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COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, *Chief Counsel and Staff Director*
KRISTINE J. LUCIUS, *Democratic Chief Counsel and Staff Director*

March 9, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable Loretta Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

The Honorable Daniel R. Levinson
Inspector General
Department of Health and Human Services
Wilbur J. Cohen Building
330 Independence Avenue SW
Washington, DC 20201

Dear Attorney General Lynch and Inspector General Levinson:

Implemented in 1983, the Medicare hospice benefit was designed to provide patients who have a terminal illness with comfort and pain relief, as well as emotional and spiritual support, generally in a home setting.¹ To be eligible for the benefit, a patient must be certified as terminally ill, which means a life expectancy of six months or less.² The Medicare hospice benefit covers a broad range of palliative services, including nursing care, counseling, and home health aide services, as well as drugs and medical supplies.³ However, beneficiaries must waive coverage of curative care that is aimed at treating their terminal condition.⁴

¹ Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, § 122, 96 Stat. 324, 356.

² 42 C.F.R. § 418.3.

³ 42 U.S.C. § 1395x(dd)(1).

⁴ 42 U.S.C. § 1395d(d)(2)(A).

Recent articles have revealed a variety of misguided incentives and potential abuses within the industry.⁵ One example of egregious abuse is the practice of hospice companies recruiting patients who are not actually terminally ill. According to the Washington Post, based on a review of the records of more than one million hospice patients in California, the proportion of patients who were discharged from hospice care rose about 50 percent between 2002 and 2012.⁶ This review also revealed that the average length of stay jumped substantially over that time.⁷ For example, in 2000 the average Medicare beneficiary enrolled in hospice used the benefit for 54 days; that number rose to 80 days in 2007 and 83 days in 2008.⁸ One cause for hospice companies to enroll patients who are not actually dying, or failing to discharge patients who are no longer eligible for hospice care, is that longer patient stays are generally more profitable for hospices than short stays under Medicare's reimbursement structure.⁹ This financial motive is corroborated by data showing that the average nonprofit hospice serves a patient for 69 days, whereas the average for-profit hospice serves a patient for 102 days.¹⁰ In 2011, nearly 60 percent of Medicare's hospice expenditure of \$13.8 billion went toward patients who stayed on hospice care longer than six months.¹¹

Patients receiving hospice care have been on the rise, and as spending for the Medicare hospice benefit continues to grow, it is critical that abuses of this important benefit are reined in.¹² Aside from fiscal waste in the Medicare program, abuse of the Medicare hospice benefit by enrolling patients who are not actually dying is particularly egregious given that beneficiaries must waive curative and rehabilitative care to be eligible; this means that patients who are not actually terminal do not have access to treatment that could improve their conditions. Moreover, the emotional toll on the patients and family members believing that their loved one is dying, when in fact they may not be, is unimaginable.

Two important mechanisms exist to determine if beneficiaries were eligible to enroll in the hospice benefits: oversight by the Department of Health and Human Services Office of

⁵ See Peter Whoriskey and Dan Keating, *Terminal neglect? How some hospices decline to treat the dying*, Wash. Post (May 3, 2014) (first installment in the "Business of Dying" series), https://www.washingtonpost.com/business/economy/terminal-neglect-how-some-hospices-fail-the-dying/2014/05/03/7d3ac8ce-b8ef-11e3-96ae-f2c36d2b1245_story.html.

⁶ Peter Whoriskey and Dan Keating, *Hospice firms draining billions from Medicare*, Wash. Post (Dec. 26, 2013), https://www.washingtonpost.com/business/economy/medicare-rules-create-a-booming-business-in-hospice-care-for-people-who-arent-dying/2013/12/26/4ff75bbe-68c9-11e3-ae56-22de072140a2_story.html.

⁷ *Id.*

⁸ David E. Thiess, *The Medicare Hospice Benefit After Health Reform: Cost Controls, Expanded Access, and System-Induced Pressures*, 3 J. Health & Life Sci. L., 39, 50 (2010).

