his/her practice at least twenty-five (25) miles and into the Hospital's service area; or

- c. Moving his/her practice less than twenty-five (25) miles and into the Hospital's service area, but at least seventy-five percent (75%) of revenues from professional services are derived from patients not seen or treated by the physician at his or her prior practice site during the preceding three (3) years.
- ___ 4. Amounts paid under recruiting agreement cannot be based on the volume or value of referrals to the Hospital by the recruited physician or by an established physician or group if the recruited physician is joining an established physician or group practice.
- ___ 5. Recruiting benefits cannot extend beyond three (3) years.
- ___ 6. Essential terms of recruiting agreement cannot be renegotiated during its term.
- ___ 7. Written recruitment agreement signed by all parties that provides:
 - a. Recruited physician is not prohibited from establishing staff privileges at other hospitals or referring to other entities.
 - b. The Agreement is not conditioned on the physician's referral of patients to the Hospital.
 - c. The recruited physician will treat Medicare/Medicaid patients.

If physician is recruited to join an established physician or group practice, the written agreement must also provide the following:

- a. Except for actual costs incurred by the established physician or group in recruiting the new physician, all payments made by the Hospital must either be made to and remain with the recruited physician, or be passed directly from the established physician or group through to the recruited physician.
 - b. In the case of an income guarantee made by the Hospital, the costs allocated by the physician or group to the recruited physician cannot exceed the actual incremental costs attributable to the recruited physician.
 - c. Records of the actual costs and passed through amounts must be maintained for a minimum of five (5) years and be made available to the Secretary of DHHS upon request.
 - d. The existing physician or group cannot impose non-compete or other practice restrictions on the recruited physician other than conditions related to quality of care.
- ___ 8. Prior to execution, Agreement must be approved by Administration, Accounting/CFO, and the Legal Services Department.

(Signature/Date)

ATTACHMENT "B"
PHYSICIAN RECRUITMENT/ RELOCATION POLICY
FREQUENTLY ASKED QUESTIONS

COMMUNITY NEED

- 1. Question:** How does the Hospital determine if there is a community need in our service area?
Answer: The Hospital has engaged a consultant who has prepared an independent, objective analysis to determine if there is a community need in our respective service area. The community need assessment will be conducted every three years to ensure timely information when contracting with a referral source.
- 2. Question:** Why do we have to determine if there is a community need in the Hospital's service area?
Answer: The OIG has indicated the risk of kickbacks is mitigated when there is an objective determination of community need in a hospital's service area for a physician with that particular specialty. Our policy permits the recruitment of a physician only if there is an objective determination of community need in the Hospital's service area. Recruiting a physician for purposes of growing or assisting an existing physician practice or to grow a Hospital's service line does not constitute a community need.
- 3. Question:** What is a Community Need Assessment?
Answer: A Community Need Assessment is a report prepared by an independent third party consultant who can objectively determine whether or not there is a community need in the Hospital's service area for a physician with a particular specialty. Under the policy, the Hospital may only recruit a physician if there is an independent, objective determination of a community need in the Hospital's service area. The Community Need Assessment will be conducted at least every three years and will be used by the Hospital in developing its annual business plans.
- 4. Question:** If the Community Needs Assessment or other surveys do not have data for certain subspecialties, which specialties will the Hospital use to determine whether there is a community need?
Answer: The independent third party consultant will determine the appropriate specialty to use in determining community need. All relevant factors should be utilized by the consultant in determining whether a community need exists for a physician with a particular subspecialty.
- 5. Question:** May the Hospital relocate a physician to its service area to provide coverage of its Emergency Department if the existing medical staff members refuse to take call coverage?
Answer: The Hospital's inability to maintain a call roster does not, in and of itself, give rise to a community need. There are a host of factors and issues to consider before the Hospital could relocate a physician to provide ER coverage. This issue must be addressed with Legal Services before recruiting any physicians.
- 6. Question:** Can the Hospital recruit a physician if the community need assessment indicates a net need of less than one full time physician, such as .3 or .7?
Answer: Maybe. The independent consultant's community need report shall indicate whether there is a need for an additional physician in the community. If the consultant's report indicates a net need for a .3, .5, or .7 physician in the hospital's service area, the consultant will make the final determination as to whether there is a need to recruit a physician in the hospital's service area and their findings shall be stated in the community need report.

