The federal Office of the Inspector General (the “OIG”) recently issued its Final Supplemental Compliance Program Guidance for Nursing Facilities (the “Supplemental Guidance”) and its 2009 Work Plan (the “Work Plan”). Both documents highlight the OIG’s primary concerns and initiatives with respect to combating Medicare/Medicaid fraud and abuse and improving the delivery of health care services by SNFs.

In both the Work Plan and the Supplemental Guidance, the OIG has identified certain new compliance initiatives and concerns with respect to SNFs, and has elaborated on several continuing focus areas. Set forth below is a synopsis of some of these key compliance areas, followed by some practical proactive compliance measures SNFs may consider taking in light of both documents.

I. Supplemental Guidance

The Supplemental Guidance (which can be found on the OIG’s website at www.oig.hhs.gov) was issued on September 30, 2008 and contains many substantial revisions to the OIG’s 2000 Compliance Program Guidance for SNFs (the “2000 Guidance”). The Supplemental Guidance is a “must-read” for all nursing home owners and administrators, CFOs, DONs, and compliance officers. It addresses several continuing areas of OIG concern, such as quality of care and Medicare/Medicaid fraud and abuse. Further, as discussed below, it sets forth some new compliance areas and provides new guidance regarding internal compliance measures that SNFs should take.

(a) Assessing Staffing Levels. While the OIG expressed concern in the 2000 Guidance that inadequate SNF staffing levels were linked to an array of quality of care issues, in the Supplemental Guidance, the OIG offered further guidance in this area. Specifically, the OIG acknowledged that there is “no single staffing model for every facility” and emphasized the need for SNFs to assess staffing patterns regularly to ensure that there are sufficient staff members who are competent enough to care for the unique acuity levels of the SNFs’ residents.

(b) Resident Care Plans. Although the 2000 Guidance touched on the need for SNFs to have comprehensive resident care plans, the Supplemental Guidance provides a much more lengthy discussion of this subject. The Supplemental Guidance identifies the failure to have care plans as a major risk area for SNFs. It also identifies the failure to have attending physicians involved with the care plans as a risk area. The Supplemental Guidance notes that care plans should be comprehensive and include all disciplines involved in a resident’s care.

(c) Medication Management. The Supplemental Guidance expands the OIG’s ongoing concerns regarding improper medication management. The Supplemental Guidance reminds the industry about the requirement for facilities to have a licensed pharmacist to consult with the facility on all aspects of the provision of pharmacy services, and recommends that facilities consult with their pharmacists to ensure that proper medication management procedures are in place and staff members are properly trained in this area.

(d) Improper Use of Psychotropic Medications. Similar to the Work Plan, the Supplemental Guidance states the OIG’s recent concern that psychotropic medications are being improperly used as a means to “chemically restrain” residents, and notes the OIG’s findings that such medications are being prescribed absent medical necessity and even where contraindicated.

(e) Resident-To-Resident Abuse. The Supplemental Guidance identifies the OIG’s recent concerns regarding resident-to-resident abuse, noting that law enforcement has become increasingly concerned with such incidents. The OIG stresses the importance of proper resident assessment and screening, and continuous resident monitoring to prevent such incidents.

(f) Therapy Services. While therapy service arrangements have consistently been identified as a risk area for SNFs, the Supplemental Guidance offers additional guidance in this area. The OIG identifies three particular practices that could result in a facility submitting a false claim: (i) improper therapy utilization that inflates RUG classifications; (ii) overutilization of therapy billed on a fee-for-service basis to Part B under consolidated billing; and (iii) stinting on therapy provided to patients covered under Part A. The OIG recommends that SNFs develop policies and procedures to ensure that residents receive medically appropriate therapy, and only submit bills for such treatment.

(g) Reserve Bed Arrangements. One new OIG fraud and abuse concern is that hospitals are making improper reserve bed payments
to SNFs to induce referrals to the hospitals. The Supplemental Guidance identifies the following three problematic scenarios: (i) payments that result in double-dipping by the SNF (i.e., sham payments for beds that are actually occupied or for which the facility is otherwise receiving reimbursement); (ii) payments for more beds than the hospital legitimately needs; and (iii) payments that exceed the SNF’s actual costs of holding a bed or the actual revenues a facility reasonably stands to forfeit by holding a bed.