⁹ *Id.* at 58.

¹⁰ Peter Whoriskey and Dan Keating, *Hospice firms draining billions from Medicare*, Wash. Post (Dec. 26, 2013) (citing the Medicare Payment Advisory Commission).

¹¹ *Id.*

¹² An academic article explains that, according to the Government Accountability Office, between 1992 and 2002, Medicare payments for hospice care increased fivefold, to about \$ 4.5 billion, the number of Medicare patients increased fourfold, to approximately 640,000, and the number of Medicare-participating hospices grew by almost 90 percent to 2,275. Joshua E. Perry and Robert C. Stone, *Cost and End-of-Life-Care: In the Business of Dying: Questioning the Commercialization of Hospice*, 39 J.L. Med. & Ethics 224, 227 (2011) (internal citations omitted). Six years later, hospice expenditures more than doubled to exceed \$11 billion, Medicare beneficiaries receiving hospice services exceeded one million, and the number of hospice locations rose to greater than 3,300, with for-profit providers accounting almost entirely for this increase. *Id.*

Inspector General (HHS-OIG) and lawsuits under the False Claims Act (FCA) brought by whistleblowers and the Department of Justice.

HHS-OIG has the critical role of fighting waste, fraud, and abuse in Medicare and, according to its website, the HHS-OIG has been involved in oversight of hospices through compliance guidance, enforcement actions, and audits.¹³ An audit completed in 2011 focused on hospices that had high percentages of their beneficiaries residing in nursing facilities. These hospices typically served beneficiaries who required less complex care, but required hospice care for longer periods, which HHS-OIG noted, can mean larger profits.¹⁴ Another audit, completed in 2015, focused on hospice care provided in assisted living facilities.¹⁵ HHS-OIG recommended that Centers for Medicare & Medicaid Services (CMS), as part of its ongoing hospice reform efforts, reform payments to reduce the incentive for hospices to target beneficiaries with certain diagnoses and those likely to have long stays, among other recommendations.¹⁶ CMS concurred with this recommendation and others, stating that it is evaluating potential payment reform options.¹⁷

I have long supported the FCA as a critical tool in fighting government waste, fraud, and abuse. Without whistleblowers who bring claims under it, substantial amounts of fraud would go undetected. Whistleblowers succeed when other oversight resources have not been able to keep up, and the hospice industry is no exception. The Justice Department has joined qui tam plaintiffs in lawsuits against hospice companies that have enrolled patients not eligible for hospice benefits, and obtained substantial settlements for liability under the FCA.¹⁸

The Justice Department similarly joined with qui tam plaintiffs in a lawsuit against AseraCare, one of the nation's largest for-profit chains of hospice providers, alleging that the company fraudulently billed Medicare for patients who were not terminal.¹⁹ According to company data publicized by the Washington Post, at AseraCare, about 78 percent of patients who enrolled at the Mobile, Alabama branch left the hospice's care alive; as many as 59 percent of patients left the AseraCare branch in nearby Foley, Alabama alive; and at the one in Monroeville, 48 percent were discharged from the hospice alive.²⁰ According to press reports, the case against AseraCare is the largest trial of a whistleblower lawsuit involving a hospice company in the United States.²¹

¹³ See, e.g., Press Release, Dep't of Justice, U.S. Attorney's Office, District of Arizona, Serenity Hospice and Palliative Care to Pay \$2.2 Million to Resolve False Claims Allegations (Oct. 7, 2015), available at <http://www.justice.gov/usao-az/pr/serenity-hospice-and-palliative-care-pay-22-million-resolve-false-claims-allegations>.

¹⁴ Office of Inspector General, U.S. Dep't of Health & Human Servs., Spotlight On...Medicare Hospice Care, <http://oig.hhs.gov/newsroom/news-releases/2011/hospice.asp>.

