

OIG Publishes Final Compliance Program Guidance for Nursing Facilities

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Practice Area: Regulatory Compliance and Fraud and Abuse

The Office of the Inspector General (OIG) has provided notice that it is releasing its final Compliance Program Guidance for Nursing Facilities. These Guidelines are scheduled for publication in the March 16th, 2000 Federal Register.

This *Legal Update* provides a summary of the key provisions, including potential benefits to providers and a summary of the Seven Elements of an Effective Compliance Program. While the OIG's selection of the number seven is coincidentally the number of seven deadly sins, the Guidelines are explicitly posited as "voluntary suggestions" for positive action, rather than "shall nots" with punitive repercussions. Still, providers are clearly incentivized to consider these guidelines in developing and assessing their corporate compliance activities.

Potential Benefits Resulting from Voluntary Implementation

The OIG Guidelines: assist nursing facility providers in developing compliance plans, programs, and policies; provide insight into areas where the OIG will be targeting its enforcement efforts; and offer strategies for handling disciplinary problems. The OIG believes that following its suggestions will serve "mutual goals" of the OIG, nursing facility providers, and individual citizens, including: reduction of fraud and abuse, enhanced operational functions, improved quality and decreasing health care costs. In addition, the OIG stresses that the provider may find that other benefits result from voluntary implementation, including formulation of effective internal controls, demonstrating a commitment to responsible corporate conduct, improving the organization's ability to assess, monitor and correct illegal or otherwise inappropriate behavior, and reducing the facility's exposure to civil damages and penalties, criminal sanctions, and administrative remedies.

Seven Elements of an Effective Compliance Program

The OIG notes that there is no one "best" compliance program, recognizing the complexities and diversity in the industry, and offering special suggestions for smaller nursing facilities with fewer available resources. Regardless of differences in organizational structures and resources, the OIG has deemed seven elements fundamental for an effective compliance program:

1) Standards for Written Policies and Procedures. The nursing facility should make a sincere effort to demonstrate and promote compliance through its written policies and procedures. Commitments should begin with a corporate statement of principles by the governing body, such as a code of conduct and statement affirming a commitment to quality of care, and should permeate through all levels and individuals in the organization. Comprehensive written policies and procedures should demonstrate the commitment, prevent fraud and abuse, and ensure quality of care.

As a starting point, the OIG has developed a list of potential risk areas for developing operational compliance policies. The OIG recommends starting with those areas most likely to arise in business operations, and with deficiencies cited by surveyors. Special areas of concern identified in the Guidelines relate to quality of care, residents' rights, billing and cost reporting, employee screening, kickbacks, inducements and self-referrals, creation and retention of records, and compliance as an element of employee performance. These examples will assist providers in identifying areas the OIG is likely to target, so that they may develop and implement policies as a proactive and preventative initiative.

2) Designation of a Compliance Officer and Compliance Committee. The nursing home should designate a compliance officer and establish a compliance committee with appropriate authority and sufficient funding and staff to handle coordination, communication, planning, implementation and monitoring. The OIG Guidelines discuss the compliance officer's primary responsibilities and committee's functions in some detail. The OIG recognizes that a small nursing facility may not be able to hire or appoint a full-time compliance officer, and the multi-facility providers may consider one individual to handle multiple locations. This opens the door to some creative alternatives for fulfillment of responsibilities.

3) Conducting Effective Training and Education. The nursing facility should ensure education and training at all organizational levels. Training programs should include a summary of the organization's program, fraud and abuse laws, and other legal requirements. The OIG Guidelines detail suggested training topics, in addition to training in those risk areas unique to the facility.

4) Developing Effective Lines of Communication. The compliance officer should have an open door policy and develop other avenues such as hotlines, e-mails, and newsletters to encourage employees to ask questions and report problems.

5) Detecting Offenses Through Internal Monitoring and Auditing. The nursing facility should conduct periodic (at least annual) reviews of its success in meeting compliance elements. The OIG Guidelines suggest monitoring techniques and qualifications for reviewers.

6) Disciplinary Guidelines. The nursing facility should maintain and disseminate disciplinary policies that delineate consequences for violations. The policies should be consistently and uniformly applied and enforced.

7) Promptly Responding, Reporting and Developing Corrective Action Initiatives. The compliance officer or other key management personnel should immediately investigate the factual basis of allegations, determine whether a legal violation has occurred, and promptly develop a corrective action plan or take other steps to correct the problem. The OIG recognizes that under some circumstances, the facility may need to consider engaging outside counsel or other experts to assist with the investigation. In addition, appropriate steps should include attempting to protect findings and reports with the attorney-client privilege.

First Steps

The first steps in the compliance process will involve education, authorization and risk-assessment. Governing bodies and those empowered to effectuate the organization's compliance commitment should familiarize themselves with the OIG Compliance Guidelines and consider an educational session for directors and executives on compliance programs. The board of directors should then adopt a resolution that formally recognizes the organization's commitment to a compliance program, authorizes the commitment of resources to implement a compliance program, establishes a compliance committee, if necessary, and directs management to appoint a compliance officer. The compliance officer and management can then develop a compliance plan, evaluate policies, procedures and operations in light of the risk areas identified by the OIG, as well as explore cost-effective means to assess risk and conduct ongoing training programs.

There are numerous sources of no or low-cost information available to assist nursing home providers on the internet, through legal publications and seminars, and through associations or other programs that develop products and programs that may be shared among providers. Still, compliance plans, policies and programs cannot be viewed as widgets. The Guidelines caution that an effective compliance program in a nursing facility may require a significant commitment of time and resources. Moreover, "superficial efforts or programs that are hastily constructed and implemented without a long term commitment to a culture of compliance likely will be ineffective and may expose the nursing facility to greater liability than if it had no program at all." Accordingly, compliance plans and actions must be tailored to address each provider's unique circumstances.

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