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OIG Nursing Facility Compliance Program Recent Guidance: Other Risk Areas

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Nursing facilities: How closely are you monitoring high-risk areas outlined by OIG?

On November 20, 2024, the Department of Health and Human Services Office of Inspector General (OIG) published an updated Industry Segment-Specific Compliance Program Guidance (ICPG) document for nursing facilities. OIG tailored the ICPG to risk areas specific to the nursing facility industry segment and recommended compliance measures that facility operators can take to reduce risks. OIG broke down the four broad sections of risks into Quality of Care and Quality of Life; Medicare and Medicaid Billing Requirements; Federal Anti-Kickback Statute; and Other Risk Areas.

This article addresses the final category, Other Risk Areas, which contains OIG's recommendations for discrete risks including:

1. Related-party transactions;
2. Physician Self-Referral Law;
3. Anti-supplementation;
4. HIPAA Privacy, Security, and Breach Notification Rules; and
5. Civil rights.

We discuss these risks and OIG's mitigation recommendations below.

Related-Party Transactions

The Centers for Medicare & Medicaid Services (CMS) previously instituted measures to combat potentially problematic accounting practices associated with related-party transactions. A related party is defined as an entity that has a business relationship with a nursing facility, and such relationship is based on common ownership or control. The agency requires nursing facilities to identify related parties and report all payments made to those parties on the facility's cost report. The costs of services and supplies furnished to a provider by an organization related to that provider by common ownership or control may be included in the provider's allowable costs in an amount equal to the related party's costs. Such reported costs must not exceed the price of comparable services, facilities, and supplies that could be purchased elsewhere. To remove the profit incentive from completing these types of transactions, CMS requires the reported amount to be the lesser of either the actual cost to the related organization or the market price for comparable services, facilities, or supplies. CMS publishes information about individuals or entities that have an ownership stake in, or operational control over, nursing facilities, which can be found on CMS's Facility Affiliation Data page.

OIG is concerned these rules may have led to further unscrupulous accounting practices and that nursing facility owners, operators, and investors in related-party transactions may be engaging in "tunneling"—the practice of mispresenting or hiding profitability by overstating payments for operational expenses that are funneled to related parties. This practice typically appears in 1) real estate transactions when a nursing facility sells its building and land to a commonly owned company or real estate investment trust and then leases the property back at higher than fair market rates; and 2) arrangements for the outsourcing of administrative or management services with commonly owned companies under which the nursing facility pays higher than fair market rates for those services. Tunneling has broad implications for federal healthcare programs and their enrollees if funds from related-party transactions are used to unjustly profit and enrich nursing facility owners, operators, and investors while allocations for resident care decrease.

To mitigate risks associated with third-party transactions, OIG recommends nursing facilities:

- Routinely audit financial data to ensure the nursing facility is reporting related-party costs in accordance with federal regulations.
- Ensure that related-party transactions are:
  - at fair market value;
  - of quality comparable to or greater than competing services provided by entities that are not commonly owned or controlled; and
  - chosen based primarily on the well-being of residents and not solely on the profit interests of owners, operators, and investors.

Physician Self-Referral Law

The Physician Self-Referral Law ("Stark law") is an area of high risk for nursing facilities. Skilled nursing facility (SNF) services covered by the Medicare Part A Prospective Payment System (PPS) payment are not designated health services (DHS) for purposes of the Stark law. Nursing facilities, however, may perform and bill for services other than SNF services covered by the Medicare Part A PPS payment. When the services are DHS for the purposes of the Stark law, the nursing facility is considered an entity that furnishes DHS.

Nursing facilities that are DHS entities should:

- Review all financial relationships with physicians who may refer or order DHS furnished by the nursing facility; and with immediate family members.
- Ensure that these financial relationships satisfy all requirements of a Stark law exception. If they do not, then DHS referrals from the physicians to the facility are prohibited.

Anti-Supplementation

Nursing facilities must accept the applicable Medicare or Medicaid payment, respectively, for covered items and services as the complete payment. They may not charge a Medicare or Medicaid enrollee any amount in addition to what is otherwise required to be paid for covered items and services under Medicare or Medicaid (i.e., a cost-sharing amount).

HIPAA Privacy, Security, and Breach Notification Rules

Most nursing facilities are considered "covered entities" under the Health Insurance Portability and Accountability Act (HIPAA) and the associated Privacy, Security, and Breach Notification Rules. Because nursing facilities are healthcare providers that conduct certain healthcare transactions electronically and routinely have arrangements with "business associates," they must follow HIPAA requirements. Nursing facilities also may be subject to privacy rules such as the confidentiality of substance use disorder patient records at 42 CFR Part 2; and the requirements of participation regarding the privacy and confidentiality of, as well as right of access to, residents' personal and medical records.

Civil Rights

Nursing facilities must comply with applicable civil rights laws, which prohibit discrimination and require that nursing facilities provide each individual an equal opportunity to participate in federal healthcare program activities regardless of certain protected characteristics.

Below are examples of civil rights–related requirements:

- Individuals with disabilities have the right to receive services in a setting most appropriate to address their needs. The unnecessary segregation of people with disabilities, which may include them living in a nursing facility, is a form of unlawful segregation. Nursing facilities are obligated to ask residents at least quarterly if they want to live in the community and make referrals to appropriate community agencies to help individuals transition successfully.
- Individuals who receive medication to treat substance use disorders are protected under federal civil rights laws that protect persons with disabilities in active treatment or recovery. Such laws prohibit nursing facilities from discriminating against those in active treatment and recovery in their admissions policies.
- Nursing facilities must take reasonable steps to provide meaningful access to individuals with limited English proficiency in federal-funded health programs and activities. Meaningful access may require the provision of translated materials and translation services. Nursing facilities also must take appropriate steps to ensure communications with people with disabilities are as effective as communications with others. This includes furnishing appropriate auxiliary aids and services.

BRG's Compliance Recommendations

Boards and executive leadership teams must ensure that nursing facilities:

- Promote a culture of compliance within the organization, starting with the "tone at the top";
- Monitor evolving laws and regulations carefully to identify and address emerging compliance risks;
- Review policies and procedures annually and update them as necessary;
- Periodically review all transactions and physician referral relationships; and
- Systematically audit all internal controls, including the disclosure program, to ensure proper detection of gaps and potential noncompliance.

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