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Managing Regulatory Risk in Nursing Home-Hospice Arrangements

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Challenges of Nursing Home-Hospice Arrangements. As a nursing home resident's life expectation sunsets, transfer of the resident from the restorative care of a skilled nursing facility (SNF) to the palliative care of a hospice may be the best and most humane choice in the health care continuum. However, coordination of benefits is challenging when a hospice patient resides in a SNF, and the unwary may be exposed to regulatory risk.

Regulatory Risk Fundamentals. Virtually all regulatory compliance issues arise from two broad areas: (1) correct submission of claims for payment; and (2) financial arrangements with referral sources. Both must be considered in managing regulatory risk arising from nursing home-hospice arrangements, and each has its peculiar complexities.

Nursing Home-Hospice Conditions of Participation. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS), published a final rule in 2013 on "Requirements for Long Term Care Facilities; Hospice Services," which provides the foundation for regulation of SNF-hospice arrangements. These requirements dovetail with the Hospice Conditions of Participation to promote coordinating care in a manner that prevents duplication of services and payments.

The regulations permit SNFs to arrange for the provision of hospice services through an agreement with one or more Medicare-certified hospices, provided that the SNF and the hospice enter into a written agreement that satisfies specific regulatory requirements. Each written agreement must include the following:

- A description of the services that the hospice will provide
- The hospice's responsibilities for determining the plan of care as described in the hospice regulations
- The services the SNF will continue to provide, based on each resident's plan of care
- A communication process, including how communication between the SNF and the hospice will be documented to ensure that the needs of the patient are met 24 hours per day
- A provision that the SNF immediately notifies the hospice of any significant change in the patient's physical, mental, social or emotional status; clinical complications that suggest a need to alter the plan of care; a need to transfer the resident from the SNF for any condition; or the patient's death
- A provision stating that the hospice assumes responsibility for determining the appropriate course of hospice care, including the determination to change the level of services provided
- An agreement that it is the SNF's responsibility to furnish 24-hour room and board care, meet the resident's personal care and nursing needs in coordination with the hospice representative and ensure that the level of care provided is appropriately based on the individual resident's needs
- A delineation of the hospice's responsibilities, including, but not limited to: providing medical direction and management of the patient; nursing counseling (including spiritual, dietary and bereavement); social work; medical supplies, durable medical equipment and drugs necessary for the palliation of pain and symptoms associated with the terminal illness and related conditions; and all other hospice services that are necessary for the care of the resident's terminal illness and related conditions
- A provision that when SNF personnel are responsible for the administration of prescribed therapies, including those therapies determined appropriate by the hospice and delineated in the hospice plan

of care, the SNF personnel may administer the therapies when permitted by state law and as specified by the SNF
- A provision stating that the SNF must report all alleged violations including mistreatment, neglect, or verbal, mental, sexual and physical abuse, including injuries of unknown source and misappropriation of patient property by hospice personnel, to the hospice administrator immediately when the SNF becomes aware of the alleged violation
- A delineation of the responsibilities of the hospice and SNF to provide bereavement services to the SNF staff

The regulation also requires that the SNF must notify the hospice immediately regarding the need to transfer a resident from the SNF for any condition, not just for a condition related to the terminal condition, and that the SNF representative designated to work with the hospice must have a clinical background.

Challenges in Coordinating Room and Board Benefits and Payments. There are peculiar rules related to payment for room and board. For a SNF-hospice resident who is either covered by Medicare or is a "private pay" resident, the SNF must provide the room and board and bill for it separately. However, if a SNF resident who qualifies for hospice coverage is a Medicaid beneficiary, the hospice must bill the applicable Medicaid program for the per diem and then pay the SNF for the room and board provided to the resident receiving hospice care. Accordingly, the accounts for SNF residents who qualify for the hospice benefit need to be carefully managed.

Challenges in Coordinating Medicare Part D Drug Benefits with the Hospice Benefit. The most recently recognized challenge to coordination of benefits in a SNF-hospice arrangement arises from coordinating benefits under Medicare Part D with the hospice benefit. The manner in which Part D must be coordinated with the hospice benefit for SNF residents who elect hospice coverage is quite complex and involves the SNF. Therefore, it must be addressed in the SNF-hospice agreement.

When a SNF resident elects the hospice benefit, it might no longer be medically necessary to prescribe certain drugs as the individual shifts from restorative to palliative care. However, some drugs not covered by the hospice benefit may continue to be prescribed, and the individual resident who elects the hospice benefit may be responsible for full payment of the drugs.

Fraud and Abuse Statutes, Regulations and Rules Governing Hospice-SNF Relationships. SNF-hospice arrangements must also comply with the fraud and abuse laws governing relationships between referral sources.

Anti-Kickback Statute Analysis. The federal Anti-Kickback Statute is very broad and imposes sanctions on individuals or entities that knowingly and willfully offer, pay, solicit or receive any remuneration (which means virtually anything of value, whether direct or indirect, overt or covert, in cash or in kind) in return for or to induce or arrange for the referral of items or services reimbursable by Medicare, Medicaid or any other federal governmental reimbursement program. The Anti-Kickback Statute is implicated when referrals for items or services payable by a governmental reimbursement program run in one direction and remuneration runs in the opposite direction. In this situation, the Statute is implicated because the SNFs will enter into agreements with hospice providers for the provision of hospice services on the SNF premises.

Most SNF-hospice arrangements do not fall within a safe harbor regulation under the Anti-Kickback Statute. While this does not necessarily mean that the arrangement is illegal, it does mean that the SNF needs to manage the regulatory risk arising from the arrangement through appropriate compliance with the Standards of Conduct.

OIG Compliance Guidance. The Department of Health and Human Services, Office of the Inspector General (OIG) has expressed concerns about violation of the Anti-Kickback Statute in hospice-nursing home relationships for many years. A 1998 Fraud Alert identified the following potential violations:

- Hospice provision of free nursing services to non-hospice patients
- Hospice payments to nursing homes for Medicaid-covered room and board payments that are in excess of what the nursing home would have been paid under the Medicaid program or for goods and services that are actually components of room and board (Medicaid pays 95 percent of daily nursing home rate)
- Inflated payments by a hospice to a SNF for provision of services to hospice patients that are not components of room and board
- Cross-referral arrangements (i.e., "You refer to my hospice if I refer to your SNF")

Compliance Guidelines. The key to any nursing home corporate compliance and ethics plan should be compliance with the SNF Compliance Guidelines promulgated in 2008, which include the following Standards of Conduct:

No hospice will be permitted to pay any nursing home more than a Medicaid- covered patient would have paid for room and board.

Any additional non-core services that the nursing home provides to the hospice must be provided at fair market value.

No party shall provide the other party with free goods or services of any nature, including, without limitation, nursing services provided by the hospice to the nursing home for non-covered services.

The hospice shall take substantive precautions to ensure that the hospice patient qualifies for the hospice benefit.

The hospice shall have procedures for reviewing its claims for payment to ensure that the hospice provides all items and services described in the plan of care.

The adage that "an ounce of prevention is worth a pound of cure" is particularly applicable when health care providers address management of regulatory risk, and every SNF and hospice needs to be sure that its arrangements and compliance and ethics plans reflect current statutory and regulatory requirements.