



Senators Pressure CMS to Improve SNF Survey Process

Alan C. Horowitz

Last month, we reported about a Department of Health and Human Services Office of the Inspector General (OIG) report that concluded 22% of the Medicare beneficiaries in skilled nursing facilities suffered from adverse events.¹ It was predictable that the OIG report about adverse events would have a ripple effect and might even result in Congressional action. It did. It took barely a month for two key senators to question the Centers for Medicare & Medicaid Services (CMS) about OIG's "troubling" findings.²

In a bipartisan letter dated April 2, 2014, and jointly signed by Senators Charles E. Grassley (R-IA) and Bill Nelson (D-FL), the senators stated that CMS "must – and should – do more" to help residents of nursing homes. Significantly, Senator Nelson chairs the Senate Special Committee on Aging, while Senator Grassley is the Ranking Member of the Senate Committee on the Judiciary.

The senators expressed their interest in working with CMS "to improve the survey and certification process to improve patient care." Citing the OIG report, they noted that more than half of the adverse events in nursing homes were preventable. Additionally, the senators stated that the cost of hospitalizations from those potentially avoidable adverse events was \$136 million in just one month.

In their letter to CMS Administrator Tavenner, the senators referenced an earlier OIG report that found one in four nursing home residents were admitted to hospitals in FY 2011 at a cost of \$14.3 billion.³ The senators found the OIG's conclusions "troubling" because the Medicare statute requires nursing homes to undergo surveys and certification to ensure quality care and compliance with federal regulations, which set minimum standards. Stating, "we want to better understand how these facilities obtained certification or passed their surveys despite these problems," the senators asked the CMS Administrator "what your plans are to address the IG's findings."

In addition to asking specifically how CMS plans to improve the survey and certification process, the senators also demanded to know how those "troubled" facilities were able to pass surveys and certifications. Referring to the OIG report on adverse events, Senator Nelson stated, "[t]he report painted a troubling picture of the care that's being provided in some of our nation's nursing homes." Senator Nelson added, "[o]ur seniors deserve better. We need to do everything we can to make sure they're getting the best care possible."⁴

Alternate Approaches

One of the OIG's recommendations was that facilities develop Quality Assurance Performance Improvement (QAPI) programs that address quality of care concerns. As we previously reported, CMS is currently engaged in the rulemaking process regarding the requirement that nursing

¹ *OIG Finds 22% of Medicare Beneficiaries in Skilled Nursing Facilities Experienced Adverse Events*, AGG Healthcare Authority, Alan C. Horowitz, March 11, 2014, available at: <http://www.agg.com/OIG-Finds-22-of-Medicare-Beneficiaries-in-Skilled-Nursing-Facilities-Experienced-Adverse-Events-03-11-2014/>.

² Letter to CMS Administrator Marilyn Tavenner from Sens. Charles E. Grassley (R-IA), Bill Nelson (D-FL), dated April 2, 2014, available at: http://media.mcknights.com/documents/67/nelson_grassley_letter_16528.pdf.

³ HHS Office of Inspector General, *Medicare Nursing Home Resident Hospitalization Rates Merit Additional Monitoring*, OEI-06-11-00040 November 2013, available at: <https://oig.hhs.gov/oei/reports/oei-06-11-00040.pdf>. Last accessed on April 10, 2014.

⁴ Email from Bryan Gulley (Communications Director, U.S. Senate Special Committee on Aging) to Alan C. Horowitz (April 11, 2014)(copy on file with author).

facilities develop and implement QAPI programs.⁵ QAPI programs, like mandatory compliance programs should go a long way towards improving care. Indeed, another approach to reducing preventable adverse events may be to have greater input from a facility's compliance and QAPI committees. According to David Hoffman, a former federal prosecutor and an expert in health care compliance, "[a]n effective compliance program that focuses on ensuring timely reporting and thorough investigation of adverse events coupled with meaningful interventions in order to prevent reoccurrence is a way to address this issue."⁶

The senators, CMS, providers and other stakeholders are in agreement on this central tenet: residents deserve quality care. The devil is in the details and how that is achieved is critical. One approach seen from CMS' increasing use of six-figure money penalties does not seem to be particularly effective given the OIG's findings. What also seems to have been overlooked is a provision in the Affordable Care Act that permits nursing facilities to use CMP funds to improve quality care.⁷

While the senators are correct to question the survey process, other more constructive approaches to resident care may yield better results. There is no paucity of objective findings supporting what the senators suggest and providers (as well as CMS) know: the survey process is often inconsistent and seriously flawed.

Regardless of what changes CMS will make to the survey process, providers should consider applying for CMP funds that may be used to promote resident care. In a future article, we will explain in detail how providers may apply for those funds and what types of activities are covered under the statute. For now, perhaps a greater emphasis should be placed on allowing providers to use a larger portion of the CMP funds, as authorized by Congress.

⁵ *Supra*, note 1.

⁶ Email from David Hoffman, Esq. (President, David Hoffman & Associates, PC) to Alan C. Horowitz (April 11, 2014) (copy on file with author).

⁷ The Patient Protection and Affordable Care Act (P.L. 111-148) as supplemented by the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152), Section 6111(a) and (b) expressly provides that "a portion" of collected CMP funds may be used to benefit residents; see *also*, 42 C.F.R. § 488.433, Civil money penalties: Uses and approval of civil money penalties imposed by CMS.

Authors and Contributors

Alan C. Horowitz

Partner, Atlanta Office

404.873.8138

alan.horowitz@agg.com

not *if*, but *how*.[®]

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a “business sensibility” approach, developing a deep understanding of each client’s industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal’s prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief “not if, but how.” Visit www.agg.com.

Atlanta Office

171 17th Street NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Ave., NW,
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: <http://www.agg.com/subscribe/>

©2014. Arnall Golden Gregory LLP. This legal insight provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice. Under professional rules, this communication may be considered advertising material.