7. Question: Can the Hospital recruit more than one physician to an existing practice?

Answer: Generally, the Hospital should limit the number of physicians it recruits to an existing practice. Recruitment of multiple physicians to the same group will require close scrutiny and require the Hospital to document why alternatives are not otherwise available. Legal Services is required to review and approve a relocation arrangement if the hospital has entered into a relocation arrangement with the group or a physician affiliated with the group during the previous five years. Legal Services will consider all relevant factors, including, but not limited to, how many other established practices with physicians in the same specialty are represented on the Hospital's medical staff, whether the Hospital surveyed all existing physicians and groups to determine their interest in hosting a recruited physician, whether the recruited physician interviewed with the other established practices, whether the recruited physician indicated his or her desire to join a group practice in lieu of starting a solo practice, and whether the prior recruit who joined an existing practice fulfilled his or her obligations under the prior relocation agreements, and if there are extenuating circumstances such as a death or untimely retirement that created the need for the established practice.

8. Question: Can the Hospital recruit a part-time physician?

Answer: Yes. The Hospital may recruit a physician who plans to practice on a part-time basis but the level of financial assistance to be provided should be reduced accordingly. For instance, if the physician plans to work only 60% of the time, then the net income guarantee should approximate only 60% of the guarantee amount that a full-time physician would otherwise receive.

9. Question: Can a hospital recruit a hospital based physician, such as an anesthesiologist?

Answer: Yes. However, the Hospital must be mindful of the fact that most hospital based agreements provide a physician will automatically lose his/her medical staff membership if the physician is no longer employed by or contracted with the group. This will result in a breach of the relocation agreement and require the physician and/or group to repay the outstanding balance due under the promissory note.

SERVICE AREA

10. Question: How does the Hospital determine its service area for recruitment purposes?

Answer: CMS, in the Stark II Phase III regulations, has defined a hospital's service area for recruitment purposes as the lowest number of contiguous zip codes that comprise at least 75 percent of the hospital's inpatient discharges during the most recent calendar year or twelve month period.

11. Question: If a hospital believes its service area (e.g., defined as the lowest number of contiguous zip codes that comprise at least 75 percent of the hospital's inpatient discharges during the most recent calendar year or twelve month period) does not accurately reflect its true service area, can it engage an independent third party to properly determine its service area?

Answer: No. CMS, in the Stark II Phase III regulations, has defined a hospital's "service area" as the area comprised of the lowest number of contiguous zip codes that comprise at least 75 percent of the hospital's inpatient discharges during the most recent calendar year or twelve month period.

12. Question: Can the Hospital recruit a physician if the physician was previously on the Hospital's medical staff and the physician moved to a distant city and desires to relocate back to the Hospital's service area?

Answer: The Hospital may recruit the physician provided (i) more than three (3) years have elapsed since the physician resigned from the medical staff and moved his/her practice to the distant city, and (ii) the physician represents and warrants he/she has a reasonable expectation at the time of relocating that (a) at least 85 percent of the

professional revenues of the physician's practice will be generated from new patients not previously seen by the relocating physician at his or her former practice during the preceding three (3) years, and (b) at least 75 percent of the professional revenues of the new practice are to be generated from patients residing in the hospital's service area.

13. Question: Can the Hospital recruit a physician to a community outside the Hospital's service area if it can prove the distant community is in need of additional physicians to service the health care needs of that community?

Answer: No. The policy permits the Hospital to recruit a physician to the Hospital's service area in order to meet a community need in the Hospital's service area. Thus, the Hospital can only recruit physicians into its defined service area.

RELOCATION REQUIREMENT

14. Question: What does it mean to "relocate"?

Answer: In order to be able to recruit a physician, a physician's practice must be located outside the Hospital's service area and the physician must move his/her practice into the Hospital's service area and cease practicing at the prior practice location. Further, the geographic move must be at least 25 miles from the Hospital and the physician must have a reasonable expectation at the time of the relocation that at least 85% of his/her professional revenues will be from patients not previously seen at the prior practice location during the preceding three (3) years and at least 75% of his/her professional revenues will be from patients who reside in the Hospital's service area.

