

MEMORANDUM

To: INTERESTED PARTIES

From: Alaina N. Crislip, J.D., Michele Grinberg, J.D., and Casie E.B. Coughlin

Re: IRS Memorandum regarding Hospitals Providing Financial Assistance to Staff Physicians to Implement Conversion to Electronic Health Records

Date: May 16, 2007

Not-for-profit hospitals can now offer financial assistance to independent physician practices to assist them in conversion to electronic health records (“EHRs”) without fear of jeopardizing their not-for-profit tax status, thanks to a recent ruling from the Internal Revenue Service (“IRS”). The IRS issued a memorandum on May 11, 2007 creating a separate regulatory exception for certain arrangements involving nonmonetary remuneration in the form of EHR software and information technology and training services (“Health IT Items and Services”).

The IRS ruled that Section 501(c)(3) not-for-profit health care organizations may purchase EHR software and Health IT Items and Services for medical staff physicians without penalty, as long as the purchase falls under the legal exemptions specified by the Department of Health and Human Services (“HHS EHR Regulations”) (*See* 42 C.F.R. §411.357 and 42 C.F.R. § 1001.952). In addition, hospitals that fall under §501(c)(3) must enter into Health IT Subsidy agreements with its medical staff physicians in order to provide Health IT Items and Services at a discount (“Health IT Subsidy Arrangements”). The IRS has specified the criteria hospitals should follow under this ruling, which is described below. Note that the IRS considers “subsidy” to mean a gift from a not-for-profit organization.

Purpose and effect of establishing interoperable EHR systems:

- Many hospitals, qualified under § 501(c)(3) of the Internal Revenue Code, plan to implement EHR systems to improve the effectiveness and efficiency of medical care and to reduce medical errors.
- Some hospitals believe that their medical staff physicians need a financial incentive to acquire and implement EHR software that would allow the physicians to connect to the hospitals’ EHR systems.
- The exemption allows health care organizations to cover up to 85% of the cost of EHR software and services for medical practices, as long as the EHR is certified as interoperable.
- These health care organizations may purchase EHR software without violating the federal anti-kickback law, 42 U.S.C. §1320a-7b and the physician self-referral law, 42 U.S.C. §1395nn. Thus, the IRS guidance states that the benefits a hospital provides to its

medical staff physicians will not be treated as impermissible private benefits or inurement in violation of §501(c)(3) if the benefits fall within the range of Health IT Items and Services that are permissible under the HHS EHR Regulations. In addition, the hospital must follow the Health IT Subsidy Arrangement requirements described below.

Health IT Subsidy Arrangement Requirements:

- The hospital’s arrangement to provide Health IT Items and Services to physicians at a discount – Health IT Subsidy Arrangements – must meet certain criteria:
 - The Health IT Subsidy Arrangements require both the hospital and the participating physicians to comply with the HHS EHR Regulations on a continuing basis.
 - The Health IT Subsidy Arrangements provide that, to the extent permitted by law, the hospital may access all of the electronic medical records created by a physician using the Health IT Items and Services subsidized by the hospital.
 - The hospital must ensure that all the Health IT Items and Services are available to all of its medical staff physicians.
 - The hospital must provide the same level of subsidy to all of its medical staff physicians, or otherwise vary the level of subsidy by applying criteria related to meeting the health care needs of the community.

Hospitals not included:

- The IRS memorandum does not apply to a hospital that allows its earnings to inure to the benefit of one or more medical staff physicians through arrangements that are other than Health IT Subsidy Agreements.

Conclusions:

- These exemptions are consistent with the President’s goal of achieving widespread adoption of interoperable electronic health records to improve the quality and efficiency of health care while maintaining the levels of security and privacy that consumers expect.
- Similarly, these exemptions are consistent with the goals of the Legislature, Governor and health care industry in West Virginia in moving towards an interoperable health information network.