

CMS' Special Focus Facility Initiative and Nursing Home Compare

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On November 29, 2007, the Centers for Medicare and Medicaid Services (CMS) released, for the first time, a list of the poorest performing nursing homes in the nation. The list of facilities, identified as Special Focus Facilities (SFF), is expected to offer consumers who are seeking long-term health care services "powerful new information when choosing nursing homes."¹ There were 54 nursing homes named in the list, spanning 34 states. The list, available on CMS' Web Site, is a key tool for promoting quality of care through transparent public reporting.²

The nursing home survey process

CMS, together with states, visits nursing homes at least annually to determine if the

nursing homes are providing the quality of care required under the Medicare and Medicaid programs.³ More than 4,000 federal and state surveyors conduct onsite reviews of nursing homes.⁴ Survey requirements are crafted to highlight key areas of quality and convey basic, enforceable expectations that nursing homes must meet. During the nursing home inspection, the state survey team examines many quality-of-care factors, including resident care processes, staff/resident interaction, environment and life safety, and clinical record review.⁵

Special Focus Facility Initiative

Nursing homes must comply with over 150 applicable regulatory standards covering a wide range of aspects of resident life and quality of care, from specifying standards for safe food storage and preparation to protecting residents from abuse or inadequate care.⁶ When a survey team finds that a nursing home does not meet a specific regulation, it issues a deficiency citation. Most nursing homes average 6-7 identified deficiencies per survey.⁷

Although most nursing homes correct their deficiencies within a reasonable time period, CMS identified a group of facilities exhibiting a "yo-yo compliance history."⁸ These facilities would periodically institute enough improvements to be in substantial compliance on one survey, only to again fail during the next, often for the same deficiency. In addition, these facilities averaged twice as many deficiencies, had more serious deficiencies, and continued to have these problems for a long period of time. In CMS' estimation, it was evident such

facilities were not addressing the underlying systemic problems that give rise to their poor quality of care. To address this concern, CMS created the SFF.

Once a nursing home is designated as an SFF, it must undergo twice as many surveys as other nursing homes.⁹ CMS applies progressive enforcement, and the longer the problems persist, the more stringent CMS will be in the enforcement actions taken against the facility.¹⁰ Within 18-24 months after a facility is identified as a SFF, CMS expects one of three possible outcomes:

1. The nursing home graduates from the SFF program because it has made significant improvements in quality of care – and those improvements have continued over time.
2. The nursing home is terminated from participation in the Medicare and Medicaid programs. Depending on state law, such a facility may continue to operate, but will typically close once Medicare and Medicaid funding is discontinued. In such a case, the state Medicaid agency will depopulate the facility, relocating residents to another location that can provide better quality of care.
3. The nursing home is provided with additional time to continue in the SFF program because there has been very promising progress (e.g., the facility is sold to a different owner and operator that has a history of providing superior quality of care).¹¹

It is important to recognize that CMS' policy of progressive enforcement means that any nursing home that demonstrates a pattern of poor quality of care, not only those identified as SFFs, is subject to increasingly stringent enforcement actions. If problems continue, the severity of penalties will increase over time, ranging from civil monetary penalties, denial of payment for new admissions, and termination from the Medicare and Medicaid programs.¹²

Immediate improvement in quality of care

“CMS’ effort to identify poor performing nursing homes is intended to promote more rapid and substantial improvement in the quality of care in identified nursing homes and end the pattern of repeated cycles of non-compliance,” noted CMS Acting Administrator Kerry Weems.¹³ As of October 2007, there were 128 SFFs, out of approximately 16,000 active nursing homes in the country.¹⁴ Those SFFs had survey results in the bottom 5%-10% in each state.

After being identified as an SFF, a facility typically achieves improved survey results. CMS data indicates approximately 50% of facilities in the SFF Initiative significantly improve their quality of care within 24-30 months.¹⁵ Conversely, approximately 16% are terminated from the Medicare and Medicaid programs.¹⁶

Nursing Home Compare

A cornerstone of CMS’ efforts to drive quality through public reporting is the Nursing Home Compare Web Site.¹⁷ Designed to be consumer-oriented, with simplified analysis and easy to understand data, the Web Site enables potential residents and their families to examine and compare nursing homes on a multitude of quality factors. It also reports a nursing home’s characteristics, compliance history and quality measures, nursing staff information, and survey results by identifying specific deficiencies and the severity of the deficiency.

The quality measures available on Nursing Home Compare were selected by CMS, because they can be readily compared and do not require facilities to prepare additional reports.¹⁸ The measures reveal ways in which nursing homes differ from one another and constitute areas that nursing homes can develop to improve their quality of care (and,

accordingly, their ranking on Nursing Home Compare). As CMS’ research continues, it will revise and improve the quality measures on Nursing Home Compare.¹⁹ Currently, the quality measures on the Nursing Home Compare database²⁰ come from two sources:

1. CMS’ Online Survey, Certification, and Reporting database (OSCAR). The information on OSCAR contains a summary of each facility’s latest survey results. Such information is prepared and reported by the individual facilities themselves at the beginning of each survey inspection. The state survey agencies are responsible for entering survey information into the OSCAR database and providing updates as needed.²¹
2. The Minimum Data Set repository (MDS). This national database, updated quarterly, includes information on 19 quality measures (e.g., percentage of residents with pressure ulcers, percentage given influenza vaccine, percentage who are depressed).²² Each nursing home is required to perform a comprehensive assessment of each resident’s functional capabilities and medical needs on a periodic basis and then submit the information to CMS.

