

# Compliance Today – January 2021

## Compliance investigation and reporting in skilled nursing facilities

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The nursing home industry is subject to numerous federal and state statutes, rules, and regulations, and skilled nursing facilities (SNFs) are required to investigate and report occurrences and events that meet defined criteria. Federal and state criminal and civil enforcement actions related to substandard quality of care can also lead to various governmental investigations. SNFs that have an established compliance and ethics program that includes robust investigation and reporting are in a better position of meeting fiduciary duties to provide quality care while navigating the challenges of evolving regulatory and enforcement actions.

SNFs are accustomed to conducting investigations, but most of these investigations are related to different clinical, financial, and administrative functions, or in relation to self-disclosed reports to federal and state agencies. Most of these investigations are handled by the SNF's management team; occasionally, human resources management and/or legal counsel become involved when the subject of the investigation is beyond the purview of the nursing home administration. In contrast, compliance investigation and reporting are relatively new and require more structuring in terms of policies and procedures, tools, and training.

Compliance investigation may be defined as an internal investigation, “often conducted by compliance officers, internal audit departments, [and/or] outside counsel,” and designed to conduct “factual review and legal analysis of potential problems,” significant wrongdoing, misconduct, or ethical lapses.<sup>[1]</sup> In SNFs, these investigations may result from reports of wrongdoing from the compliance hotline learning of whistleblower complaints, information that the insurance carrier or fiscal intermediary is conducting an audit, or notification from a governmental agency in a form of request for documents, subpoena, or search warrant.

### Government oversight

Quality of care in SNFs has always been a matter of public concern and policy attention. Despite a complex regulatory system that consists of state licensure and federal certification, there appears to be an endemic problem of poor quality of care and abuse and neglect of residents.<sup>[2]</sup> On March 3, 2020, the Department of Justice launched a National Nursing Home Initiative to investigate and bring enforcement actions against some of the worst-performing nursing homes and skilled care professionals for providing “grossly substandard care” to their residents.<sup>[3]</sup> The department will consider several factors to identify the most problematic nursing homes, such as systemic failures in providing “adequate nursing staff to care for [the] residents,” consistent failures “to adhere to basic protocols of hygiene and infection control,” not providing residents with enough food, and withholding pain medication.

The Centers for Medicare & Medicaid Services (CMS), in conjunction with state agencies, oversees Medicare and Medicaid-funded nursing homes/nursing facilities to ensure they meet requirements of participation (RoP) in federal healthcare programs. State survey agencies investigate SNF complaints on behalf of CMS, and problems raised about the SNF operations and compliance are addressed through the nursing home complaint process.<sup>[4]</sup>

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## Platforms for addressing quality deficiencies

In general, SNFs have internal mechanisms for identifying, investigating, reporting, and addressing quality deficiencies through ongoing quality assessment and performance improvement (QAPI) activities.<sup>[5]</sup> Before the mandate for QAPI activities, the Omnibus Budget Reconciliation Act of 1987 required SNFs to maintain quality assurance committees as vehicles for improving the quality of life and quality of care in nursing homes.<sup>[6]</sup> At a minimum, the quality assurance committees were to meet at least quarterly, identify quality deficiencies through multiple sources of data, and correct and improve care through implementation of performance improvement plans. Although CMS determined SNFs generally met those requirements, governmental studies showed issues with staff shortages and lack of knowledge by the quality assurance committees on how to use available information to formulate effective plans of actions.<sup>[7]</sup> In 2010, the Affordable Care Act required SNFs to have an effective QAPI program designed to prevent adverse events, promote safety and quality, and reduce risks to residents and caregivers.<sup>[8]</sup> Under Section 6102 of the Affordable Care Act, SNFs were also required to create and maintain compliance programs that would, by design, prevent and detect criminal, civil, and administrative violations and promote quality of care.<sup>[9]</sup> Although the Affordable Care Act requirements were passed in 2010, CMS did not enforce the RoP related to QAPI until November 28, 2016, and the requirement to implement a compliance and ethics program pursuant to 42 C.F.R. § 483.85 was implemented on November 28, 2019.<sup>[10]</sup>

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