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Questionable Practices by Hospices and Nursing Homes Under Health Care Fraud and Abuse Rules

Certain questionable practices by hospices and nursing homes may violate health care fraud and abuse laws enforced by the Department of Health and Human Services, Office of the Inspector General (OIG). Chief among these laws are the federal anti-kickback statute and the civil monetary penalties statute (CMP). Hospices and nursing homes should be familiar with the types of practices that the OIG could consider to be violations of the anti-kickback statute and CMP, and ensure that their policies address these questionable practices.

By way of introduction, we will briefly describe the anti-kickback statute and CMP.

Anti-Kickback Statute

The anti-kickback statute makes it a criminal offense for any entity or individual to knowingly offer, pay, solicit or receive any remuneration to induce or reward referrals of patients for items or services that might be payable by a federal health care program. Courts have held that if one purpose of a remuneration arrangement is to reward referrals, this could violate the anti-kickback statute.

CMP

One provision of CMP imposes civil penalties on any person or entity that knowingly offers or provides any form of remuneration to a Medicare or Medicaid beneficiary that the entity knows, or should know, is likely to influence the beneficiary to select a particular entity to provide items or services for which payment may be made by a federal health care program. The OIG will ask three questions when confronted with a potential violation under this provision of CMP:

- Has anything of value been offered by an entity to a Medicare or Medicaid beneficiary?
- Is the remuneration offered likely to influence a Medicare or Medicaid beneficiary in selecting a particular provider of items or services reimbursable by a federal health care program?
- Does the entity offering remuneration know (or should the entity know) that offering the remuneration is likely to influence the beneficiary to choose a

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particular provider of items or services?

If the OIG answers each of these questions in the affirmative, it could find an arrangement to be in violation of CMP.

Guidance from OIG

Hospice and nursing home arrangements have been an ongoing subject of regulatory scrutiny because of perceived vulnerabilities under such arrangements. The OIG has issued several forms of guidance related to hospice and nursing home arrangements, including:

- March 1998 Special Fraud Alert for Fraud and Abuse in Nursing Home Arrangements with Hospices
- October 1999 OIG Compliance Program Guidance for Hospices
- March 2000 OIG Compliance Program Guidance for Nursing Facilities
- OIG Work Plans in 2007 and 2006

The OIG has stated that arrangements between hospices and nursing homes are vulnerable to fraud and abuse because nursing homes have control over the hospices permitted to provide hospice services to their residents. Therefore, nursing homes may request or hospices may offer illegal inducements to influence a nursing home's decision to do business with a particular hospice.

With respect to CMP, the OIG released an August 2002 Special Advisory Bulletin informing providers and suppliers of the CMP rules that affect an entity's ability to provide gifts or other inducements to Medicare or Medicaid beneficiaries. The bulletin details the prohibition against providing inducements to influence a Medicare or Medicaid beneficiary's selection of a particular provider or supplier, and includes information on exceptions to this general prohibition. One exception allows providers to offer gifts (other than cash or cash equivalents) or services that are valued at not more than $10 per patient individually, and not more than $50 in the aggregate annually per patient. Other exceptions include waivers of cost-sharing amounts based on financial need, copayment differentials in health plans, incentives to promote the delivery of certain preventative care services, and practices permitted under the anti-kickback statute.

The following are short responses to some questions that we have received

regarding fraud and abuse considerations in nursing home arrangements with hospices, and in provider gifts to Medicare or Medicaid beneficiaries.

1. *Can a nursing home violate the anti-kickback statute by requesting something of value from a hospice in exchange for referring patients to the hospice or for contracting with the hospice? Similarly, can a hospice violate the anti-kickback statute by offering something of value to a nursing home in exchange for patient referrals?*

   Yes. The anti-kickback statute covers both sides of a remuneration arrangement – the party offering or paying the remuneration and the party soliciting or receiving the remuneration. Therefore, if a nursing home knowingly solicits or receives anything of value from a hospice, or if a hospice offers or pays something of value to a nursing home, in exchange for referring patients to the hospice for services that are payable by Medicare or Medicaid, this would violate the anti-kickback statute.

2. *How does the OIG define "remuneration"? If a nursing home solicits a free service or item from the hospice (instead of cash) in exchange for patient referrals, could that still violate the anti-kickback statute?*

   Yes. "Remuneration" includes not only cash or cash equivalents, but also free goods or services, or goods or services provided at below fair market value. Therefore, if a hospice provides staff to the nursing home at the hospice's expense (or if a nursing home solicits such staff from the hospice) to perform duties that otherwise would be performed by the nursing home, this could violate the anti-kickback statute. Similarly, if a nursing home requests that the hospice automatically provide items, such as low air loss mattresses or Geri-Chairs, for hospice patients who are nursing home residents in order to serve patients within their facility, this could violate the anti-kickback statute. Hospices must provide these items to hospice patients if determined necessary as part of a patient's individualized plan of care, but these items should not be provided automatically as a matter of course. Needless to say, if the hospice provides such items for free or for below market value to nursing home residents who are not hospice patients, this could also violate the anti-kickback statute.

3. *Our hospice would like to pay for all of a potential hospice patient's medications (including those unrelated to the patient's terminal illness) by using*

funds from our hospice's foundation. Is this OK under CMP?

