Creating an Audit & Investigation Resilient Hospice Program

Presented by:

Christine J. Wilson, R.N., J.D.

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<table>
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<th><strong>Why Hospice, Why Now?</strong></th>
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<td>- All Medicare/Medi-Cal providers are a target</td>
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<td>- Hospice claims have increased dramatically since the program began in 1982</td>
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<td>- More than 50% of Medicare beneficiaries use their hospice benefit</td>
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<td>- Between 2003 and 2011 Medicare payments for hospice have gone from $5.9 billion to $13.7 billion</td>
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<td>- A minority of providers have abused the system, making it difficult for everyone else</td>
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More Scrutiny, More Challenges

- Auditors upon auditors:
  - MAC (Medicare Administrative Contractor)
  - RA (Recovery Auditor)
  - ZPIC (Zone Program Integrity Contractor)

- Enforcers upon enforcers:
  - CMS
  - OIG → DOJ
  - FBI

- Qui Tam “Relators”
  - Your favorite disgruntled employees
OMG, it’s the OIG!

- The Office of Inspector General
  - Inspector General appointed by the President of the U.S. for federal agencies, including CMS
  - Office conducts audits and investigations and supervises activities carried out or financed by CMS
  - Purpose is to promote “economy and efficiency” and “preventing and detecting fraud and abuse”
  - Required to “report expeditiously” to the Attorney General whenever the OIG has “reasonable grounds to believe there has been a violation of federal criminal law”
Government tool #1: the Federal False Claims Act 31 USC §§ 3729 – 3733

Generally applicable to any person who –

a) knowingly presents, (or causes to be presented), a false claim for payment;

b) knowingly makes, a false statement material to a false or fraudulent claim;

c) conspires to commit a false claims violation;

d) has control of property or money to be used by the Government and turns over less than all it

e) is authorized to certify receipt of property to be used by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information is true;
Government tool #1 the Federal False Claims Act 31 USC §§ 3729 – 3733

Generally applicable to any person who (Continued):

f) knowingly buys, or receives as a pledge of an obligation, public property from an officer or employee of the Government; and

g) knowingly makes or causes a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or avoids same.

Penalty: $5,500 to $11,000 per claim, plus triple the amount of the claim, suspension of license and provider number, exclusion from Medicare + other government contracts AND possible criminal penalties – more if a patient suffers bodily injury.
Government Tool #2 the Anti-Kickback Statute 42 USC § 1320(b)

Prohibits knowing and willful soliciting or receiving any remuneration in return for referring an individual for an item or service for which payment may be made under a Federal health care program.

Penalty: a felony conviction and fine up to $25,000 or imprisonment for not more than five years, or both.
Government Tool #5 Physician self-referral (and its little brother the Related Party rule)

- Although there are certain exceptions, if a physician (or an immediate family member of such physician) has a financial relationship with an entity that receives payment from a Federal health care program then the physician may not make a referral to the entity for the furnishing of designated health services for which payment otherwise may be made. 42 USC 1395nn

- A “related party” cannot make a profit from a transaction with a Medicare provider. A “related party” exists where the provider, to a significant extent, has the power, directly or indirectly, to significantly influence or direct the actions or policies of an organization. 42 C.F.R. § 413.17.

- Certain limited exceptions to both rules – seek answers prior to making the referrals or engaging in the transaction.
Government Tool #6 EXCLUSION (the CMS Death Penalty)

- Mandatory exclusion
  - Conviction of program related crimes
  - Conviction relating to patient abuse
  - Felony conviction relating to health care fraud
  - Felony conviction relating to controlled substance
Government Tool #6 EXCLUSION (the CMS Death Penalty)

- Permissive exclusion
  - Misdemeanor conviction relating to fraud
  - Conviction relating to obstruction of an investigation or audit
  - Misdemeanor conviction relating to controlled substance
  - License revocation or suspension
  - Exclusion or suspension under Federal or State health care program
  - Claims for excessive charges or unnecessary services and failure of certain organizations to furnish medically necessary services
  - Fraud, kickbacks, and other prohibited activities
  - Entities controlled by a sanctioned individual
Government Tool #6 EXCLUSION (the CMS Death Penalty)

Permissive exclusion ( Continued )
- Failure to disclose required information
- Failure to supply requested information on subcontractors and suppliers
- Failure to supply payment information
- Failure to grant immediate access to the OIG, CMS or State regulatory agencies
- Failure to take corrective action
- Default on health education loan or scholarship obligations
- Individuals controlling a sanctioned entity
- Making false statements or misrepresentation of material facts
FWA Consequences can be severe:

- Hospice of the Comforter (FL) $3 Million settlement, CIA and 3 year exclusion for CEO
- Hospice of Arizona (AZ) $12 Million settlement and CIA
- Home Care Hospice (PA) Owner sentenced to 176 months in prison + 32.4 million (includes restitution to Medicare and money judgment) after trial. The medical director also sentenced to 51 months in prison and a $300,000 fine for kickbacks.
- Amedisys Home Care and Hospice (LA) $150 Million + CIA
- Hospice Compassus (AL) $3.92 Million settlement

The above are examples and not a complete list

NOTE: There are more cases pending – just search “hospice” on http://www.justice.gov/ the DOJ website.
“Ex. Rel.”
A Relationship You Don’t Want

