# DHHS Inspector General Issues Supplemental Program Guidance for Nursing Facilities

**Client Advisories**

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On September 30, 2008, the Office of the Inspector General ("OIG") for the U.S. Department of Health and Human Services published in the Federal Register supplemental program compliance guidance specifically directed at nursing facilities that accept Medicare and Medicaid funds. The complete 17-page Notice may be found at 73 Fed. Reg. 56832-56848.

The Program Guidance, which, OIG cautions, is neither mandatory nor exhaustive, identifies fraud and abuse risk areas in four (4) broad categories; quality of care; submission of accurate claims; the federal anti-kickback statute; and "other" risk areas.

**A. Quality of Care**

In cases that involve failure of care on a systemic and widespread basis, the OIG asserts that a facility may be liable for submitting false or fraudulent claims to the federal government. False claims may result in criminal, civil or administrative sanctions.

1. Sufficient Staffing

"While the OIG acknowledges that nursing facilities operate in an environment of high staff turnover, where it is difficult to attract, train and retain an adequate workforce, the OIG makes it clear that facilities remain responsible to provide staff in sufficient numbers and with appropriate clinical expertise to maintain the highest practicable physical, mental and psycho-social wellbeing of residents."

2. Resident Care Plans

"OIG emphasizes that care planning must include all disciplines involved in the resident's care, specifically including the resident's physician and the resident him- or herself, unless declared incapacitated. The OIG warns that perfunctory meetings, or plans developed without the full clinical team, may create less than comprehensive care plans, resulting in inadequate care, medically unnecessary care, or medically inappropriate services."

3. Medication Management

"The OIG warns that failure to manage pharmaceutical services properly can jeopardize resident safety and even result in resident deaths. The OIG identifies the facility's consultant pharmacist as an important resource. Facilities should implement policies and procedures for maintaining accurate drug records and tracking medications."

4. Psychotropic Medications

"OIG reminds facilities that federal law prohibits facilities from using any medication a s a means of chemical restraint for "purposes of discipline or convenience, and not required to treat the resident's medical symptoms." For residents who specifically require antipsychotic medications, CMS rules require gradual dose reductions and behavioral interventions, unless medically contraindicated."

5. Resident Safety

"OIG makes it clear that abuse and neglect are the concerns here. Of particular concern is harm caused by staff and fellow residents. An effective compliance program will include policies, procedures and

practices to prevent, investigate and respond to instances of potential resident abuse, neglect or mistreatment. The OIG emphasizes the importance of a confidential reporting mechanism. Facilities must be committed to protecting reporters from retaliation. Both potential residents and staff should be screened for aggressive behaviors and abusive backgrounds."

**B. Submission of Accurate Claims**

Examples of false or fraudulent claims include claims for items not provided (or not provided as claimed), claims for services that are not medically necessary, and claims where there has been a failure of care. The OIG warns that submission of a false claim may subject the individual, the entity or both to criminal prosecution, treble damages under the Federal False Claims Act, and exclusion from participation in Federal health care programs. OIG states that facilities must ensure that residents receive care to prevent pressure ulcers, active and passive range of motion, ambulation, fall prevention, incontinence management, bathing, dressing and grooming activities. To see customary ADLs listed in connection with potential false claims action may be a surprise to some, nevertheless, OIG identifies failure to provide care that is paid for by Medicare or Medicaid as an instance of false claim.

**C. The Federal Anti-Kickback Statute**

The OIG begins by stating that the anti-kickback statute (42 U.S.C. 1320a-7b(b)) prohibits the health care industry from engaging in practices that are common in other business sectors, such as offering or receiving gifts or rebates to reward past or potential new referrals. The anti-kickback statute is a criminal law, which prohibits remuneration (in any form, direct or indirect) made to induce referrals of health care business. Nursing facilities need to ensure that referrals they make or receive comply with this law. The anti-kickback law and its corresponding regulations (42 C.F.R. 1001.952) establish a number of "safe harbors" for certain business arrangements, but to receive protection, the arrangement must fit squarely within a safe-harbor.

The OIG identifies five (5) known areas of potential risk to nursing facilities under the anti-kickback statute. Facilities should take care to obtain competent legal advice when dealing in these areas:

1. Free Goods and Services

"Examples are: free services or supplies offered by a pharmacy; free services offered by an outside laboratory; free equipment, such as computers or software; free durable medical equipment, such as

walkers, offered by a DME supplier; a hospice nurse providing services for non-hospice residents; and a hospital providing a registered nurse."

2. Service Contracts

"OIG points out that kickbacks may be disguised as otherwise legitimate payments, or may be hidden in business arrangements. Relationships with outside providers and suppliers need to be scrutinized closely. Key is that the arrangement not be related in any way to the volume or value of business."

3. Discounts

"OIG identifies two forms of discounts that may run afoul of the anti-kickback law: price reductions and "swapping." Facilities should ensure that all price reductions and rebates are properly disclosed and accurately reflected on their cost reports. An example of "swapping" is the acceptance of a low price on an item covered by Medicare Part A, in exchange for referring the supplier Part B or Medicaid business."

4. Hospices

"For example, if a hospice offers a nursing facility free nursing services in order to induce referrals, or pays room and board in excess of what the facility would have received from Medicaid if the resident had not been on hospice, such arrangements could violate the anti-kickback law."

5. Reserved Bed Payments

"If a hospital provides remuneration to a nursing facility to keep certain numbers of beds open and available for its patients, it could be problematic. Sham payments for beds that are already occupied, payments for more beds than the hospital needs, and payments that



exceed the nursing facility's actual costs of holding a bed, all give rise to an inference that the payment is intended to induce referrals."

**D. Other Risk Areas**

Physician self-referrals that violate the federal Stark law (42 U.S.C. 1395nn); supplementation of covered items or services, conditioning acceptance of a Medicare or Medicaid beneficiary upon payment from a hospital or the beneficiary's family; and steering a resident to a particular Medicare Part D prescription plan, all are examples of other risk areas the OIG is monitoring.

In summary, the OIG urges nursing facilities to develop an ethical culture that values compliance from the top down and fosters compliance from the bottom up. Perhaps the most significant lesson of this new Program Guidance is that the OIG is serious about identifying substandard care as a factor in making a false or fraudulent claim for federal funds, which may be prosecuted criminally, as well as subjected to civil or administrative enforcement. Such areas as staffing, care plans, medication management, and even abuse and neglect might not traditionally have been considered as constituting false or fraudulent claims. This new Program Guidance removes any doubt that the OIG is of a different opinion.

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