In answering this question, we are cognizant of the fact that it is sometimes very difficult to ascertain whether medications are truly unrelated to the terminal illness. A hospice may take a liberal and consistent view for all patients, regardless of referral source, regarding which medications are related to and necessary for the palliation of the terminal illness. However, a hospice arrangement in which it (or its foundation) pays for all patient medications, even those clearly unrelated to the patient's terminal illness, could violate CMP.When reviewing this type of arrangement under CMP, the OIG would consider three questions. The first question is whether paying for a patient's medications unrelated to a hospice patient's terminal illness would constitute remuneration paid to the beneficiary who receives the drugs. Because the value of these medications could be considerable, the answer to this question is likely yes. A second question is whether the remuneration provided to the beneficiary is likely to influence the beneficiary to choose a particular hospice to provide hospice services. Again, the answer is likely yes, because the beneficiary could reasonably choose the hospice solely because of the value of the free medications provided by the hospice's foundation. Finally, the OIG must determine whether the hospice foundation knows, or should know, that offering this remuneration is likely to influence the beneficiary's choice in hospice providers. Again, the answer to this question is yes, because the beneficiary is likely to connect the hospice's foundation to the hospice, and the presence of these free medications is likely to influence the beneficiary to choose the hospice for his or her hospice care. Therefore, this practice could violate CMP, and should be closely analyzed to determine whether it could fit within an exception to the law. Remember that it does not matter whether the remuneration comes from a hospice's foundation or the hospice directly. The analysis is simply whether remuneration provided to a beneficiary is likely to influence that beneficiary's choice of hospices.In addition, if a hospice would target only nursing home patients under such an arrangement, this could lead to criminal penalties under the anti-kickback statute, because this action could be viewed as an inducement to the nursing home to refer patients to the hospice.

4. *Our hospice informs patients that they can receive a set number of days of inpatient care in our inpatient unit, without charge to the patients. If a patient is not clinically appropriate for general inpatient care, our hospice foundation*

pays the difference between routine home care rates and our rates for inpatient care. Could this violate CMP or the anti-kickback statute?

Yes, this practice could potentially violate both statutes. With respect to CMP, the OIG could affirmatively answer the three key questions in a potential CMP violation: (1) does paying the difference between routine home care and the standard rate for inpatient care constitute remuneration; (2) are these payments likely to influence a beneficiary's choice of the hospice to provide services; and (3) should the hospice foundation know that offering this remuneration is likely to influence the beneficiary's choice of hospice providers? Therefore, this practice could violate CMP, and should be closely analyzed to determine whether it could fit within an exception to the law.With respect to anti-kickback, if the inpatient care is provided to patients in a facility other than the hospice's own inpatient facility, there is a potential anti-kickback violation. If a hospice is promising (or a nursing home or hospital is requesting) that patients will be treated at the general inpatient level of care, this could be viewed as remuneration in exchange for future referrals. A hospice patient receiving general inpatient care in a nursing home or hospital facility will bring the facility more revenue under the contract with the hospice, and could serve to fill otherwise empty beds in the facility. Therefore, this practice could violate the anti-kickback statute.Finally, this practice could also violate the Medicare conditions of participation for hospice care, because each patient is to be treated at the appropriate level of care according to his or her individualized plan of care. To automatically place a patient in a higher level of care, regardless of the patient's individualized plan of care is improper under Medicare hospice rules.

5. *If a hospice offers a nursing home a predetermined number of aide hours for hospice patients residing in the nursing home, could this violate the anti-kickback statute?*

   As with all other services provided by a hospice to its patients, the frequency of hospice aide services must be determined by the interdisciplinary team as part of each hospice patient's individualized care plan. Because of the individualized nature of hospice care, it is impossible for a hospice to credibly guarantee a nursing home a certain number of aide hours when contracting with the facility. A hospice making such a promise is exposing itself (and the nursing home) to scrutiny by the OIG

and other government fraud and abuse investigators. If even one purpose of the hospice's offer of a predetermined number of aide hours to the nursing home is to gain access to patients residing in the nursing home, or to secure referrals of hospice patients from the nursing home, this may violate the anti-kickback statute.

Conclusion

Hospices and nursing facilities should carefully analyze their relationships with one another, and any programs offering incentives or other remuneration to Medicare or Medicaid beneficiaries, to ensure that none of their practices could violate the anti-kickback statute or CMP.

References

1. March 1998 Special Fraud Alert for Fraud and Abuse in Nursing Home Arrangements with Hospices (available at http://oig.hhs.gov/fraud/docs/alertsandbulletins/hospice.pdf)
2. October 1999 OIG Compliance Program Guidance for Hospices (available at http://oig.hhs.gov/authorities/docs/hospicx.pdf)
3. March 2000 OIG Compliance Program Guidance for Nursing Facilities (available at http://oig.hhs.gov/authorities/docs/cpgnf.pdf)
4. OIG Work Plans (available at http://oig.hhs.gov/reports-and-publications/workplan/)
5. August 2002 Special Advisory Bulletin on Offering Gifts to Beneficiaries (available at http://oig.hhs.gov/fraud/docs/alertsandbulletins/SABGiftsandInducements.pdf)