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## HOSPICE AND PALLIATIVE CARE PRACTICE GROUP

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### **OIG SPECIAL ADVISORY BULLETIN: OFFERING GIFTS AND OTHER INDUCEMENTS TO BENEFICIARIES**

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In August 2002, the Office of the Inspector General issued a Special Advisory Bulletin regarding offering gifts and other inducements to beneficiaries. This Bulletin is of particular importance to hospices, as it outlines the statutory provisions under HIPAA that prohibit a person from offering or transferring to a Medicare or Medicaid beneficiary any remuneration that the person knows or should know is likely to influence that beneficiary's selection of a particular provider. The statute provides for civil monetary penalties of up to \$10,000 for each wrongful act and broadly defines "remuneration."

Hospices have long understood the potential of violating the anti-kickback provisions in providing something of value to a referral source. However, offering valuable gifts directly to beneficiaries is also impermissible. In this Special Advisory Bulletin, the OIG intends to provide a "bright line guidance that will protect the Medicare and Medicaid programs, encourage compliance and level the playing field among providers." The OIG emphasized the following:

- "Inexpensive gifts," (those having a retail value of no more than \$10 individually and no more than \$50 in the aggregate annually per patient) may be permissible.
- Providers may offer more expensive items or services if they fall within one of the five statutory exceptions (waivers of cost-

sharing based on financial need, properly disclosed co-payment differentials in health plans, incentives to promote the delivery of certain preventive care services, any practice permitted under the federal anti-kickback statute or waivers of hospital outpatient co-payments in certain circumstances.)

- The OIG is considering several additional regulatory exceptions and may solicit public comments regarding those. Currently the OIG is considering exceptions for complimentary local transportation and for free goods in connection with participation in certain clinical studies.
- The OIG will continue to entertain requests for advisory opinions. However, these opinions are limited to conduct that is very close to an existing statutory or regulatory exception.

In this Advisory Bulletin, the OIG discusses the "should know" standard. The OIG emphasizes that it is a violation of the statute for a provider to offer remuneration if the provider knows or should know that the remuneration is likely to influence the beneficiary to order or receive items or services from a particular provider. Therefore, services offered to an individual who is not but may become eligible for Medicare or Medicaid hospice services may well constitute an inducement under the statute. In the case of a hospice also offering a palliative care program, such programs should be carefully constructed to avoid any inference that they are merely an inducement to self-refer into the hospice program when the individual becomes hospice eligible. One of the ways to blunt that allegation is to emphasize the organization's mission driven commitment to providing such services and to charging for them based on a sliding fee scale. Those hospices that routinely provide services to individuals who are not but may become eligible for hospice without charging for them, run the risk of violating the statutory prohibitions against remuneration as an inducement to self-refer.

This Bulletin should not deter a hospice from providing otherwise permissible services in their communities. However, it is a reminder that any program offering free services or services provided at less than market value should be very carefully evaluated from a compliance

perspective.

Reinhart Boerner Van Deuren's Hospice and Palliative Care Practice Group serves hospices across the country in a variety of areas, including: regulatory compliance; survey and certification; accreditation; licensing; HIPAA; caregiver misconduct investigations; due diligence, mergers and acquisitions and other corporate matters; labor and employment; criminal and civil investigations by state or federal government agencies; litigation; contracts and daily operational issues.



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Hospices are encouraged to contact their legal counsel.