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July 20, 2016

Hon. Alva Lambert
Executive Director
State Health Planning and Development Agency
P.O. Box 303025
Montgomery, Alabama 36130

RECEIVED

JUL 25 2016

STATE HEALTH PLANNING
AND DEVELOPMENT AGENCY

Re: Non-Reviewability Determination Request for
Vascular Associates of South Alabama, LLC

Required Information For Letter of Non-Reviewability.

1. Name of Company Applying: Vascular Associates of South Alabama, LLC, an Alabama limited liability company ("VASA").
2. Address and Contact Information of the Company: 124 A South University Blvd. Mobile, Alabama 36608, Attn: Harry Bishop.
3. Service Area Being Requested: Mobile, Alabama.
4. What Services will be Provided by Requestor: Vascular Surgery and related services.
5. Financial Breakdown:
 - a. Equipment Required for Venture: See 5(a)(i) below.
 - b. First Year Operating Costs: \$1,560,000.
 - c. Capital Costs:
 - i. Equipment Leases: \$112,000 per year.
 - ii. Facility Lease: \$39,600 per year.
 - iii. Construction Costs: none

6. Financial Interests By Any Other Health Care Facilities or Groups: As described below, VASA is controlled by representatives of Nephrology Associates of Mobile, PA, an Alabama professional Association (“Nephrology Associates”), though VASA Ventures, LLC, an Alabama limited liability company.

Statement of Relevant Facts

I am writing on behalf of VASA to submit a reviewability determination request in accordance with the Alabama State Health and Planning Development Agency’s Certificate of Need (“CON”) program rules and regulations.

VASA is an extension of the medical practice of Nephrology Associates that has practiced provided medical services to patients in the Mobile, Alabama area since 1980. VASA is effectively owned by Nephrology Associates Physicians: over 95% of the membership units of VASA are owned by VASA Ventures, LLC whose membership consists solely of Nephrology Associates physicians. The remaining membership unit is owned by Benjamin Makamson, M.D., a vascular surgeon and employee of Nephrology Associates. Nephrology Associates structured this extension of its practice in this manner for ownership and administrative reasons.

VASA wishes to engage physicians on an independent contractor basis to provide vascular surgery and related professional medical services to patients in the Mobile, Alabama area.

Such vascular surgeons will perform such services at the VASA facility located at 1551 Old Shell Road in Mobile, Alabama 36604. They will perform such services pursuant to a contract with VASA with an automatically renewing one-year term that is terminable (other than for cause) only upon 60 days’ prior written notice by either party.

Applicable Law.

The establishment of a new health care facility shall be considered a new institutional health service and is thus subject to Certificate of Need review. Ala. Admin. Code Rule 410-1-4.01(1)(a). However, the definition of “health care facility” specifically excludes “the private office of any duly licensed physician . . . whether for individual or group practice and regardless of ownership.” Ala. Admin Code Rule 410-1-2-.05(2)(a). This exception is generally referred to as the “Physician’s Office Exception” or “POE.”

The Supreme Court of Alabama, in *Ex Parte Sacred Heart Health System, Inc.* has developed “the POE application test” in order to provide clarification as to the exemption from CON review for the offices of licensed physicians. *Ex Parte Sacred Heart Health System, Inc.*, 155 So.3d 980 (Ala. 2012). The elements of the POE application test are as follows:

1. The proposed services are to be provided, and related equipment, used, exclusively by the physicians identified as owners or employees of the physicians’ practice for the care of their patients;

5. The proposed services are to be provided and related equipment used, at any office of such physicians;
6. All patient billings related to such services are through, or expressly on behalf of, the physicians' practice; and
7. The equipment shall not be used for inpatient care, nor by, through, or on behalf of a health-care facility.

Id. at 988.

The Supreme Court of Alabama in *Sacred Heart* did not define or otherwise address what it means to be an employee for purposes of the first element of the POE application test. It did not exclude independent contractors from fitting within that element.

Analysis and Request.

Nephrology Associates' expansion of its practice into vascular surgery meets the latter three elements of the POE application test:

4. The proposed services will be provided and related equipment used at a VASA facility, at which such physicians will maintain offices;
5. All patient billings related to services performed by such surgeons will be billed in the name of VASA; and
6. The applicable equipment will be used exclusively for outpatient vascular surgery and related services, all performed on an outpatient basis.

It is with respect to the first element of the above POE application test that we submit this request. The POE application test requires that "the proposed services are to be provided, and related equipment used, exclusively by the physicians identified as owners or employees of the physicians practice for the care of their patients." The test does not define "employee" and does not address whether physicians performing services on an independent contractor basis are within the purview of that element. In the absence of any definition of "employee" or exclusion of independent contractors, we feel it to be reasonable that the phrase "owner or employee" includes any substantial contractual affiliation between a physician and the applicable practice, regardless of his or her classification.¹

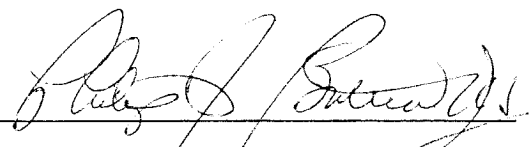
¹ The distinction between and employment relationship and that of an independent contractor is governed by the regulations and decisions by the US Department of Labor and Internal Revenue Service. The distinction can be subtle and turns largely on the amount of control imposed by the contracting party; the more control that is imposed, the more likely the arrangement should be characterized as that of an employer/employee. The distinction does not refer to the full or part-time nature of the arrangement; nor does it refer to whether the arrangement is on an exclusive or non-exclusive basis. Employment relationship can, and commonly are, on a part-time and/or non-exclusive basis. The distinction between and employment relationship and that of an independent contractor essentially refers to whether one party is subject to enough control by the other party that such party cannot rightly be considered "independent." Indeed, professionals such as physicians generally may choose to characterize a given arrangement as that of an employee or an independent contractor because relatively little control and supervision is generally required of them.

Given the contractual relationship between VASA and the vascular surgeons described above, we request that the physicians performing professional medical services on behalf of VASA on an independent contractor basis be considered to have satisfied the first element of the POE application test and thus that Nephrology Associates' expansion of its practice through VASA can be considered to have met the POE.

Therefore, in consideration of the foregoing, we hereby request that the SHPDA issue a Letter of Non-Reviewability in favor of Nephrology Associates' extension of its practice through VASA as described above.

Sincerely,

VASCULAR ASSOCIATES OF SOUTH ALABAMA, LLC

By: 
Philip J. Butera, M.D., Managing Member

Enclosure