Because the data is being made public to consumers, nursing homes must be careful when recording and submitting information used in the OSCAR and MDS databases. For that reason, nursing homes should periodically review the information on Nursing Home Compare for accuracy. If any information on Nursing Home Compare is inaccurate, the facility should immediately contact its state survey agency to have the information corrected and updated.

Campaign for quality improvement

In addition to the public reporting under the SFF Initiative and Nursing Home Compare, CMS is taking many other steps to improve

the quality of care in nursing homes. Such efforts include:

- developing new, more stringent systems for criminal background checks on facility workers and applicants;
- an unprecedented focus on preventing severe pressure ulcers in residents;
- reducing the use of restraints;
- considering resident feedback and emotional satisfaction; and
- refining the survey process.²³

A noteworthy program is CMS’ Nursing Home Value-Based Purchasing (VBP) Demonstration. As the largest purchaser of nursing home services (approximately \$64 billion per year), CMS and states can exert significant leverage to insist on basic levels of quality. Under VBP, CMS would assess the performance of nursing homes based on selected measures of quality of care.²⁴ The anticipated improvements in quality may reduce the number of hospitalizations, thereby saving money in the Medicare program.²⁵ Those savings would then be shared with nursing homes that either improve quality or maintain exceptionally high quality of care. The VBP demonstration is scheduled to begin in Winter 2007/08, with approximately 300 participating facilities across 4 or 5 states. By offering payment incentives for quality care, VBP is intended to augment and reinforce other quality efforts by ensuring that financial investments made by nursing homes to improve quality will be met by reimbursement methods that can discern the difference between excellent, good, mediocre, and poor quality.²⁶

Public reporting and enforcement

Given the data available to the government to identify poorly performing nursing homes, a facility may find itself the subject of a quality-of-care enforcement action under the False Claims Act, based on data mining.²⁷ The government

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has been actively mining data of nursing homes. As James Sheehan, Medicaid Inspector General of New York, cautioned, "We are reviewing assorted sources of quality information on your facility to see what it says and if it is consistent. You should be doing the same."²⁸

Reporting efforts such as OSCAR, MDS, and Nursing Home Compare complement the increased use of software to aggregate and analyze the reported information. This combination permits greater analysis than ever before about quality of care in individual nursing homes nationwide. Such quality data is typically not subject to any privilege or discovery protection; it is reported directly to the government or government contractor and publicly posted.²⁹

The government is quickly becoming adept at using statistical data in its quality-of-care enforcement efforts. Last summer, a special strike force, consisting of federal, state, and local investigators, arrested approximately 38 people in Florida in connection with alleged schemes to defraud Medicare, including billing Medicare for unnecessary services.³⁰ The strike force identified the individuals through its real-time analysis of Medicare billing data.

Next steps for nursing homes

Nursing homes must evaluate whether they have sufficiently integrated quality-of-care review into their operations and compliance programs. Given the current enforcement environment, nursing homes should strive to be just as vigilant as hospitals – if not more so, given the public's general attitude toward nursing homes – to develop a quality-of-care compliance program.³¹ This requires a broad-based, coordinated approach among the administration, the medical director, supervising nurses, therapists, nursing support staff, risk managers, and legal counsel.

Establishing internal quality controls and identifying areas of potential quality breakdowns are two key areas a nursing home should immediately address to reduce the risk of an adverse government enforcement action. In light of the government's quality of care initiative, these areas should be given equal oversight attention as areas of traditional concern (e.g., billing and claims submission). Such an assessment, ideally performed by objective outside counsel, can reveal the true operational landscape of a nursing home, which is a necessary prerequisite to identifying and addressing the compliance implications of the quality of care it provides.

Conclusion

Quality of care, with its attendant impact on payments, public reporting, and civil enforcement, should be the primary concern of nursing homes. Addressing quality of care proactively, and integrating it with compliance, will give a nursing home a financial and operational advantage by readying it to meet the quality measures reported on Nursing Home Compare, thereby boosting its reputation among consumers and regulators alike. Those same investments in quality of care can simultaneously provide additional returns by minimizing litigation exposure and enforcement actions based on poor quality. An effective option nursing homes should consider is to submit their facility to an external audit for quality controls and legal risks. Such an audit, performed under the attorney-client privilege by skilled health care counsel, can reveal to a nursing home its current legal exposure, based on quality-of-care factors. With this information in hand, the nursing home can revise its structure and operations accordingly. Nursing homes that refuse to recognize and address their quality-of-care failures should not be surprised to find themselves candidates for the SFF Initiative or, worse, excluded from federal programs.

