CORPORATE COMPLIANCE ALERT

5/9/13

Turning up the HEAT on Hospice Care Providers

The Department of Justice (DOJ) very recently charged the nation's largest for-profit hospice chain, Vitas Innovative Hospice Care (Vitas), which is headquartered in Miami, with inappropriately admitting patients and billing Medicare for unnecessary crisis care in violation of the False Claims Act, highlighting the agency's ongoing battle to combat fraud in the hospice industry.[1]

The complaint against Vitas further alleged that Vitas paid employees bonuses tied to the number of patients they enrolled for crisis care services[2] when those services were not reasonably medically necessary.[3] The compliant further alleged that Vitas used "aggressive marketing tactics and expected their employees to increase the number of crisis care claims submitted to Medicare, without regard to whether the crisis care services were appropriate."[4] Finally, the complaint alleged that the company's marketing department intentionally misled patients into believing they qualified for "intensive comfort care" services, a level of care covered by Medicare only in the case of a short-term crisis and acute medical symptoms, and "to believe that the Medicare hospice benefit would routinely cover around the clock care for hospice patients."[5]

The lawsuit is further evidence of the DOJ's commitment to making hospice care an essential component of its Health Care Fraud Prevention and Enforcement Action Team (HEAT) initiative, announced by Attorney General Eric Holder and Health and Human Services (HHS) Secretary Katherine Sebelius in May of 2009, and is the latest in a series of actions by the DOJ against a number of hospices for the submission of inaccurate or fraudulent claims to Medicare.

Recent Hospice Care Enforcement Actions

For example, in late March of this year, Hospice of Arizona L.C. entered into a corporate integrity agreement[6] to resolve allegations that Hospice of Arizona, and its related entities, submitted or caused the submission of false Medicare claims for Hospice of Arizona patients who did not need end of life care or for whom the hospice billed at a higher reimbursement rate than it was entitled.[7] More specifically, the government had alleged that Hospice of Arizona pressured staff to find more eligible patients for Medicare,

[1] The Medicare hospice benefit is limited to patients who elect palliative care (medical care focused on providing patients with relief from pain and stress) for a terminal illness and have a life expectancy of six months or less. Whenever a patient is admitted to hospice care, the patient is no longer eligible to receive curative care – services designed to cure his or her illness.

[2] Crisis care is for a patient who elects to receive hospice care at home, or in a long-term care facility such as a nursing home. Crisis care is provided when the (at-home or nursing home) hospice patient is experiencing a "brief period[] of crisis," and only as necessary to allow the patient to remain at their residence. *See* 42 C.F.R. § 418.302(b)(2). Medicare defines a brief "period of crisis" as "a period in which the individual requires continuous care to achieve palliation and management of acute medical symptoms." *Id*. at § 418.204(a).

To bill Medicare for crisis care, a hospice must provide care that is: (1) designed to palliate the patient's acute medical symptoms, (2) provided to the patient for at least eight hours in a 24-hour period, counted from midnight to midnight, and (3) predominantly nursing care, meaning care provided by a registered nurse (RN), licensed practical nurse (LPN), or nurse practitioner (NP). *See* 42 C.F.R. §§ 418.302, 418.204. If the care lasts less than eight hours in a 24-hour period, the hospice may only bill Medicare for routine home care for that day of hospice services. Similarly, if the care provided does not consist of predominantly nursing care, the hospice may not bill Medicare for crisis care and must instead bill for routine home care. *See* 42 C.F.R. §§ 418.302, 418.204

[3] *United States v. Vitas Hospice Services, LLC., et al.* Case No. 4:13 cv-00449-BCW (May 2, 2013), DE-1 at 13-17.

[4] *Ibid* at note 3, at DE-1 at 13.

[5] *Ibid* at note 3, at DE-1 at 14.

[6] https://oig.hhs.gov/fraud/cia/agreements/American_Hospice_Management_03152013.pdf. American Hospice Management Holdings, Inc., a related entity, entered into the agreement as part of the settlement.

