

Report on Medicare Compliance Volume 28, Number 26. July 22, 2019 CMS Rule Would Discard Compliance Program Requirements; Lawyer: DOJ, OIG Loom Larger

By Nina Youngstrom

CMS is planning to kill a lot of specific compliance-program requirements for skilled nursing facilities (SNFs) and nursing facilities (NFs) under the Medicare requirements of participation (RoPs), according to a proposed regulation announced July 16. They wouldn't need to designate a compliance officer or have a contact person to whom "people may report suspected violations," CMS said in the Requirements for Long-Term Care Facilities: Regulatory Provisions to Promote Efficiency, and Transparency, 84 Fed. Reg. 34,737. If these and other changes in the regulation are finalized, CMS said long-term care (LTC) facilities would save \$100 million annually.

"It's a welcome development" in terms of giving LTC facilities more flexibility in implementing their compliance programs, says attorney Paula Sanders, with Post & Schell in Harrisburg, Pennsylvania. "But we have two different paradigms." One is the risk to Medicare and Medicaid certification. "If you don't have a compliance program, what's the worst that will happen—you'll get a deficiency under the RoPs? I don't see that rising to immediate jeopardy. The larger risk to any organization is whether they're going to be able to prove they have a compliance and ethics program if they wind up before the Department of Justice because an effective compliance program will minimize the likelihood of significant penalties." If anything, the government is raising the stakes for corporate self-policing and responsibility, Sanders says.

She points to a flurry of recent activity. The Department of Justice (DOJ) criminal division on April 30 updated its 2017 guidance for white-collar prosecutors who evaluate compliance programs when deciding whether to file fraud charges and what the charges will be, with an emphasis on good faith ("In Updated Compliance Evaluation Guidance, DOJ Asks Three Questions," *RMC28*, no. 17). And on July 11, the DOJ antitrust division announced it will take compliance programs into account during the charging and sentencing phases of criminal investigations. Its *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* focuses on compliance in the context of the Sherman Act (e.g., price fixing, market allocation).

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