

## **More Scrutiny For Nursing Homes Under ACA**

Law360, New York (September 28, 2012, 1:50 PM ET) -- In November 2007, Center for Medicare and Medicaid Services began issuing a list of the poorest performing nursing homes in the nation. CMS' Special Focus Facility (SFF) initiative identifies troubled facilities and requires that SFF nursing homes be visited in person by survey teams twice as frequently as other nursing homes.

In August, CMS updated its webpage listing nursing homes that have had a history of serious quality issues under the SFF initiative. Over 25 new facilities were added to the SFF list, and over 45 nursing homes across the country remain on the list of facilities that have not improved despite having had the opportunity to do so.

Also in August, a former nursing home operator in Rome, Ga., received a 20-year prison sentence for Medicaid fraud, which included the all-too-common issue of submitting claims for unrendered or overvalued services.

The compliance failings of the nation's nursing homes is one of the very issues the 2010 Affordable Care Act sought to address in its Nursing Home Transparency and Improvement provisions at Title IV, Section B. Indeed, Title IV of the act created an invigorated set of tools to combat fraud and abuse and new reporting requirements for skilled nursing facilities and nursing facilities, in addition to providers, hospitals and drug companies.

The ACA provided a new opportunity to strengthen and improve federal oversight of nursing homes. In particular, the act emphasized public reporting of nursing home ownership and meaningful and robust ethics and compliance programs.

Specifically, under the ACA, skilled nursing facilities (SNF) and nursing facilities are required to make available information regarding the identity of each member of their governing body and all officers, directors, members or partners (persons or entities). These provisions are aimed at a number of issues that have plagued the industry and garnered significant attention from the government, including conflicts of interest, self-dealing and improper referrals, among others.

In addition, under the act, SNFs and nursing facilities are required to implement a meaningful compliance and ethics program in operation that "is effective in preventing and detecting criminal, civil, and administrative violations." The ACA details certain components such programs should contain, including that the program should:

- Establish compliance standards and procedures that are reasonably capable of reducing the prospect of violations
- Assign high-level personnel with overall responsibility to oversee the compliance
- Avoid delegating discretionary authority to individuals the organization knew or should have known had a propensity to engage in criminal, civil or administrative violations
- Take steps to effectively communicate its standards and procedures to all employees and agents, such as requiring training
- Implement monitoring and audit systems reasonably designed to detect violations
- Take appropriate and consistent disciplinary action against responsible individuals
- Take all reasonable steps to respond to a detected offense
- Periodically reassess its compliance program.

While the need to have a compliance program may not be new, the continued presence of nursing homes on CMS' SFF list likely means some nursing homes either do not have the resources, infrastructure or will to implement effective programs.

The act also includes provisions aimed at encouraging self-reporting. For example, the act provides for a reduction in civil penalties up to as much as 50 percent for SNFs and nursing facilities that promptly report and correct deficiencies. Exceptions include instances of repeat deficiencies or deficiencies resulting from a pattern of harm that jeopardizes the health and safety of its residents.

Of course, in addition to the substantive provisions, the ACA expressly grants increased funding to fight fraud and abuse.

While the government's attention to combat fraud and abuse in nursing homes has been years in the making, the ACA gave these efforts renewed life. The SFF list demonstrates that the nursing home community has not caught up to the significant compliance requirements required by the act.

Nursing homes can be assured that the government's scrutiny is here to stay. These entities need to evaluate their compliance programs and make sure their procedures and protocols are in order in light of the government's dedicated resources, transparency requirements and enhanced ability to seek civil and criminal enforcement penalties.

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