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False Claims Act and Compliance Plans

On January 13, 1999, the Office of the Inspector General issued a Solicitation for Comments on Compliance Guidance for Hospices. Thus far, the OIG has issued compliance guidance for laboratories, hospitals, home health agencies and third party billing agents. It has solicited comments for nursing homes and hospices; and therefore, it can be anticipated that these two provider groups will be the next to receive specific compliance guidance. We can expect several things:

1. The OIG will strongly urge all hospices to have compliance plans;
2. The OIG will list certain risk areas that are targeted for scrutiny as violating the False Claims Act; and
3. The relationship of nursing homes and hospices can be expected to continue to be a major risk area for both hospices and nursing homes.

Two of the most major issues facing hospices with regard to the False Claims Act are admitting patients who do not meet the six month prognosis and providing free care. This article will focus on the latter issue. While hospices have traditionally provided free care, that practice has come under increasing scrutiny due to the vigilance of the OIG in enforcing the provisions of the False Claims Act dealing with kickback. Under the federal law, provision or receipt of goods or services for less than market value will be considered an illegal kickback if the intent is to induce a referral. Therefore, the provision of free care must be carefully reviewed to assure that it is not an illegal inducement. In structuring hospice services, it is useful to review OIG Advisory Opinions. In Advisory Opinion 98-16, a pharmacy proposed placing a pharmacist in a hospital's transplant center to provide services to patients at no cost to the hospital. The OIG found that the relationship could violate the anti-kickback law because the pharmacist would be providing services that the hospital would otherwise be obligated to provide pursuant to Medicare conditions of participation. The second problematic aspect of the arrangement was the ability of the hospital to exercise substantial influence over the initial recommendation of a pharmacy for transplant patients who typically require expensive pharmacy services for the rest of their life. The inference, then, was that free services were being offered to induce the recommendation. The OIG noted that the proposed arrangement contained to safeguards, conditions or controls to mitigate the risk of improper patient steering.

In a hospice situation, where the hospice is providing free services in a nursing

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home, home health agency, hospital, etc., the same analysis might apply.

When developing a relationship with another health care provider that might be in a position to make referrals, a hospice will have to initially decide whether it will provide certain services for free. As discussed above, there will always be a risk that the OIG will consider the services to be a violation of the anti-kickback statute. In the OIG's own words, it "has a longstanding antipathy to arrangements where a party gives an existing or potential referral source valuable services or goods for free or below market value."

Once a hospice decides to offer free services, it should be sure to avoid practices that raise red flags with the OIG. Obviously, the hospice should not directly tie the amount or types of services offered to the number of referrals generated by the relationship. Similarly, the hospice should in no way measure the success of the relationship by how many patients, if any, eventually enroll in the hospice.

In determining which patients will receive free care, the hospice should not consider a factor to be the likelihood that the patient will become eligible for hospice. A hospice may consider this factor to be appropriate because such patients will benefit from the smooth transition that the free services will create. Nevertheless, the practice should be avoided because it creates the appearance that the free services are being offered to expand enrollment in the hospice.

Finally, the hospice should refrain from any marketing that promotes the possible benefit to other health care providers of shifting payroll costs to the hospital. For example, hospice should not indicate that the nursing home's staffing burden will be reduced because the hospice will be providing various services.

A hospice may take proactive measures to minimize the risk of the free services it offers will be considered to violate the anti-kickback statute. One strategy is to charge for its services on a sliding scale. For example, a hospice could provide free services to those who are uninsured and unable to pay while charging others based on the ability to pay. Such a sliding scale strengthens the inference that the free services are designed to address unmet needs rather than to induce referrals. Any sliding scale policy should be in writing and formally adopted by the hospice organization.

The hospice may also want to make clear in any contract entered into with a referral source that the referral source is not obligated or expected to recommend the hospice should hospice patients elect the hospice benefit. Again, a hospice manager may find such language to be counterintuitive because it

would limit some of the continuity of care benefits that the relationship could create. The language will, however, make clear that there is no intent to induce referrals. The hospice must be sure it is committed to any contractual language it uses. Otherwise the language will be seen as a self-serving statement intended to mask an illegal intent to induce referrals.

Whether the provision of free services by a hospice violates the anti-kickback statute will remain a controversial issue at least until the OIG provides direct guidance on the issue. The extent to which the ambiguity of the anti-kickback statute impedes legitimate efforts to address important community needs is unfortunate. By following the recommendations above, hospices that choose to provide free services can minimize the risk of appearing to violate the anti-kickback statute.