

POLICY ON HOSPITAL PARTICIPATION IN JOINT VENTURES

I. Overview. The Board of Trustees recognizes that in order to promote the health of the community, it may be beneficial for the Hospital to partner with other organizations and/or physicians to bring a certain healthcare service to the community. For example, instead of the Hospital purchasing an MRI itself, it may enter into a joint venture with a group of radiologists to make MRI services available at the Hospital. Joint ventures can provide hospitals with an opportunity to work with members of their medical staffs, save resources and focus on delivering their core services.

The following sets forth the Policy that the Hospital's management will follow in negotiating and pursuing a joint venture.

II. Legal Review: Initial Review and Periodic Review.

1. Type of Joint Venture.

A. Whole Hospital Joint Venture. Includes merger of two hospitals or major affiliation with a third party for a number of Hospital services. The IRS refers to this as a "Whole Hospital Joint Venture". Per IRS Revenue Ruling 98-15, to retain its tax exemption the Hospital must:

- (i) Have voting control of the joint venture entity;
- (ii) Board of managers must allow charitable purposes to override duty to maximize profits for the owner of the joint venture;
- (iii) LLC must be operated in furtherance of charitable purposes by promoting health for a broad section of the community.

B. Ancillary Services Joint Venture (less than Whole Hospital). Hospital and for profit partner form a joint venture to provide a discreet service such as MRI or CT Scans. If the joint venture is ancillary to Hospital's overall activities, per IRS Revenue Ruling 2004-51, Hospital does not have to have voting control of the joint venture. Its ownership interests should be proportionate to its capital contribution to the Company. If the joint venture furthers the Hospital's charitable purpose and allows the Hospital to act exclusively in furtherance of its exempt purpose by having special rights under the operating agreement, the Hospital's participation will not jeopardize its tax exempt status.

2. Does the Hospital's participation in the joint venture further the Hospital's charitable purpose? If the joint venture provides the healthcare service in the community, the Hospital's participation in the joint venture should further its charitable purpose, which is to promote the health of the community.

3. **Do the joint venture documents allow the Hospital to operate exclusively for exempt purposes and result in not more than incidental private benefit to the for profit partners?**

Required Provisions:

A. The Operating Agreement (if joint venture is LLC) or joint venture documents should require the broadest access to the community of the health care services provided by the joint venture. The operating agreement should require the joint venture to provide services to Medicare and Medicaid patients, a majority of commercial payers, and patients without the ability to pay (i.e. the joint venture should adopt a charity care policy). If the operating agreement requires the joint venture to provide services to a broad cross-section of the community including Medicare, Medicaid and the indigent population, and that provision cannot be changed without the Hospital's consent, then the operating agreement allows the Hospital to operate exclusively for its exempt purposes by providing health care to a broad cross-section of the community.

B. The Operating Agreement provides that all returns of capital allocations and distributions shall be made in accordance with ownership interest.

C. The Operating Agreement provides that the Company will not engage in any activity which is inconsistent with the Hospital's charitable purposes, as a charitable organization described in Section 501(c)(3) [for profit partner may require a dispute resolution provision here in the event that it disagrees with the Hospital that an activity of the joint venture is inconsistent with the Hospital's charitable purpose.]

D. The Operating Agreement should require that the Company will pay no more than fair market value or reasonable compensation for any services rendered to the joint venture, any services agreement between the Hospital and the joint venture or physician entities and the joint venture should document the fair market value of any compensation paid by the joint venture to the Hospital or to a physician owner.

4. **UBIT Analysis.** Hospital should analyze whether the distributions it receives from the joint venture will be considered exempt income or unrelated trade or business income subject to income tax and reported on Form 990-T. An unrelated trade or business is a trade or business which is regularly carried on and which is not substantially related to the Hospital's charitable purposes. To be substantially related the activity must contribute importantly to the accomplishment of the Hospital's exempt purposes. In the case of bringing an MRI scanner to the community and providing the MRI scans to Medicare, Medicaid patients and all patients regardless of the ability to pay, the joint venture would contribute importantly to the accomplishment of the Hospital's exempt purposes and therefore should be related income.

5. **Publicity.** Hospital's participation in joint venture may be in the local newspaper. New IRS Form 990 Schedule H may require disclosure of joint venture activity and Form 990 is subject to disclosure.