- A Qui Tam lawsuit means that the United States brings the action “on the relation of” a whistleblower, usually a disgruntled former employee but may be any person with evidence of FWA.
- If successful, the relator can receive 15 – 25% of the amount recovered.
- The Qui Tam suit is initially sealed while the government investigates; the defendant will not know about the suit until it is unsealed (unlike an ordinary civil suit).
- Well over half of FWA actions are brought by Qui Tam relators.
We are convinced that the risk is serious but enough of the bad news, what can we do?
Know the Areas of Increased Scrutiny and Potential Vulnerability

- Anticipate regulatory focus upon higher than average:
  - Length of stay
  - Non-CA diagnosis
  - SNF inpatient
  - Live discharge and/or readmit
- Also will be looking for:
  - Documentation of eligibility and CTI (Certification of Terminal Illness)
  - Compliance program (don’t wait for the ACA)
Know the Areas of Increased Scrutiny and Potential Vulnerability

- OIG Work Plan for 2014 specifically targets:
  - Appropriateness of GIP claims and content of election statements for GIP population
  - Hospice in ALFs: length of stay, levels of care and type of terminal illness
Particular Focus Upon GIP

- Identified subject of OIG Work Plan
- Concern about increased utilization and longer lengths of stay
- Increasing your census can also increase scrutiny (no good deed goes unpunished)
- Will be evaluating coordination with SNF services
- Evaluation and Documentation is the key: consider outside evaluation and training
Whistleblower Prevention: Beyond Just “Doing It Right”

- Policies and procedures to deter FWA
- Strong statement that management does not tolerate FWA
- Part of new employee orientation
- Compliance program with confidential in-house reporting
- Meaningful and thorough investigation
Investigating FWA Allegations

- Must be objective
- Consider outside investigator depending upon severity
- Conclusions must be based upon evidence
- Written report as appropriate
- Corrective action – in consultation with legal counsel if FWA detected
Kickbacks

- Strong policies prohibiting improper remuneration
- Education of staff at all levels
- Internal compliance reporting
- Avoid incentives to staff that would invite improper conduct (i.e. census bonus)
- Have legal counsel review all arrangements with contract providers and referral sources
FWA Prevention Starts on Admission

- Thorough assessment of eligibility
- Hospice election entered into knowingly by patient or legal representative
- Timely and complete initial certification and recertification
- Meaningful initial POC
- Auditing all of the above with a second pair of eyes
FWA Prevention Starts on Admission

- Certification must be accurate and complete
- Prognosis: 6 months or less if terminal illness runs its normal course
- Benefit period dates which the certification (or recertification) applies
- Signed and dated by MD (no rubber stamp)
- MD Narrative and attestation
- Face to face encounter date and attestation
FWA Prevention Starts on Admission

- Notice of Election must have all required elements:
  - Identification of the hospice
  - Acknowledgment by patient or representative that he or she has been given a full understanding of palliative rather than curative nature of hospice care as it relates to the terminal illness.
  - Acknowledgment that certain Medicare services are waived
  - Effective date of the election (may not be before the election date)
  - Signature of patient or representative
FWA Prevention Starts on Hire

- Verify prior employment, references and CHECK THE EXCLUSION DATABASE
- Have a meaningful orientation program
- Stress “zero tolerance” for fraud, waste and abuse
- Have an internal reporting mechanism and ensure employee awareness
Clinical Documentation

- Accurate documentation in relation to hospice diagnosis
- Justification for hospice services
- Family/caregiver support and teaching
- Pain and symptoms: assessment and intervention
- Coordinated and consistent among team members (including SNF staff if applicable)
- Patient/family response to intervention and care
Particular Concerns About Medication

- The OIG has determined that Medicare may be paying twice for medication related to the hospice diagnosis: Once under Part D and again under the hospice Part A Per Diem.
- Audit all medications to ensure those that should be included in the Per Diem are not being billed to Part D.
- Related concern: Part D copayments may be inappropriately charged to beneficiaries.
Particular Concerns About Medication

- Clinical record should reflect which medications are appropriately covered under hospice
- Discuss non-covered medication issues and hospice coverage with patient or family
- Audit to ensure compliance – particularly important with medications provided by SNF pharmacy
Develop A Compliance Plan

From the CMS 1999 guidelines that are still valid today:

- Have written policies, procedures and standards of conduct;
- Designate a compliance officer and compliance committee;
- Conduct effective training and document employee participation;
Develop a Compliance Plan (continued)

- Develop and maintain effective lines of communication;
- Enforce standards through well publicized disciplinary guidelines;
- Conduct internal monitoring and auditing; and
- Respond promptly to detected offenses and take corrective action.
The Auditors At The Door!

- Remain polite, calm and professional
- Ask for identification/business card
- Provide private work area away from care staff
- Advise appropriate management
- Ensure that staff are prepared for auditor visits and possible interviews
Your Staff and Government Auditors

- Answering government questions can be a frightening experience
- Encourage truthfulness while putting the agency’s best foot forward
- OIG investigations may require special handling due to potential DOJ referral: “what you say may be used against you”.
- Consult legal counsel if needed
Bottom Line: It’s the Money

- Appropriate and lawful justification for all services rendered
- Truthful and detailed documentation
- Dot each “i” and cross each “t”.
- Assure coordination and avoid duplication
- Ethical professional relationships without improper financial incentives
- Robust compliance program
Thank you for your time and attention.

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Note: This class is intended to provide general information only. For specific legal advice applicable to your personal situation, please consult an attorney. No attorney-client relationship with the firm Tyler & Wilson is intended to be created by this presentation.