¹⁵ Office of Inspector General, U.S. Dep't of Health & Human Servs., OEI-02-14-00070, *Medicare Hospices Have Financial Incentives to Provide Care in Assisted Living Facilities* (2015), available at <http://oig.hhs.gov/oei/reports/oei-02-14-00070.pdf>.

¹⁶ *Id.* at 18-20.

¹⁷ *Id.* at 22-23.

¹⁸ Thiess, *supra* note 8, at 63 (citing settlements against SouthernCare and Odyssey Healthcare, for \$24.7 and \$12.9 million, respectively).

¹⁹ *United States First Amended Compl. in Intervention, U.S. ex rel. Richardson v. GGNHC Administrative Servs., LLC.*, No. 09-00627 (N.D. Ala. Aug. 1, 2012) (consolidated with *U.S. ex rel. Paradise v. AseraCare Inc.*, No. 12-00245 (N.D. Ala.).

²⁰ Peter Whoriskey and Dan Keating, *Hospice firms draining billions from Medicare*, Wash. Post (Dec. 26, 2013).

²¹ Kent Faulk, *Jury deliberating in Aseracare hospice whistleblower lawsuit; \$200 million in penalties at stake*, AL.Com (Oct. 8, 2015, 4:48PM), http://www.al.com/news/birmingham/index.ssf/2015/10/jury_deliberating_in_aseracare.html.

Yet, it appears that the claims against AseraCare—and the FCA more broadly—may be facing obstacles in this case. In particular, the trial was bifurcated into two phases—the first phase to address whether the billing claims submitted by Medicare were objectively false, and the second on whether company officials had knowledge of falsity.²² This appears to be the first such bifurcation under the FCA.²³ Then, after a ten-week trial, the jury found that AseraCare had fraudulently billed for 104 out of 121 patients, which were part of a random sample of AseraCare patients for whom the company billed Medicare for at least a year of continuous care during a specified time period.²⁴ However, just before moving to the second phase of the trial, the district court judge granted a request for a new trial that was filed after the judge stated she realized she committed reversible error in the jury instructions.²⁵ Currently pending is the judge's sua sponte consideration of summary judgment.²⁶

In order to better understand ongoing efforts to ensure the hospice industry meets Medicare requirements, I request that you make knowledgeable officials available to brief my staff on these issues. This briefing should address current investigative and enforcement efforts, including FCA actions, being undertaken by your agencies; and industry trends and concerns being uncovered by HHS-OIG and the Justice Department. In particular, I ask that the officials speak to the issue of hospice companies improperly enrolling or failing to dis-enroll patients who are not eligible for hospice care because they are not actually dying, as well as the ongoing litigation issues in the AseraCare case and other qui tam actions in this area.

Please contact DeLisa Lay or Josh Flynn-Brown of my Committee staff at (202) 224-5225 should you have any questions. Thank you for your cooperation in this important matter.

Sincerely,



Charles E. Grassley
Chairman
Committee on the Judiciary

cc:

The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

²² Jeff Overley, *DOJ Decries 'Extraordinary' FCA Trial Split For Hospice*, Law360 (June 10, 2015, 7:22PM).

²³ Jessica Corso, *Judge Allows 1st-Ever Split In FCA Trial*, Law360 (June 26, 2015, 1:20PM).

²⁴ Kent Faulk, *Jury finds hospice company filed false Medicare claims in 104 of 121 cases*, AL.Com (Oct. 15, 2015, 4:55PM), http://www.al.com/news/birmingham/index.ssf/2015/10/jury_finds_hospice_company_fil.html.

²⁵ Kent Faulk, *AseraCare hospice trial with \$200 million at stake gets do-over*, AL.Com (Oct. 26, 2015), http://www.al.com/news/birmingham/index.ssf/2015/10/federal_judge_halts_aseracare.html.

²⁶ *U.S. ex rel. Paradies v. AseraCare Inc.*, No. 12-00245, doc. 483 (N.D. Ala. Nov. 3, 2015).