

The Impact of Mandatory Compliance Programs on Reimbursement for Skilled Nursing Facilities

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Effective compliance programs are an essential tool for identifying and mitigating audit risks. Due to the recently imposed mandatory compliance requirements in the Patient Protection and Affordable Care Act (PPACA), the lack of an effective compliance program could also be an audit or fraud and abuse risk. PPACA requires skilled nursing facilities (SNFs), as a condition of participation, to have a compliance program in place by March 2013. Because compliance with the conditions of participation is a prerequisite for payment, noncompliance could result in denied claims and pose an audit risk for SNFs in the future. Failure to meet the conditions of participation has also been used in the past as a basis for liability under the False Claims Act.

Specifically, section 6102 of PPACA requires compliance and ethics programs to be implemented in all SNFs. SNFs will be allowed flexibility in crafting the required program for their organization and the program may be tailored based on the size and scope of services provided by the SNF. The program must be followed by all employees and agents of the SNF and be effective in the prevention and detection of criminal, civil and administrative violations. The program must also identify and involve specific individuals with authority and resources who are assigned to oversee compliance. As part of its program, the organization must exercise due care in delegating authority, so as not to delegate substantial discretionary authority to individuals whom the SNF knew or should have known would have a propensity to engage in criminal, civil or administrative violations. Further, if an offense is detected, the organization must respond appropriately. The organization must take steps to educate its employees in the compliance program and will be required to make efforts to achieve compliance with the standards it promulgates. A periodic reassessment of the program and any necessary changes will also be a required component of the SNF's program. Regulations addressing additional requirements for the programs have yet to be released by the Secretary of Health and Human Services (HHS), but are required to be issued within two years of PPACA's passage.

SNFs will also be required to comply with the compliance program requirements promulgated pursuant to Section 6401(a) of the Act, which includes all providers enrolled in Medicare, Medicaid and CHIP. While a final rule has not yet been issued, a Proposed Approach and Solicitation of Comments in connection with the mandatory compliance program provisions was released on February 2, 2011 in the Federal Register. The Solicitation of Comments seeks to gain insight from various industry stakeholders on the proposed compliance program provisions. Specifically, HHS is currently seeking comments on the use of the elements of an effective compliance program set forth in Chapter 8 of the U.S. Federal Sentencing Guidelines Manual. These core elements are based around the idea of preventing, detecting, and correcting behavior that is detrimental to compliance with applicable laws and ethical standards within a facility or organization. HHS is looking to see how providers with compliance plans in place currently have integrated these elements. Moreover, the Solicitation also seeks to find any other elements, beyond those set forth in the Sentencing Guidelines that should be integrated into the future regulations.

The Solicitation also seeks to receive comments on several other issues. Input related to the costs and benefits of compliance programs, the type of systems providers will need to implement effective programs, as well as the extent to which providers integrate the use of consultants, review organizations and auditors in their current compliance efforts were all raised in the recent Solicitation. It is important to note that HHS indicated that it does not intend to finalize the compliance plan requirements in this final rule, but instead will continue with further rulemaking and issue proposals in the future.

SNFs need to prepare themselves now for the changes in the compliance landscape. Even if SNFs currently have a compliance program in place, the administration should look to see that the program is effective and contains all of the elements set forth in the statute and associated regulations once published. The express focus on SNFs in the healthcare reform legislation may also be an indication of increased scrutiny on SNFs by the various audit contractors. As such, it is vital for SNF providers and administrators to increase compliance efforts. An effective compliance program will not only help the SNF to meet the conditions of participation, but will also help to identify and rectify potential audit risk areas.