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## HOSPICE AND PALLIATIVE CARE PRACTICE GROUP

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### **CORPORATE COMPLIANCE AND PROVISION OF GENERAL INPATIENT CARE: SELECTED RISK AREAS**

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General inpatient care is an integral part of the Medicare hospice benefit. It is important that hospice patients whose care needs require this level of care receive it. It is critical that this important component of hospice care be fully utilized whenever the care needs of hospice patients require it. A hospice's under-utilization of general inpatient care can raise ethical, quality and regulatory issues.

However, over-utilization can also pose risks. Because of the higher reimbursement level and the potential for allegations of anti-kickback and false claims, policies and procedures governing general inpatient care should be considered within the general context of the hospice's corporate compliance plan. A compliance plan is a health care provider's strategy to establish a culture within the organization that promotes prevention, detection and resolution of instances of conduct that do not conform to federal and state law, especially in the areas of fraud and abuse, federal, state and private payor health care program requirements and the organization's own ethical and business policies. A corporate compliance plan follows the U.S. Sentencing Guidelines and provides a definition of what constitutes an "effective program to prevent and detect violations of the law." There are seven minimum elements of an effective compliance plan and they are as follows:

1. Written standards of conduct and written policies and procedures.
2. Development of a compliance team, including a compliance officer.

3. Education and training.
4. Effective lines of communication.
5. Discipline policies that reflect compliance concerns.
6. An audit and monitoring procedure.
7. A mechanism for investigating and correcting problems.

A hospice that develops, implements and continues to refine its corporate compliance program will be better able to ensure its compliance with conditions of participation as well as payment issues and fraud and abuse laws.

The question of inpatient care implicates a number of the risk areas specific to hospices as set forth in the OIG Compliance Program Guidance for Hospices. Following is a summary of those risk areas:

1. *Hospice incentives to actual or potential referral sources (e.g., physicians, nursing homes, hospitals, patients, etc. that may violate the anti-kickback statute or other similar federal or state statute or regulation, including improper arrangements with nursing homes).*

The practice of admitting hospitalized patients and keeping them in the hospital is permissible. An individual who is eligible for the hospice benefit and chooses hospice care should receive hospice, whatever their required care level. However, a practice of offering a hospital compensation for hospice patients after the DRG has run out and promising the hospital and/or the hospice patient that they may remain in the hospital indefinitely poses a risk for the hospice. If it appears that the hospice is offering something of value as an inducement to obtain referrals from the hospital (or directly from the beneficiary), there is a possibility of an anti-kickback violation. Only those patients who clearly need general inpatient care should receive it. This medical necessity should be well documented by the IDG.

If the hospice provides general inpatient care in a skilled nursing facility, the relationship between the hospice and the nursing home must be carefully reviewed. The OIG Compliance Program Guidance for Hospices and the OIG Compliance Program Guidance for Nursing Homes both emphasize the OIG's concerns regarding possible abuse in such relationships. If, for example, the hospice contracts with a skilled nursing facility for the provision of general inpatient care and provides staffing to the skilled nursing facility to ensure 24-hour RN coverage, there may be an inference of an unfair inducement to refer. Likewise, if the SNF is receiving the full general inpatient Medicare payment and the general inpatient care is not clearly documented by the hospice, it too could be seen as an impermissible inducement to refer.

It should be noted that a hospice incentive to a patient is also a potential violation of the anti-kickback statute. If the patient and the patient's family are told that they may remain in the hospital, for example, if they sign up for the hospice benefit, that might be considered to be an unfair inducement to refer.

2. *Billing for a higher level of care than was necessary.*

The OIG makes clear that if only routine home care is needed, billing for general inpatient care constitutes fraud. In addition to recoupment issues, this practice may implicate federal fraud laws with their attendant penalties. A hospice that has its own inpatient facility may find that the percentage of general inpatient days in the hospice has multiplied. While this is not necessarily a violation (and may be very appropriate in ensuring access to appropriate hospice care), it is an important area for scrutiny within the context of the hospice's corporate compliance plan. An increase in general inpatient care days should be carefully audited by the hospice to ensure that documentation is clear and that the general inpatient level of benefits is clinically justified.

3. *General inpatient care in skilled nursing facilities: specific issues.*

As it becomes more difficult for hospices to contract with hospitals for the general inpatient benefit, more hospices are entering into contracts with skilled nursing facilities for the general

inpatient level of care. As set forth above, the provision of general inpatient care in SNF should be carefully reviewed as part of the hospice's overall corporate compliance plan. Not all SNFs are capable of providing the general inpatient level of care and it is therefore suggested that the template hospice/nursing home contract for routine home care be separated from the general inpatient contract. In deciding whether a particular SNF is capable of providing that level of care, hospices are advised to carefully review the tools that have been developed by NHPCO, in particular *Hospice in Nursing Facilities*. The importance of communication and careful due diligence on the part of the hospice in entering into such agreements cannot be overstated. A SNF that is substandard or does not include 24-hour RN coverage poses significant risks from the standpoint of patient care, professional liability and regulatory compliance. Further, a hospice that contracts with a SNF to provide GIP care and then discharges the patient (or has the patient revoke) when only routine home care is needed, runs the risk of regulatory scrutiny. Following is the checklist of conditions of participation for all provider contracting. As with all such contracts, the importance of clear protocols, policies and procedures and ongoing communications is key.

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The analysis of fraud and anti-kickback prohibitions is very complex and depends on the individual fact situation. For example, it is permissible for the hospice to accept patients who are in the hospital and provide general inpatient care until the patients are ready to go home under the routine home care benefit if the hospice clearly documents the clinical justification for its decision. However, if the hospice also provides pain consults to any hospital patient at no charge and otherwise assists the hospital in providing care to hospital patients, the overall relationship may be suspect. It is important for hospices to carefully review all of their policies and procedures and to create an environment within the hospice whereby those policies and procedures are consistently implemented in compliance with federal and state laws and regulations. Since general inpatient care is increasing so dramatically, we can expect that it will be an ongoing area of scrutiny by fiscal intermediaries and by the OIG itself. Potential penalties and consequences for failure to follow the requirements include forfeitures, civil judgments and penalties, restitution as well as fines and imprisonment. The benefits of

reviewing all hospice program elements include not only the minimization of the risk of violating the law but also the mitigation of any consequences of any violations that do occur and reduction in the likelihood of whistleblower suits. A hospice that develops and maintains a clear corporate compliance plan promotes its reputation as a good corporate citizen, protects its officers and directors from liability and allows itself to assess all of its business relationships with other providers. The increase in general inpatient days may be valid, given the totality of the circumstances in an individual hospice. Because it is increasingly an area of scrutiny for fiscal intermediaries, the need for a higher level of care should be carefully documented and audited by the hospice itself.

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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