15. Question: Is there any time when a physician does not have to relocate?

Answer: Yes. A physician completing his/her residency and physicians in practice less than one year since completing their residency are not required to "relocate" as defined in the immediately preceding question but must establish their practice in the Hospital's service area. Further, a physician in this instance is not required to represent and warrant that he or she reasonably expects at least 85% of his or her professional revenues to be from patients not previously seen at the prior practice location during the preceding three (3) years since he or she will not have been in practice during this period of time.

16. Question: Can the Hospital recruit a physician if the physician's personal residence is located within the Hospital's service area but his/her practice is outside the Hospital's service area?

Answer: Yes. The location of the physician's residence is irrelevant for purposes of recruiting a physician. Provided the physician relocates his/her practice at least 25 miles and has a reasonable expectation at the time of the relocation that at least 85% of his/her professional revenues will be from patients not previously seen at the prior practice location during the preceding three (3) years and at least 75% of his/her professional revenues will be from patients who reside in the Hospital's service area, then the physician will meet the "relocation" requirement under the policy.

17. Question: Can the Hospital recruit a physician whose practice is located outside the Hospital's service area but will only relocate his/her practice a distance less than the 25 miles?

Answer: The answer will depend on the facts and circumstances. At a minimum, the Hospital will need to demonstrate there is an independent, objectively determined community need for this particular specialty in the Hospital's service area and the physician will have to represent and warrant that he/she reasonably believes at the time of relocation that at least 85% of his/her professional revenues will be from patients not previously seen at the prior practice location during the preceding three (3) years and at least 75% of his/her professional revenues will be from patients who reside in the Hospital's service area. Additional factors to consider are whether there are geographic

considerations such as a lake or mountain that make it unlikely patients will follow the physician to the new location, whether the physician was employed by another group and subject to a non-compete or non-solicitation provision, whether the physician plans to solicit and market to his or her former patients, and if joining a group, whether the group markets and derives a substantial percentage of their business from the recruited physician's prior service area. The main concern is the likelihood that existing patients from the prior practice location will follow the recruited physician to the new practice location.

18. Question: How is the 25 mile distance requirement measured?

Answer: The distance can be measured by driving distance using the most direct route. It would be appropriate to use an internet website such as Mapquest to calculate the distance by inserting both the former and new practice locations.

FINANCIAL ASSISTANCE

19. Question: What types of financial assistance can the Hospital provide to a recruited physician?

Answer: The Hospital can only provide the following types of financial assistance: (i) all or a fixed dollar amount of documented, actual relocation expenses, including temporary lodging, meals and travel, (ii) recruitment fees paid directly to a third party recruitment firm (e.g., The Hospital will not permit paying a physician on the Hospital's medical staff a recruitment fee for recruiting a physician), (iii) all or a fixed dollar amount of the physician's documented, actual malpractice premium during the guarantee period, (iv) a net income guarantee based on the actual, ordinary and reasonable expenses incurred by the physician; and if the recruited physician is joining an existing practice, based on the actual, ordinary, reasonable and *incremental* expenses incurred by the existing practice on behalf of the recruited physician. The expenses will be limited to a monthly expense cap. Also, the net income guarantee amount (e.g., the physician's salary) will generally be limited to the AMGA or MGMA median compensation for that particular specialty based on years of service, unless the Hospital can demonstrate that a higher amount is justified. To do so, the Hospital will need to provide all documentation in support of the higher amount, such as copies of competing offers, amounts earned during the preceding two years as reported on the physician's W-2 or Schedule C and any additional information requested. If the preceding requirements are met, then the

Hospital can provide up to the AMGA or MGMA 75th percentile compensation amount in calculating the net income guarantee amount. Legal Services may offer a higher percentile upon additional documentation.

