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OIG Advisory Opinion: Impact on Nursing Home/Hospice Relationships

On November 21, 2001, the Office of the Inspector General ("OIG") issued its first Advisory Opinion relating directly to hospice/nursing home relationships. Since these relationships have been the subject of much scrutiny for the last several years, this Opinion is particularly important. While referencing the Special Fraud Alert, Fraud and Abuse in Nursing Home Arrangements with Hospices (Office of Inspector General, March 1998), the Opinion makes it clear that a hospice may pay a nursing facility for the hospice patient's room and board in an amount equal to 100% of the Medicaid daily nursing facility rate for non-hospice patients without running afoul of the anti-kickback statute. The Requestor, a New York hospice contracting with New York nursing homes, wished to pay the nursing homes 100% of their rate plus pharmacy services, even though in New York State the Medicaid nursing facility per diem rate for non-hospice patients covers pharmacy services. The OIG, while opining that 100% of the facility's Medicaid rate is acceptable, did not have "enough information to ascertain the level of risk of fraud or abuse presented by the arrangement with respect to separate payments for specific drugs." The OIG, however, noted that "because services included in the Medicaid daily nursing facility rate for non-hospice patients vary by state, apparently similar arrangements in other states may not raise the same concerns present here." The OIG emphasized that it was concerned that even though the facility was paid for prescriptions as part of its Medicaid daily rate, the hospice intended to pay the facility additionally for such services.

While many states do not include medications in the Medicaid nursing facility daily rate, and while, as with all OIG Advisory Opinions, the OIG emphasizes that the Opinion is issued only to a specific entity and has "no application to and cannot be relied upon by any other individual or entity," nevertheless this Opinion is instructive and constitutes an important reminder that hospice/nursing home relationships continue to be a focus of attention for the OIG. The following is a list of important points to remember when entering into such arrangements:

- Incorporate hospice/nursing home relationships into your overall Corporate Compliance Plan. If you don't have a Compliance Plan, now is the time to start.
- Review all such arrangements to ensure that they are based at market value. Particularly, if the hospice purchases additional services from the nursing home, be assured that such services or supplies are purchased at fair market

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https://www.reinhartlaw.com/services/hospice-and-palliative-care value. If a hospice pays more than market value, such payment could be construed as an impermissible inducement to the nursing home to refer patients to the hospice.

- Be particularly cognizant of those areas where both the hospice and the nursing facility may be responsible for providing care, i.e., nursing aides. The contract and protocols should be very clear so as to overcome any inference of an impermissible inducement to refer, based on the provision of free services by the hospice to the nursing facility.
- "Transitions" or pre-hospice services are not impermissible per se. However, any relationship between a hospice and a nursing home should be carefully reviewed, as it is an area that is particularly scrutinized by the OIG. There are other issues such as licensure, professional liability and CoPs that need to be carefully analyzed as well. · Re-read the Compliance Guidance for Hospices, the Compliance Guidance for Nursing Facilities and Fraud and Abuse in Nursing Home Arrangements with Hospices (Office of Inspector General, March 1998).
- Stay mission-driven! Some hospices deny care for fear of regulatory scrutiny. A carefully followed Compliance Plan will allow your hospice to continue its important work in your community.