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Nursing Facilities Weigh In: OIG Issues New Draft Compliance Program Guidance

Beginning in 1998, the Department of Health and Human Services Office of the Inspector General (OIG) published a series of compliance program guidance (CPG) for several health care industries. These original guidance documents encouraged health care providers to develop compliance programs and identified specific fraud and abuse risk areas that the compliance programs should address. The OIG continues to periodically release supplemental compliance guidance documents identifying emerging risk areas and new suggestions for compliance programs. While these compliance program guidance documents are not intended to set forth mandatory or model compliance programs, the documents do give health care facilities important clues as to the fraud and abuse issues the OIG intends to target.

On April 16, 2008, the OIG released a draft compliance guidance update for Nursing Facilities.[1] The draft guidance document supplements the OIG's original CPG for nursing facilities, which was published on March 16, 2000. The Draft OIG Supplemental Compliance Program Guidance for Nursing Facilities ("Draft Supplemental CPG") touches on many of the same topics originally set forth in the 2000 CPG; however, it also includes a number of new compliance targets and updated guidance on those existing areas.

The OIG is soliciting comments on the Draft Supplemental CPG and will accept comments either by mail or electronically until 5 p.m. on June 2, 2008. Nursing Facilities should utilize this opportunity to learn more about the OIG's fraud and abuse enforcement objectives and to provide feedback to the OIG regarding the Draft Supplemental CPG.

I. Fraud and Abuse Risk Areas

The Draft Supplemental CPG sets forth compliance guidance regarding a number of new fraud and abuse risk areas. The document also provides updated information regarding several risk areas that were addressed in the initial 2000 CPG publication.

A. Newly Identified Risk Areas

i) Appropriate Use of Psychotropic Medications

The Draft Supplemental CPG contains new guidance as to the

[1]The Draft OIG Supplemental Compliance Program Guidance for Nursing Facilities is available at http://www.oig.hhs.gov/fraud/docs/complianceguidance/NurseCPGIIFR.pdf.

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appropriate use of psychotropic medications. In the CPG, the OIG expressed a concern that facilities may be violating the prohibition against inappropriate use of chemical restraints and the requirement to avoid unnecessary drug usage. The CPG urges facilities to meet these requirements by (1) ensuring there is an adequate indication for the use of the medication; (2) carefully monitoring, documenting and reviewing each resident's use of psychotropic drugs; (3) educating providers regarding appropriate monitoring and documentation; (4) auditing drug regimen reviews and resident care plans to determine if they indicated the need for psychotropic medications for a specific medical condition; and (5) analyzing the outcomes associated with the drug usage including monitoring of resident's behaviors.

B. Updated Guidance for Existing Risk Areas

i) Quality of Care

The Draft Supplemental CPG offered new compliance guidance regarding several quality of care issues already addressed in the 2000 guidance document. The OIG emphasized that failure of care on a systemic and widespread basis can lead to the submission of false claims for reimbursement and, in turn, to liability under the Federal False Claims Act, the Civil Monetary Penalties Law or other authorities that address false or fraudulent claims. The OIG cautioned that facilities that fail to make quality a priority risk becoming the target of governmental investigations.

ii) Sufficient Staffing

The Draft Supplemental CPG reemphasized the need to provide staff in sufficient numbers and with appropriate clinical expertise to serve their residents' needs. The OIG urged facilities to assess their staffing models with respect to staff skill levels, staff-to-resident ratios, staff turnover, staffing schedules, disciplinary records, payroll records, timesheets and adverse event reports. The OIG also urged facilities to engage in interviews with staff, residents or residents' family or legal guardians and to assess staffing levels based on "on-the-floor" needs rather than theoretical "paper" staffing models.

iii) Comprehensive Resident Care Plans

In the Draft Supplemental CPG, the OIG reiterated its guidance from 2000 that development of comprehensive resident care plans is essential to reducing risk. The OIG noted that its prior investigations revealed a significant percentage of resident care plans that did not reflect residents' actual care needs. The Draft Supplemental CPG urged facilities to design measures to ensure an interdisciplinary and comprehensive approach to developing care plans. Such an approach would involve scheduling meetings to accommodate the full interdisciplinary care team, completing all clinical assessments prior to these meetings, opening lines of communication between direct care providers and the resident or the resident's family members or legal guardian, and documenting the length and content of each clinical assessment meeting. OIG also reiterated the need for attending physicians to be actively involved in the development of the resident's care plan and to engage in meaningful evaluations of each resident.

iv) Medication Management

The OIG expanded its guidance regarding medication management to focus on the development and implementation of proper medication management processes. The OIG emphasized the need to train staff in