20. Question: What are examples of reasonable and ordinary business expenses for purposes of a recruitment arrangement?

Answer: -Support staff salaries

- Consulting fees (e.g., legal and accounting) associated with the practice
- Consulting fees associated with the start-up of the physician's practice up to \$12,000 (limited to solo practitioners)
- Rent
- Interest expense on a loan related to the practice
- Advertising and initial marketing expenses
- Medical supplies
- Non-medical supplies
- Office supplies
- Equipment rentals (operating leases only; but not capital leases)
- Utilities, including telephone, beepers and pagers

- Equipment repair
- Outside tests
- Postage
- CME expenses, including travel, lodging and meals (excludes spouse)
- Property taxes
- License fees (license fees may be expensed in the month paid or prorated monthly over the term of the licensee fee)
- Malpractice insurance (but excluding expenses associated with a "tail" policy)
{Note: Malpractice premiums can only be included as line item expenses on the pro forma if those expenses are not otherwise reimbursed by the hospital as a separate benefit. In other words, the malpractice premiums should not be "double counted."}
- Incorporation fees
- Health/disability benefits
- Payroll taxes (may expense the accrued but not paid payroll taxes for the month since payroll taxes are typically paid on a quarterly basis)
- Any capital expenditure under \$500
- Depreciation on property, plant and equipment, provided depreciation is calculated in accordance with generally accepted accounting principles using the straight line method of depreciation
{Note: For a recruited physician joining an existing practice, only incremental expenses incurred by the existing practice on behalf of the recruited physician can be considered. For example, if the practice had existing space in its medical office for the recruited physician, then the rent associated with the space would not be considered an incremental expense. However, if the practice had to lease an additional 500 square feet for the recruited physician, then the rent associated with these 500 square feet would be considered an incremental expense.}

21. Question: What are examples of expenses that are not reasonable and necessary for purposes of a recruitment arrangement?

- Answer:** -Any capital expenditure in excess of 20% of total cost, including, but not limited to equipment, furniture or fixtures with a useful life in excess of one year
- Leasehold improvements
 - Computers, software, printers, etc.
 - Window coverings
 - Principal payments related to loans associated with the practice
 - Principal and interest on loans not related to the practice (e.g., home improvement loans, student loans, etc.)
 - Costs not pertaining to the daily operations of the relocated physician's practice
 - Country club dues and other entertainment expenditures, including meals
 - Tickets to sporting events, concerts, etc.
 - Physician draws
 - Preparation of individual tax returns
 - Life insurance and retirement plan expenses
 - Rental expenses for equipment/office space owned by another member of the practice
 - Auto expenses, including auto lease expenses
 - Gifts or charitable contributions
 - Other or miscellaneous expenses not documented

22. Question: Over what period of time can the Hospital provide financial assistance to a recruited physician?

Answer: Generally, the financial assistance is limited to one year, however in certain circumstances the assistance may be provided over a three year period.