6. **Federal Stark Compliance.** Will the joint venture be a designated health service with physician owners? If so, the physicians may not make a referral to the joint venture for the furnishing of designated health services for which payment may be made by Medicare, except as otherwise provided in the statute or regulations. *See* 42 U.S.C. Section 1395nn. Service agreements should also comply with a Stark exception such as a rental of office space, 42 C.F.R. Section 411.357(a); rental of equipment, 42 C.F.R. Section 411.357(b), personal services arrangements, 42 C.F.R. Section 411.357(d) or fair market value compensation 42 C.F.R. Section 411.357(d).

7. **Federal Anti-Kickback Statute.** The joint venture should not violate the Federal Anti-Kickback Statute (42 U.S.C. Section 1320a-7(b)) which prohibits the knowing and willful offering to pay, solicit or receive any remuneration directly or indirectly to induce or reward referral of items or services reimbursable under a federal healthcare program. There are a variety of safe harbors to the anti-kickback statute at 42 C.F.R. 1001.952 including investment interests, rental of office space, personal and management services agreements and rental of equipment.

8. **New York State's Stark Statutes.**

A. Public Health Law Section 238-A.1(a) provides that a practitioner authorized to order clinical lab services, pharmacy, radiation therapy, physical therapy, X-ray or imaging services may not make a referral for such service to a health care provider to provide such services where the practitioner has a financial relationship with the healthcare provider, unless an exception applies.

B. New York State Education Law Section 6530.18 provides that it is professional misconduct for a licensed physician to directly or indirectly offer, give, solicit or receive or agree to receive any other fee or consideration to or from a third party for the referral of a patient or in connection with the performance of professional services.

9. **Civil Monetary Penalty.** 42 U.S.C. Section 1320a-7a(b)(1) provides that if a hospital knowingly makes a payment directly or indirectly to a physician as an inducement to reduce or limit services provided with the respect to individuals who are Medicare beneficiaries or Medicaid beneficiaries and are under direct care of a physician the Hospital shall be subject to a civil monetary penalty of not more than \$2,000 per each individual with respect to whom the payment is made.

10. **Anti-Trust Requirements.** The joint venture activity should be reviewed for compliance with anti-trust laws.

11. **New York State Public Health Law.** Does the joint venture create a new healthcare provider which requires an operating certificate? If so, the joint venture needs to submit Certificate of Need Application to New York State Department of Health

(“DOH”) for an operating certificate. Does the Hospital have to separately apply to the DOH for approval of the new service where the parties are leasing space, equipment and services from the joint venture entity, but Hospital is billing the new service as a Hospital services?

III. Financial Review – Do business terms make sense?

IV. Board Approval – Rebuttable Presumption of Reasonableness. Due to the complex legal requirements concerning tax exempt hospitals participating in joint ventures, Hospital counsel and the Board should review and approve any joint venture, prior to the Hospital’s participation. The Hospital’s By-laws required periodic review (annually or every two years) of all joint ventures that the Hospital participates in to ensure the activity conforms to Hospital policy, are properly recorded, reflect reasonable investment or payments for goods and services, further charitable purposes and do not result in impermissible private benefit or excess private benefit.

PERIODIC REVIEW BY BOARD OF HOSPITAL JOINT VENTURES

- 1. Name of joint venture entity and partners. _____

- 2. How does Hospital’s participation in joint venture further the Hospital’s charitable purposes? _____

- 3. How does Operating Agreement allow Hospital to operate exclusively for exempt purposes and result in not more than incidental private benefit? [Cite Operating Agreement Section (e.g. joint venture must accept Medicare, Medicaid, charity care patients and Hospital consent required to change)] _____

- 4. Are tax exempt safeguards (Policy ¶ 3) present in Operating Agreement? _____
- 5. Does joint venture create UBIT? _____
- 6. How is FMV substantiated for goods and services: _____

- 7. Legal Review – Any changes to:
 - (A) Federal Stark analysis? _____
 - (B) Federal anti-kickback analysis? _____
 - (C) NYS Stark exemption? _____
 - (D) Civil Monetary Penalty (Hospital pays to reduce or limit services)? _____
 - (E) Anti-trust review? _____
 - (F) NYS Department of Health approval? _____
- 8. Are the Hospital’s goals of participating in joint venture still being accomplished? _____

Compliance Review Completed _____, 20__

Last Review Completed _____, 20__

Secretary, Board of Trustees

We would like to thank Timothy J. Conan (Costello Cooney & Fearon PLLC, Syracuse, NY) for providing this Practice Corner submission.