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all aspects of pharmaceutical care and the requirement that nursing facilities employ or obtain the services of a licensed pharmacist to provide consultation on all aspects of pharmaceutical care in the facility. The Draft Supplemental CPG also urged nursing facilities to monitor drug records for patterns that may indicate inappropriate drug usage and to review the total compensation paid to consultant pharmacists to ensure the compensation is not structured in a manner that corresponds to the volume or value of the drugs prescribed.

v) Resident Safety

The Draft Supplemental CPG greatly expanded the guidance regarding resident safety and placed particular emphasis on protecting residents from harm caused by facility staff and fellow residents. OIG encourages facilities to engage in targeted education relating to resident-on-resident abuse and to utilize thorough resident assessments to identify potential problems. The Draft Supplemental CPG also emphasized the importance of background checks for potential employees as a mechanism for protecting facility residents.

II. Submission of Accurate Claims

Since 2000, reimbursement for nursing facilities has undergone dramatic changes. As the reimbursement structure has changed, OIG has identified emerging areas of health care fraud beyond the common and longstanding risks of duplicate billing, insufficient documentation and false or fraudulent cost reports. The OIG specifically addressed several new areas of potential abuse, but emphasized that this list was not meant to be exhaustive and is, instead, intended to help facilities evaluate their own risk areas.

A. Correct RUG Coding

OIG announced that it has uncovered several instances in which skilled nursing facilities have improperly reported their resident case-mix data by upcoding resident RUG assignments. OIG emphasized that inaccurate recording of case-mix data could result in the misrepresentation of a resident's status, submission of false claims and potential enforcement actions. The Draft Supplemental CPG encourages facilities to update their compliance programs to ensure that RUG data reported to the federal government is accurate, as well as increased staff training and internal and external periodic data validation of case-mix data.

i) Therapy Services

The Draft Supplemental CPG identifies a number of potential fraud and abuse issues associated with the provision of therapy services, including improper utilization of therapy services to inflate the severity of RUG classifications, overutilization of therapy services billed on a fee-for-service basis, and failing to provide necessary therapy services to patients covered by the Part A PPS payment. OIG cautioned that not only may these practices result in the submission of false claims, but the provision of unnecessary therapy services may also place residents at risk for physical injuries. OIG strongly encouraged nursing facilities to develop policies, procedures and measures to ensure that each resident receives medically appropriate therapy services.

III. Anti-Kickback Statute

While the OIG addressed anti-kickback prohibitions in the 2000 guidance document, the new Draft Supplemental CPG includes a greatly expanded discussion of anti-kickback prohibitions, risk areas and

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compliance strategies. The Draft Supplemental CPG emphasized that nursing facilities need to ensure that all referrals of Federal health care program business comply with the anti-kickback statute including interactions with physicians and other health care professionals, hospitals, hospices, home health agencies, other nursing facilities and DME companies. The Draft Supplemental CPG includes a checklist that facilities are encouraged to use to identify potential kickback risks.[2] Facilities should review this list and incorporate the OIG's suggestions into their reviews of all referral arrangements. The Draft Supplemental CPG also provides additional guidance regarding several areas of potential risk, as set forth below.

A. Free Goods and Services

The OIG is greatly concerned about the provision of free goods or services to an existing referral source. As explained in the Draft Supplemental CPG, OIG believes there is a substantial risk that free goods or services may be used as a vehicle to disguise or confer an unlawful payment for referrals of Federal health care program business. The guidance includes a list of suspect free goods and services including certain consultation, administration or review services; free computers or equipment; and free DME or supplies offered for patients covered under the SNF Part A benefit.

B. Contracts for Non-Physician Services

In the Draft Supplemental CPG, the OIG urged nursing facilities to closely scrutinize relationships with outside suppliers and providers such as pharmacies, clinical laboratories, DME suppliers, ambulance providers, parenteral and enteral nutrition suppliers, diagnostic testing facilities, rehabilitation companies and physical, occupation and speech therapists, to ensure these relationships are not vehicles to disguise prohibited kickbacks from the suppliers and providers to the nursing facility. OIG directed facilities to minimize their risk in this area by periodically reviewing such arrangements to ensure that (1) there is a legitimate need for the services or supplies; (2) that the services or supplies are actually provided and adequately documented; (3) that arrangement is an arm's-length transaction and involves payment of fair market value compensation; and (4) that the arrangement is not related in any manner to the volume or value of Federal health care program business.

