

## HOME HEALTH AND HOSPICE NEWS

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### OIG ADVISORY OPINION REITERATES POLICY ON INDUCEMENTS

In a recent Advisory Opinion (“Opinion”) issued by the Department of Health and Human Services’ Office of the Inspector General (OIG), the OIG reiterates a prior interpretation of the “inducements” provision of the civil monetary penalties law (CMPL) as it applies to a provider furnishing free items or services to Medicare or Medicaid beneficiaries who are prospective patients. OIG Adv. Op. 07-08 (7/23/07).

The CMPL prohibits a person from conferring something of value on a beneficiary that the person knows or should know is likely to influence the recipient to select a particular provider or supplier for Medicare or Medicaid-reimbursed items or services. Soc. Sec. Act, §1128A(a)(5). An exception applies to items or services of “nominal value,” currently set at \$10 each, and \$50 in the aggregate, per year.

Here, the OIG addresses a DME Supplier’s proposal to offer free pulse oximetry tests and free congestive heart failure (“CHF”) assessments to individuals diagnosed with CHF. While the Supplier would not be entitled to Medicare reimbursement for those services, it could be reimbursed for oxygen and related supplies for those patients who qualify.

The OIG restates the three-part analysis that it undertook in 2006 in evaluating a home health agency’s proposal to offer free pre-surgical home visits to prospective patients. See, Adv. Op. 06-01. In both cases, the OIG concluded that the arrangements could result in improper inducements under the statute, for many of the same reasons.

In evaluating potential inducements, the OIG determines: (1) whether there is a benefit bestowed on a beneficiary for free or below fair market value; (2) whether the benefit is likely to influence the recipient’s selection of health care provider for covered items or services; and (3) whether the bestowing party knows or should know that the benefit is likely to influence the individual’s selection of provider.

With regard to the first part of the analysis, the oximetry tests themselves were valued at \$22 and, therefore, not protected under the “nominal value” exception. The free CHF assessments, however, were of an indeterminate value, and thus the OIG focused on the perceived value to

the beneficiary. The OIG concluded that a reasonable beneficiary was likely to believe that an in-home, personal assessment was a valuable service.

This subjective, “reasonable beneficiary” standard could have broad application in any arrangement, or part of an arrangement, in which an item or service bestowed is intangible, or does not have a readily determinable market value, such as “consultations,” “educational” or “informational” meetings, and introductory visits, particularly where the service is tailored to the individual.

Second, the OIG concludes that the benefit would be likely to influence recipients’ choice of provider for reimbursable items and services. Among other factors, the OIG notes that the highly personalized manner of furnishing the CHF assessments – through face-to-face encounters with individuals in their homes - is an inextricable part of the inducement. In addition, the beneficiaries would be referred to the Supplier for the free benefits by their own physician, thereby raising the inference that the physician would also recommend that Supplier for reimbursable items and services.

Finally, the pre-identification of CHF patients and the marketing of the free benefits to physicians treating those patients would allow the Supplier to target a narrow subset of potential “paying” customers for the free items and services. This led the OIG to conclude that the Supplier knew or should have known that the benefits were likely to influence a patient’s selection of supplier.

Providers engaging in these types of marketing activities should always take care to document the fair market value of any benefits bestowed on potential customers when possible. In addition, providers should be aware of factors that render an item or service highly individualized, such as specifically tailored test results, personal encounters with patients and their families, entry into patient’s homes, and physician recommendations. These are likely to be viewed as “valuable” to a “reasonable beneficiary,” and thus in furtherance of the inducement by the OIG.

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