

## POST-ACUTE COMPLIANCE PROGRAM UPDATE: OIG RECOMMENDATIONS ON MEDICAL DIRECTOR AGREEMENTS AND ROLES

On November 20, 2024, the Office of Inspector General (“OIG”) for the U.S. Department of Health and Human Services (“HHS”) issued new [Industry Segment-Specific Compliance Program Guidance For Nursing Facilities](#) (“Nursing Facility ICPG”) for nursing home members of the health care compliance community. Motivating factors for issuing the Nursing Facility ICPG included long-standing issues such as medical director agreements and roles and other compliance and quality issues.

### NURSING FACILITY ICPG

The Nursing Facility ICPG describes risk areas for nursing facilities, recommendations and practical considerations for mitigating those risks, and other important information OIG believes nursing facilities should consider when implementing, evaluating and updating their compliance and quality programs. Nursing Facility ICPG, together with OIG’s [General Compliance Program Guidance](#) (“GCPG”) issued in November 2023, serve as OIG’s updated and centralized source of voluntary compliance program guidance for nursing facilities. Nursing facilities should use the Nursing Facility ICPG to help identify their own risks and implement an effective compliance and quality program to reduce those risks.

### MEDICAL DIRECTORS IN NURSING HOMES

[42 CFR §483.70\(g\)](#) provides that a nursing home must designate a physician to serve as medical director. The medical director is responsible for (i) the implementation of resident care policies; and (ii) the coordination of medical care in the facility. Nationally, violations under this regulation were cited 36 times in 2024 and 27 times in 2023.

### NURSING FACILITY ICPG AND MEDICAL DIRECTORS

The Nursing Facility ICPG includes revisions of the medical director’s responsibilities for the nursing home.

The Nursing Facility ICPG emphasizes the importance of reviewing medical director arrangements for services and supplies. Often a kickback or other illegal remuneration is disguised as an otherwise legitimate payment or is hidden in a business arrangement that appears, on its face, to be appropriate. Nursing facilities arrange for physicians (and potentially nonphysician practitioners) to provide medical director, quality assurance and other services. These physicians and nonphysician practitioners may be in a position to refer federal health care program patients for admission at the facility, admit patients to the facility, certify or recertify patients’ need for skilled services or order items and services that are billable separately by the facility. The Nursing Facility ICPG declares that physician and nonphysician practitioner arrangements should be carefully monitored to ensure that they are not vehicles for paying for referrals.

### NURSING FACILITY ICPG AND FEDERAL ANTI-KICKBACK STATUTE

In the Nursing Facility ICPG, OIG identified that nursing facilities must comply with the federal Anti-Kickback Statute (“AKS”).

Although liability under the AKS depends in part on a party’s intent, it is incumbent on nursing facilities to identify arrangements with referral sources and referral recipients that present a potential for fraud and abuse under the AKS. The GCPG provides some illustrative questions to consider when attempting to identify problematic arrangements. Those questions, and appropriate follow-up questions, can help nursing facilities identify, address and avoid potentially problematic arrangements.

OIG highlighted several risk areas for nursing facilities under the AKS and recommendations for mitigation of those risks. Nursing facilities should scrutinize the listed risk areas as part of their risk assessment, internal review and monitoring processes. These risk areas include, but are not limited to the following:

- Free (or Below Fair Market Value) Goods and Services
- Discounts – Price Reductions and Swapping
- Arrangements for Services and Supplies

- Long-Term Care Pharmacy and Consultant Pharmacist Arrangements
- Hospital Arrangements
- Hospice Arrangements
- Care Coordination and Value-Based Care Arrangements
- Joint Ventures

In 2015, the United States Department of Justice (“DOJ”) **announced** that a skilled nursing facility agreed to pay \$17 million to resolve False Claims Act allegations. The announcement provided that the facility allegedly operated a sophisticated kickback scheme, in which they hired numerous physicians ostensibly as medical directors pursuant to contracts that specified numerous job duties and hourly requirements. The various facilities had several such medical directors under contract at any given time, paying each several thousand dollars monthly. The DOJ alleged that these were ghost positions and that most of the medical directors were required to perform few, if any, of their contracted job duties. Instead, they were allegedly paid for their patient referrals to the nursing facilities, which increased exponentially once the medical directors were put on the payroll.

## **NURSING FACILITY ICPG AND PHYSICIAN SELF-REFERRAL LAW**

The federal physician self-referral law (“PSL”) at Section 1877 of the **Social Security Act, 42 U.S.C. Sec. 1395nn**, is often referred to as the “Stark Law.” SNF services covered by the Medicare Part A Skilled Nursing Prospective Payment System (“PPS”) payment are not designated health services (“DHS”) for purposes of the PSL. Nursing facilities, however, may perform or bill for services other than SNF services covered by the Medicare Part A PPS payment—such as services covered by Medicare Part B furnished to enrollees who are in a non-covered Part A stay or who reside in a nursing facility (or part thereof) that is not certified as an SNF by Medicare. When the services are DHS for purposes of the PSL (e.g., laboratory services, physical therapy, occupational therapy, and outpatient speech-language pathology services), the nursing facility is considered an entity that furnishes DHS (“DHS entity”).

Nursing facilities that are DHS entities should review all financial relationships with: (i) physicians who may refer or order DHS furnished by the nursing facility, such as attending physicians and physicians who are nursing facility owners, investors, medical directors or consultants; and (ii) immediate family members of such referring physicians, to ensure that these financial relationships satisfy all requirements of an applicable PSL exception. If they do not, then DHS referrals from the physicians to the facility are prohibited. Implementing recommendations in the GCPG regarding financial arrangements tracking may help support compliance with the requirements of applicable PSL exceptions. Financial relationships under the PSL include both ownership interests and compensation arrangements. See **42 C.F.R. § 411.354**, which defines “financial relationship,” “ownership interest” and “compensation arrangement.”

## **PRIOR OIG GUIDANCE**

According to the OIG’s 2008 **Memo** entitled “OIG Supplemental Compliance Program Guidance for Nursing Facilities” (“OIG 2008 Memo”), contracts for physician services as medical director and quality assurance services must not offer anything of value in exchange for referrals of patients for Medicare or Medicaid services. The physician arrangements need to be closely monitored to ensure that they are not vehicles to pay physicians for referrals.

The OIG 2008 Memo recommends that nursing facilities should periodically review physician contracts to ensure that:

- There is a legitimate need for the services.
- The services are provided.
- The compensation is at fair market value in an arms-length transaction.
- The arrangement is not related in any manner to the volume or value of federal health care program business.

## **PRACTICAL TAKEAWAYS**

- Nursing facilities should maintain documentation of the medical director arrangement, including compensation terms, time logs or other accounts of services rendered, and the basis for determining compensation.
- Nursing facilities should ensure that compensation is only for the number of medical directors or physicians needed for legitimate

purposes and that compensation is commensurate with the skill level and experience needed for the contracted services.

- Nursing facilities should comply with personal services and management contracts safe harbors whenever possible.

For assistance in evaluating and enhancing your current compliance program, developing a compliance program or for more information on the Nursing Facility ICPG, please contact:

- **Sean Fahey** at (317) 977-1472 or [sfahey@hallrender.com](mailto:sfahey@hallrender.com);
- **Brian Jent** at (317) 977-1402 or [bjent@hallrender.com](mailto:bjent@hallrender.com);
- **Todd Selby** at (317) 977-1440 or [tselby@hallrender.com](mailto:tselby@hallrender.com); or
- Your primary Hall Render contact.

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