C. Contracts for Physician Services

OIG also encouraged nursing facilities to closely monitor arrangements with physicians to provide medical director, quality assurance, and other services, to ensure that these arrangements are not vehicles to pay physicians for referrals. The Draft Supplemental CPG urged nursing facilities to maintain contemporaneous documentation of the arrangement, take steps to ensure they have not engaged more medical directors or other physicians than necessary for legitimate business purposes, and ensure that the compensation paid is commensurate with the skill level and experience necessary to perform the contracted services. Further, OIG urged facilities to structure these agreements to comply with the "personal services and management contracts" safe harbor provision of the anti-kickback statute.[3]

[2] The anti-kickback "checklist" appears on pages 20689-20690 of the Federal Register notice. The notice is available at http://www.oig.hhs.gov/fraud/docs/complianceguidance/NurseCPGIIIFR.pdf .
[3] 42 CFR 1001.952(d).

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D. Discounts

The OIG expressed concern about two types of discounts: price reductions and swapping. The Draft Supplemental CPG explains that discounts may be offered to participants in Federal health care programs so long as the discounts are properly disclosed and accurately reported, are in the form of a reduction in the price of a good or service, and are based on an arm's-length transaction.[4] The OIG also cautions that nursing facilities should not engage in "swapping arrangements," or arrangement in which the facility accepts a low price from a supplier or provider on an item or service covered by the nursing facility's Part A per diem payment in exchange for the nursing facility referring to that supplier or provider other Federal health care program business, such as Part B business excluded from consolidated billing.

E. Hospices

Nursing facilities often arrange for the provision of hospice services in the facility setting. The OIG cautions that such arrangements pose several fraud and abuse risks, including attempts by hospice programs to induce referrals by offering the nursing facility remuneration in the form of free nursing services for non-hospice patients, additional room and board payments, or inflated payments for providing hospice services. The OIG has addressed these concerns in other guidance documents and encouraged nursing facilities to review this alternate guidance for more information.[5]

F. Reserve Bed Arrangements

The Draft Supplemental CPG encouraged nursing facilities to carefully scrutinize "reserved bed arrangements" under which hospitals provide remuneration to nursing facilities to keep certain beds available and open for the hospital's patients. The OIG cautioned that these arrangements may represent disguised payment for referrals from the nursing facility to the hospital. Specifically, the OIG is concerned about payments for more than the actual cost to the nursing facility of holding an empty bed, payment for "lost opportunity" or similar costs that are calculated based on the nursing facility's revenues for an occupied bed, and payments for more beds than the hospital legitimately needs.

IV. Stark and Physician Self Referrals

A. Physician Self Referrals

While nursing facility services, including skilled nursing facility services covered by the Part A PPS payment are not considered designated health services (DHS) for purposes of the Stark law, nursing facilities that bill Part B for laboratory services, physical or occupational therapy services, or other DHS are considered entities that furnish DHS. Accordingly, OIG encouraged all nursing facilities to review all financial relationships with physicians who refer or order DHS services to ensure compliance with the Stark self-referral law. The Draft Supplemental CPG contains a checklist that facilities can use to assess financial relationships with physicians, much like the anti-kickback checklist discussed above.

[4] The OIG urges facilities to ensure discounts comply with the discount safe harbor provision at 42 CFR 1001.952(h).
[5] The OIG's Special Fraud Alert on Nursing Home Arrangements with Hospices is available at http://oig.hhs.gov/fraud/docs/alertsandbulletins/hospice.pdf

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B. Medicare Part D

The Draft Supplemental CPG contains new compliance guidance regarding the application of the Medicare Part D drug benefit in the nursing facility context. Under Medicare Part D, nursing facilities are expected to work with their current pharmacies to ensure that they recognize the Part D plans chosen by the facility's beneficiaries or to provide other arrangements for those beneficiaries. The OIG cautioned that nursing facilities are prohibited from limiting a beneficiary's freedom of choice in selecting their Part D plan.

V. HIPAA Privacy and Security Rules

All nursing facilities that conduct electronic transactions are subject to the Privacy Rule adopted under HIPAA, however, the privacy rule gives nursing facilities and other covered entities some flexibility to create their own privacy procedures. The OIG emphasized that when creating privacy procedures, each facility must ensure that it is compliant with all applicable provisions of the privacy rule, including standards for the use and disclosure of personally identifiable health information.

VI. Summary

The Draft OIG Supplemental Compliance Program Guidance for Nursing Facilities is a valuable compliance tool for all nursing facilities. The Draft Supplemental CPG provides updated compliance guidance from the OIG on fraud and abuse issues that have emerged or evolved since the original Compliance Program Guidance for Nursing Facilities was published in 2000. Nursing facilities should use this draft document to update their compliance plans and, in turn, decrease the risk of fraud and abuse liability. Nursing facilities may also provide comments on the draft document to the OIG at the address stated in the Federal Register notice.

For more information about the new Draft Supplemental CPG, please contact Mary C. Malone, Emily W.G. Towey or Rachel J. Suddarth at (804) 967-9604, or by email mmalone@hdjn.com, etowey@hdjn.com or rsuddarth@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at www.hdjn.com.

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