- 1 See CMS Press Release, "CMS Publishes National List of Poor-Performing Nursing Homes, Key Tool for Families Seeking Quality Care." (November 29, 2007).
- 2 www.cms.hhs.gov/CertificationandCompliance/Downloads/SFFList.pdf.
- 3 Skilled nursing facilities ("SNF") and nursing facilities ("NF") are required to be in compliance with the requirements in 42 CFR Part 483(B) to receive payment under the Medicare or Medicaid programs. To certify a SNF or NF, a state surveyor completed at least a Life Safety Code survey and a standard survey. www.cms.hhs.gov/CertificationandCompliance/12_NHs.asp.
- 4 See CMS' 2007 Action Plan for (Further Improvement of) Nursing Home Quality (September 2006) at p. i.
- 5 Using an established protocol, the team interviews a sample of residents and family members about their life within the nursing home, and interviews caregivers and administrative staff. www.medicare.gov/NHCompare/Static/Related/AboutInspections.
- 6 www.medicare.gov/NHCompare/Static/Related/AboutInspections.
- 7 www.cms.hhs.gov/CertificationandCompliance/Downloads/SFFBack-ground.pdf.
- 8 www.cms.hhs.gov/CertificationandCompliance/Downloads/SFFBack-ground.pdf.
- 9 www.cms.hhs.gov/CertificationandCompliance/Downloads/SFFBack-ground.pdf.
- 10 See CMS Press Release, "CMS Publishes National List of Poor-Performing Nursing Homes, Key Tool for Families Seeking Quality Care." (November 29, 2007).
- 11 www.cms.hhs.gov/CertificationandCompliance/Downloads/SFFBack-ground.pdf.
- 12 See CMS Press Release, "CMS Publishes National List of Poor-Performing Nursing Homes, Key Tool for Families Seeking Quality Care." (November 29, 2007).
- 13 See CMS Press Release, "CMS Publishes National List of Poor-Performing Nursing Homes, Key Tool for Families Seeking Quality Care." (November 29, 2007).
- 14 See CMS Press Release, "CMS Publishes National List of Poor-Performing Nursing Homes, Key Tool for Families Seeking Quality Care." (November 29, 2007).
- 15 www.cms.hhs.gov/CertificationandCompliance/Downloads/SFFBack-ground.pdf.
- 16 www.cms.hhs.gov/CertificationandCompliance/Downloads/SFFBack-ground.pdf.
- 17 www.medicare.gov/NHCompare.
- 18 www.medicare.gov/NHCompare/Static/Related/AboutMeasures.
- 19 www.medicare.gov/NHCompare/Static/Related/AboutMeasures.
- 20 www.medicare.gov/NHCompare/Static/Related/NoteToNursingHomes.
- 21 The information on OSCAR is reviewed by state surveyors, but not formally audited for accuracy. www.medicare.gov/NHCompare/Static/Related/DataCollection.
- 22 The complete list of quality measures from MDS, along with the look-back time revealing the surveyors' depth of chart review, are listed on Nursing Home Compare. www.medicare.gov/NHCompare/Static/Related/DataCollection.
- 23 See CMS Press Release, "CMS Publishes National List of Poor-Performing Nursing Homes, Key Tool for Families Seeking Quality Care" (November 29, 2007); see also CMS' 2007 Action Plan for (Further Improvement of) Nursing Home Quality (September 2006).
- 24 CMS' 2007 Action Plan for (Further Improvement of) Nursing Home Quality (September 2006) at pp. 31-32.
- 25 CMS' 2007 Action Plan for (Further Improvement of) Nursing Home Quality (September 2006) at p. 32.
- 26 CMS' 2007 Action Plan for (Further Improvement of) Nursing Home Quality (September 2006) at p. 31.
- 27 31 U.S.C. §§ 3729-3733.
- 28 February 6, 2007.
- 29 Certain protections exist for health care quality information (e.g., state laws protecting from discovery certain medical staff peer review information, privileged attorney-client communications, certain information reported to a Patient Safety Organization (PSO) under the Patient Safety and Quality Improvement Act (PSQIA)). However, the publicly-available quality data the government uses for data mining is not subject to those protections and can be a source for False Claims Act liability.
- 30 Press Release, U.S. Department of Health and Human Services, Strike Force Formed to Target Fraudulent Billing of Medicare Program by Health Care Companies (May 9, 2007), available at <http://www.hhs.gov/news/press/2007pres/05/pr20070509c.html>.
- 31 The *Wall Street Journal* ran a front page article highlighting the excessive use of prescription antipsychotic medications to chemically restrain residents at U.S. nursing homes. Federal and some state regulators are questioning such off-label use of antipsychotic drugs and issuing citations against nursing homes for using them in ways that violate federal rules. "Prescription Abuse Seen In U.S. Nursing Homes: Powerful Antipsychotics Used to Subdue Elderly, Huge Medicaid Expense," *Wall Street Journal* (December 4, 2007).