- 23. Question:** What type of financial assistance is permitted if a physician purchases services and office space from an existing practice but is not an employee of the practice?
- Answer:** This will be based on the facts and circumstances of the arrangement. It should be noted that the Stark II Phase III regulations require the recruited physician, the existing practice and the Hospital to all execute the relocation agreement when the recruited physician joins an existing practice. The regulations are silent as to whether the physician must join the existing practice as an employee. Since both CMS and the OIG are concerned about the financial benefit derived by the existing practice, it is Legal Services's position that all expenses in this type of arrangement be limited to the actual, reasonable, ordinary, and **incremental** expenses incurred by the existing practice on behalf of the recruited physician.
- 24. Question:** If the recruited physician purchases services and office space from an existing practice but is not an employee or an affiliated provider with the practice, will a two-party or a three-party Relocation Agreement be required?
- Answer:** This will be based on the facts and circumstances of the arrangement. It should be noted the Stark II Phase III regulations require the recruited physician, the existing practice and the Hospital to all execute the relocation agreement when the recruited physician joins the existing practice and payment is made to the existing practice. The regulations are silent as to whether the physician must join the practice as an employee. Since both CMS and the OIG are concerned about the financial benefit derived by an existing practice, it is Legal Services' position that in cases where the recruited physician purchases services from an existing practice in this type of arrangement, including the use of office space, personnel, or other services, that all expenses in this type of arrangement shall be limited to the actual, reasonable, ordinary, and **incremental** expenses incurred by the existing practice on behalf of the recruited physician. If the physician is an independent contractor and does not join the existing practice as an employee or as an affiliated provider with the established practice, then a modified two party agreement may be utilized. In this case, the recruited physician will have to represent and warrant the following: (i) he or she is not joining the existing practice as an employee or as an affiliated provider, (ii) he or she will maintain his or her own medical malpractice insurance in accordance with the Hospital's medical staff bylaws (i.e., the recruited physician cannot be added to the existing practice's malpractice policy), (iii) professional services rendered are billed under a tax identification number assigned to the recruited physician or his or her professional corporation, not a number associated with the existing practice, and (iv) the existing practice does not advertise its affiliation with the recruited physician. Further, the existing practice will be required to execute a rider to the Relocation Agreement whereby the existing practice (i) gives the Hospital the right to inspect and audit the books and records of the existing practice as it pertains to services provided to the recruited physician, (ii) will separately identify the incremental expenses incurred by the existing practice in providing the management services to the recruited physician, (iii) represents and warrants that it does not impose any practice restrictions on the recruited physician, other than quality of care related restrictions, and (iv) will maintain its books and records in connection with its arrangement with the recruited physician for at least five (5) years. In this case, the recruited physician, and not the existing practice, will be solely liable for any repayment obligation under the relocation agreement. Nonetheless, all expenses in this type of two party arrangement shall be limited to the actual, reasonable, ordinary, and **incremental** expenses incurred by the existing practice on behalf of the recruited physician.
- 25. Question:** If there is a breach under the three party agreement, is there joint and several liability for both the recruited physician and the existing practice?

Answer: Depending on the cause of the breach, either the recruited physician or the existing practice or both may be liable for all or a portion of any repayment obligation due under the agreement. Because the sheer number of potential breaches and the repayment consequences are too numerous to discuss in this Q & A, the reader is advised to read the Recruitment Agreement and to discuss any questions they have with Legal Services.

26. Question: Is the three year forgiveness period described in the promissory note mandatory or negotiable?

Answer: The three year forgiveness period described in the promissory note is mandatory and may not be negotiated to a shorter period, such as two years. In the event a physician desires to break the forgiveness period, all monies advanced by the Hospital, including those that had been forgiven in previous months, shall be payable in full by the physician and/or the established practice.

27. Question: If the relocating physician is joining an existing practice, does the Hospital make payment to the relocating physician, the existing practice or both as joint payees?

Answer: The Hospital should make all payments directly to and in the name of the existing practice, except for payments made directly to third parties, such as headhunter fees.

28. Question: Can the Hospital pay or reimburse a relocating physician pursuant to a relocation arrangement for the cost of purchasing a "tail" policy?

Answer: No. The Hospital may not pay or reimburse the physician for the cost of purchasing a tail policy but the Hospital is permitted to pay for the documented, actual malpractice insurance premiums incurred in connection with the purchase of a professional malpractice insurance policy covering the physician's services in the Hospital's service area.

29. Question: Is the Hospital required to conduct a monthly audit of the relocated physician's books and records to verify the physician's actual collections?

Answer: No. A monthly audit of the physician's books and records is not required. Rather, through the referral source check request process, Compliance, Accounting and Administration members are required to analyze all appropriate documentation regarding collections and expenses and reconciling a prescribed spreadsheet submitted by the physician monthly. Additional information may be requested to affirm information contained on the spreadsheet. Once affirmed, a calculation shall be made to determine if the net income guarantee has been met or if an advance is justified. Approval of payments to a relocated physician or existing practice will occur only if such payments are supported by such documentation and any other applicable terms and conditions of the Recruitment Agreement, including factoring and offset created by any carry forward balance. In addition, the Accounting Department, or his or her designee, is required to conduct a Reconciliation audit of the Guarantee Period after the term of the Agreement to determine whether the physician or practice has a repayment obligation in accordance with the terms of the Recruitment Agreement.

30. Question: If a recruited physician borrows money to construct tenant improvements, can the interest and principal payments be included as an expense in calculating the physician's net income?

Answer: As listed above under permitted expenses, interest expense on a loan incurred in connection with the practice is a permitted expense. However, since leasehold improvements are not a permitted expense and are also considered a capital expenditure, the principal payments would not be considered a permitted expense.

