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CLIENT ADVISORY

The OIG Encourages Nursing Facilities to Evaluate the Effectiveness of their Compliance Programs in New Supplemental Compliance Program Guidance

On September 30, 2008, the Department of Health and Human Services Office of the Inspector General (“OIG”) published Supplemental Compliance Program Guidance (“Supplemental CPG”) for nursing facilities.¹ The document supplements the OIG’s original CPG for nursing facilities published on March 16, 2000. The document also incorporates clarifications and revisions made in response to comments from the public regarding the draft Supplemental CPG for nursing facilities published by the OIG on April 16, 2008.²

The OIG’s original CPG for nursing facilities published on March 16, 2000 and the newly released Supplemental CPG are not intended to set forth mandatory or model compliance programs. Instead, both documents collectively offer a set of guidelines that nursing facilities should consider when developing and implementing a new

compliance program or evaluating an existing one.

The new Supplemental CPG identifies fraud and abuse risk areas in the following categories: (1) quality of care, (2) submission of accurate claims, (3) Federal Anti-Kickback Statute compliance, and (4) other risk areas.

Quality of Care

The Supplemental CPG encourages facilities to make quality of care a top priority to reduce the risk of fraud and abuse. The OIG advises nursing facilities to implement specific best practices to address the following areas impacting quality of care:

- sufficient staffing of nursing facilities,
- comprehensive resident care plans,
- appropriate medication management,

¹ 73 Fed. Reg. 56832 (September 30, 2008).

² See May 14, 2008 HDJN Client Advisory titled *Nursing Facilities Weigh In: OIG Issues New Draft Compliance Program Guidance* at <http://www.hdjn.com/publications/>.



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- resident safety and
- appropriate use of psychotropic medication.

Submission of Accurate Claims

In the Supplemental CPG, the OIG also addresses new areas of potential abuse relating to the submission of nursing facility claims. The Supplemental CPG recommends methods to enhance proper reporting of resident case-mix for purposes of RUG assignments. The Supplemental CPG also recommends best practices to reduce or eliminate the risk of non-compliance in submitting claims for therapy, restorative and personal care services. Appropriate methods for screening for excluded individuals and entities are also addressed by the Supplemental CPG.

Federal Anti-Kickback Statute

The new Supplement CPG recommends strategies for reviewing existing or proposed arrangements for compliance with the Federal Anti-Kickback Statute. In the guidance document, the OIG also cautions nursing facilities that the OIG considers the following to be “suspect” arrangements that warrant careful scrutiny:

- Arrangements involving the exchange of free goods or services
- Non-physician service contracts
- Physician service contracts
- Arrangements involving discounts
- Hospice agreements
- Reserved bed agreements

Other Risk Areas

The new Supplemental CPG briefly addresses several other areas of potential risk relating to the federal physician self-referral law (the “Stark” law), Medicare Part D and HIPAA. For example, the Supplemental CPG recommends strategies for analyzing potential physician self-referral

situations to avoid violations of the physician self-referral law. Additionally, the OIG reminds nursing facilities that, as a condition of Medicare and Medicaid participation, the nursing facilities must accept Medicare and Medicaid payments for covered items and services as payment in full. Any arrangements resulting in the supplementation of Medicare and Medicaid payment rates is prohibited. The Supplemental CPG also advises nursing facilities to provide complete and objective information to Medicare beneficiaries regarding their freedom to choose Medicare Part D prescription drug plans. The new guidance document warns nursing facilities against accepting payment or other inducements from any pharmacies in return for steering residents to a particular Part D plan. Finally, the Supplemental CPG reminds nursing facilities that they are required to comply with HIPAA’s Privacy and Security Rules.

Conclusion

In the Supplemental CPG, the OIG encourages nursing facilities to adopt particular measures to express their commitment to compliance (e.g., Code of Conduct and quality of care “dashboards”) and suggests that nursing facilities should regularly review the implementation and execution of their compliance program systems and structures. The new Supplemental CPG should serve nursing facilities as a roadmap for updating or refining their current compliance plan. It should be used as a starting point for a nursing facility’s legal review of its particular practices and for the development or refinement of policies and procedures to reduce or eliminate the potential risk of fraud and abuse in the facility. For any nursing facility that has a compliance program in place, now is a good time to evaluate the compliance program’s effectiveness.



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If you have additional questions about the new Supplemental CPG or if you would like an assessment of your current compliance program, please contact Mary C. Malone (mmalone@hdjn.com), Emily W.G. Towey (etowey@hdjn.com) or Rachel J. Suddarth (rsuddarth@hdjn.com) at 804-967-9604, or by e-mail.

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