II. The 2009 Work Plan

The OIG’s 2009 Work Plan (which can also be found on the OIG’s website at www.oig.hhs.gov) contains many issues which have been of concern to the OIG in the past, but also identifies several new priority areas directly impacting SNFs (which were not part of the OIG’s 2008 Work Plan), including the following:

(a) Submission of “No-Pay Bills” / Calculation of Medicare Benefit Days. The OIG plans to review whether the failure of SNFs to submit “no-pay bills” (bills required to be submitted, but for which no benefits are payable) contributes to inappropriate calculations of SNF eligibility periods.

(b) Submission of Accurate and Complete MDS Data. The OIG will review the government’s processes for ensuring that SNFs submit complete and accurate MDS data, which serves as the basis of SNF reimbursement.

(c) Review of Reimbursement for Antipsychotic Drugs. Concerned about the improper utilization of anti-psychotic medications, the OIG will examine Medicare Part B and Part D reimbursements for certain anti-psychotic medications received by SNF residents 65 or older. The OIG plans to analyze the extent to which these drugs were improperly prescribed and reimbursed.

(d) Review of Potentially Overlapping Per-Diem Payments. As part of its continuing efforts to avoid waste, fraud and abuse in the Medicaid program, the OIG will examine the extent to which states made Medicaid payments for SNF services provided to beneficiaries while such beneficiaries were receiving other Medicare Part A services (i.e., at a hospital).

(e) Transparency of SNF Ownership. The OIG noted its concern that corporate complexities with SNF ownership structures may be adversely impacting patient care. It plans to review the ownership structures of investor-owned SNFs and examine how such ownership structures actually impact quality of care.

(f) Appropriate and Necessary Resident Care. The OIG is concerned that plans of care are insufficient and resident care needs are not being properly met. Thus, it plans to review the use of federally-required MDS and standard resident assessment instruments in the development of appropriate plans of care.

(g) Medicaid Payments for “Bed Holds”. States are authorized to pay SNFs for reserving beds while residents are on temporary leaves of absence to ensure continuity of residence and care for Medicaid beneficiaries. The OIG will review the appropriateness of such payments. It will also review the government’s oversight of Medicaid payments for bed holds to ensure that SNFs are properly and accurately reporting bed hold days.

III. Practical Recommendations

Based on the compliance focus areas and initiatives identified by the OIG in the Work Plan and the Supplemental Guidance, your facility should consider the following recommendations:

1. Compliance Program. Review your facility’s compliance program to ensure that it is consistent with the Work Plan and the Supplemental Guidance. In this regard, conduct a meeting of your facility’s compliance committee to discuss proposing modifications to your facility’s compliance program based on the important new developments in both documents. Keep written minutes of all meetings to document these efforts, and proceed to adopt and implement any necessary changes to your compliance program.

2. Audits. Initiate internal and/or external audits of your facility’s systems, policies and procedures which may be implicated by the Work Plan and Supplemental Guidance (particularly those that have not recently been audited by your facility) to evaluate the facility’s compliance in these areas. Document these efforts thoroughly by preparing a written summary of the methodology and results of such audits, including any corrective actions taken.

3. Dissemination to Management. Send copies of the Work Plan and Supplemental Guidance to facility management, as appropriate, with a memo explaining the significance of the new developments in both documents, or send selected segments of both documents to facility managers based on each manager’s area of responsibility. Keep copies of all such memos distributed to facility management.

4. In-Service Personnel. Conduct seminars for facility personnel - - targeted to their departments/service areas - - to familiarize them with applicable areas of the Work Plan and Supplemental Guidance, and document all such efforts.

5. Compliance Training. Modify your facility’s annual compliance training to add references to the Work Plan and Supplemental Guidance, highlighting areas which are of particular relevance to your facility.

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