[7] *United States ex rel. Momeyer v. Hospice of Arizona, L.C., et al.,* No. 1:10-cv-280 (D. Md. Mar, 2013); http://www.justice.gov/opa/pr/2013/March/13-civ-326.html;

adopted procedures that delayed and discouraged staff from discharging patients from hospice when they were no longer appropriate for such services, and failed to implement an adequate compliance program that might have addressed these problems.[8]

After reaching that settlement, Stuart F. Delery, Acting Assistant Attorney General for the Civil Division of the DOJ, emphasized that, "[T]his settlement is the result of the Justice Department's efforts to prevent the misuse of the taxpayer-funded Medicare hospice program, which is intended to provide comfort and care to terminally ill persons at the end of their lives."[9]

In November of last year, Harmony Care Hospice, Inc. of South Carolina agreed to pay the government $1.2 million to settle False Claims Act allegations. In that case, the United States alleged that Harmony knowingly submitted or caused to be submitted false claims for patients who did not have such a prognosis and thus were not eligible for hospice care.[10]

In addition, in September of last year, the DOJ intervened in a False Claims Act lawsuit against Hospice of the Comforter, Inc. (HOTCI) for knowingly submitting false claims to Medicare for hospice care for patients who were not terminally ill.[11] Specifically, the lawsuit alleged that HOTCI's chief executive officer verbally instructed HOTCI employees to admit Medicare recipients for hospice care even where there had not yet been a determination that they were eligible for the hospice benefit.[12] The lawsuit also alleges that, after being notified that it would be audited by its Medicare contractor, HOTCI formed an internal committee to review the eligibility of its Medicare patients and discharged at least 150 patients in 2009-2010 as being ineligible for the Medicare hospice benefit.[13]

After intervening in the lawsuit against HOTCI, Robert O'Neill, U.S. Attorney for the Middle District of Florida, stressed that, "[I]t is critically important that Medicare remains solvent in order to provide hospice benefits, and that we confront those whose practices in this area put economic gain before patient care.[14] Some of the most vulnerable people in our district rely on hospice services."[15]

Significance of HEAT Initiative for Hospice Care Providers

Collectively, these developments demonstrate that DOJ and HHS will continue to aggressively target hospice care providers through the HEAT initiative. Based on this current enforcement environment, hospice care providers would be well advised to implement and establish comprehensive compliance programs that are narrowly tailored to address quality of care concerns and the accuracy and adequacy of in-house procedures for submitting claims to Medicare. As shown, the failure to implement such procedures is an invitation to any former or current employee to file a *qui tam* lawsuit under the False Claims Act against the hospice care provider. Under these circumstances, the potential damages to the hospice care provider are devastating, including the payment of hefty fines, entering into an onerous corporate integrity agreement, an HHS order of exclusion from Medicare or the filing of indictments against the provider pursuant to the federal health care fraud statute or the federal Anti-Kickback Statute.[16]

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[8] *Ibid,* at note 7.
[9] *Ibid,* at note 7.
[10] *United States ex rel. Singletary, et al. v. Harmony Care Hospice, Inc., et al. ,* Case No. 2:10-cv-01404-PMD (D.S.C. Nov. 2012); http://www.justice.gov/opa/pr/2012/November/12-civ-1401.html
[11] *United States ex rel. Stone v. Hospice of the Comforter, Inc.,* No. 6:11-cv-1498-ORL-22-AAB (M.D. Fla. Sept, 2012); http://www.justice.gov/opa/pr/2012/September/12-civ-1080.html
[12] *Ibid*, at note 11.
[13] *Ibid*, at note 11.
[14] *Ibid*, at note 11.
[15] *Ibid*, at note 11.
[16] *See* 18 U.S.C §1349; *see* 42 U.S.C. §1320a-7b (Anti-Kick Back Statute).

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