

PUBLICATION

OIG Approves Home Health Provider's Free Introductory Visit Policy [Ober|Kaler]

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On August 6, 2015, the U.S. Department of Health & Human Services, Office of Inspector General (OIG) issued an advisory opinion approving a for-profit home health provider's policy to offer free introductory visits to patients who have already chosen it as their home health provider. In Advisory Opinion 15-12, the OIG concluded that the introductory visits do not constitute remuneration to patients. therefore, the OIG chose not to impose sanctions in connection with the federal antikickback statute (AKS) or the civil monetary penalty prohibition against inducements to beneficiaries (CMP).

The Advisory Opinion's Requester is a for-profit entity that provides home health services to, among others, beneficiaries who participate in federal health care programs. If a beneficiary requires home health services, a physician or health care professional serving as a hospital discharge planner or case management planner presents a list of possible home health providers to the beneficiary. If the Requestor is selected as the home health provider, then the physician or health care professional contacts the Requestor. The Requester is not involved in the selection process, and does not pay or offer to pay any direct or indirect remuneration to the physician, health care professional, or others involved in the selection process.

Once the Requester is notified that it has been selected as the beneficiary's home health provider, the Requester's liaison contacts the beneficiary by telephone to set up an initial visit (Introductory Visit). The beneficiary can select to conduct the Introductory Visit in person, by phone, or by email – or not at all. The primary purpose of the Introductory Visit is to facilitate the transition to home health services and increase compliance with the post-acute treatment plan. The Introductory Visit is limited to the liaison's provision of three things: (1) an overview of the home health experience; (2) written materials that list contact information for the Requester's administrative and clinical employees; and (3) pictures of the Requester's care team. No reimbursable diagnostic or therapeutic services are provided and, while the liaison is a licensed practical nurse, nothing provided during the Introductory Visit requires any clinical training. The Requester certified that the Introductory Visit is not a covered service under Medicare or Medicaid, it does not submit claims for reimbursement to any federal health care program or third-party payor, and it does not claim costs associated with the Introductory Visit on any cost reports or shift the burden of the costs to any federal health care program, third-party payor, or the beneficiary.

The OIG's analysis centered on whether the Introductory Visits constitute *remuneration* to beneficiaries as that term is defined under the AKS and CMP. The OIG ultimately concluded that the Introductory Visits do not provide any "actual or expected economic benefit" and thus do not constitute remuneration. In reaching this conclusion, the OIG cited three key reasons:

- The beneficiary only receives information about the Requestor – materials about the Requester's employees and an overview of the home health experience. Providing this information is designed to facilitate the transition to home health services and to increase compliance with the treatment plan.
- No reimbursable diagnostic or treatment services are provided during the Introductory Visit.
- The Introductory Visit helps ensure the beneficiary's personal safety by familiarizing them with the members of the care team who will be coming into the beneficiary's home.

The OIG acknowledged that the Introductory Visits have "some intrinsic value" to patients, but found that such value was not sufficient to implicate the AKS or CMP.

The OIG then tried to distinguish the Introductory Visits from other visits and assessments by health care providers that may constitute remuneration. In particular, the OIG noted that such visits often involved either reimbursable services or services that are of more than nominal value. Finally, the OIG stressed that with the Introductory Visits the Requestor has already been selected as the beneficiary's home health provider. The Introductory Visits serve as the "logical and reasonable first step in the care relationships that have been established."

Ober|Kaler Comments

While the OIG seems to have come to the proper result in Advisory Opinion 15-12, it provides little certainty as to when a service in the future will have sufficient "intrinsic value" to implicate the AKS and CMP. Whether the service involves a billable diagnostic or therapeutic service seems to be a critical factor. It would not, however, seem to be determinative. The OIG adds in a footnote that the lack of a paying market for a service is not dispositive on the question of whether it might have sufficient economic value to implicate the AKS or CMP. Advisory Opinion 15-12 provides some clues as to what might have sufficient intrinsic value to implicate the AKS and CMP, but ultimately leaves us with a facts-and-circumstances inquiry.