OTHER

- 31. Question:** What are the ramifications if a physician relocates his/her practice and/or residence prior to executing the Recruitment Agreement or a non-binding letter of intent?
- Answer:** The Hospital may not enter into a Recruitment Agreement with a physician who has already relocated his/her practice and/or residence prior to executing a Recruitment Agreement or a non-binding letter of intent. The Hospital should advise the physician in writing early in the negotiation process not to relocate his/her practice or residence prior to executing the Recruitment Agreement or the non-binding letter of intent. The Stark II recruitment exception allows a hospital to provide remuneration to a physician in order to **induce** the physician to relocate to the geographic area served by the hospital in order to become a member of the Hospital's medical staff. If the physician has already made commitments to relocate to the service area, then the inducement requirement will not be met. In the event special consideration is needed, the matter shall be forwarded to the Hospital Legal Services Department for review.
- 32. Question:** Who is responsible for performing reconciliations and audits and making sure the physician repays any amounts owed under the Recruitment Agreement?
- Answer:** The Accounting Department is responsible for performing all reconciliations and audits under the Recruitment Agreement and for seeking timely repayment of all amounts due under the Recruitment Agreement. The Accounting Department should contact Legal Services if the physician is delinquent in the repayment of any amounts due under the Recruitment Agreement.
- 33. Question:** Can the Hospital amend the agreement during the term of the agreement?
- Answer:** Except in very limited circumstances and with Legal Services' prior approval, the Recruitment Agreement shall not be amended, modified, extended or renegotiated during the term of the agreement. In no event shall the amount of financial assistance or the period of time over which the financial assistance is provided be amended or modified.
- 34. Question:** Can the Hospital enter into a Recruitment Agreement with a physician who will be completing their residency program in the next 6-12 months?
- Answer:** Yes. The Hospital can enter into a Recruitment Agreement today with the resident even though the resident will not be completing his or her residency program for the next 6-12 months. The Hospital will obviously need to know whether the resident will be a solo practitioner or joining an existing practice. It should be noted that the annual community need assessments generally take into account the community need for physicians in the Hospital's service area for the next 3 to 5 years. Thus, it is appropriate for the Hospital to enter into a Recruitment Agreement with a resident even though the resident will not be completing his or her residency program for the next 6 to 12 months
- 35. Question:** When the Hospital is interviewing a prospective relocation candidate, (i) what types of travel related expenses may be reimbursed, and (ii) is the Hospital required to enter into a written agreement with the candidate?
- Answer:** (i) The Hospital will reimburse all travel accommodations and meals when they are judged as modest by local community standards and airline travel should be limited to coach. Any expenses that are to be reimbursed by the Hospital to the candidate will need to be substantiated by appropriate receipts. (ii) Although the Hospital is not required to enter into a written agreement with a candidate, if a physician on the Hospital's Medical Staff or within the community is going to attend a meeting with the CEO and the recruitment candidate at which a meal will be served, the Hospital should use a letter agreement so that the value of the meal is not counted against the \$300 non-monetary compensation limit.

36. Question: What types of expenses are “incremental expenses” that are allowed to pass through when a recruited physician “joins” an existing practice?

Answer: Under the Stark II Phase III regulations, the only expenses that may be properly passed through are “incremental expenses.” Any cost (which includes office rent, personnel costs, equipment lease, etc.) that existed prior to the time the relocated physician joined the existing practice would not be considered an incremental expense. With respect to office rent, personnel and equipment, such expenses may not be passed through unless the expenses are directly related to and incurred on behalf of the relocated physician. For example, if an existing practice enlarges its existing space employs additional personnel or adds equipment solely for use by the relocated physician, and then such expenses will be treated as incremental expenses and may be passed through to the recruited physician.

TOMBALL REGIONAL HOSPITAL
SUBJECT: **PHYSICIAN RECRUITMENT AGREEMENTS**
IMPLEMENTED: 03/06
REVIEWED:
REVISED: 03/08 07/09 07/10

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AD1.0073.0713 **PHYSICIAN RECRUITMENT AGREEMENTS**

COMPLIANCE: All Departments

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