

## Legal Issues



By Janet K. Feldkamp, JD, RN, LNHA

# A Look Into LTC's Future: Inspector General's 2012 Work Plan Foreshadows Enforcement

In just about every installment of this column, I tell you about lawsuits and enforcement actions that have involved long-term care facilities and practitioners – and what they might mean you in your professional life.

This month, let's look at legal and regulatory actions that haven't happened yet but are now predictable because the Office of Inspector General (OIG) of the Department of Health and Human Services has issued its annual "Work Plan." This is the document that defines what the OIG will be investigating and acting on over the next 12 months and well beyond. Previous years' Work Plan items have found their way to new regulations and increased focus in areas such as the survey process by the Centers for Medicare & Medicaid Services (CMS).

While the OIG has been issuing annual work plans for many years, the new plan for October 2011 to October 2012 (fiscal year 2012) is particularly notable for the breadth and depth of its proposed activities.

With staff deployed in various regional and field offices across the nation, the OIG is charged with protecting the integrity of Medicare, Medicaid, and other federal health programs. This force routinely recovers significant sums of money from providers whose offenses range from innocent billing errors and omissions to deliberate, high-priced fraud.

This year's Work Plan consists of 165 pages divided into multiple sections and three appendices indicating the OIG's focus. The document is remarkably manageable and reader friendly.

The seven major focus areas, by title, are: Medicare Part A and Part B, Medicare Part C and Part D, Medicaid Reviews, Legal and Investigative Activities, Public Health Reviews, Human Service Reviews, and Other HHS-Related Reviews. Within these are subcategories including nursing homes, hospice, home health, durable medical equipment, and many others.

The OIG's activities relating to skilled nursing facilities (SNFs) fiscal year 2012 include both new and recurring items, with particular focus on quality of care, payments and billing, compliance plans, and preparedness for natural disasters. Below are high points from these sections.

### Quality Care and Transfers

► The OIG will be conducting reviews of SNFs' care plans to ensure they are developed to meet the beneficiaries' needs. Along those lines, the OIG will be reviewing Resident Assessment Instruments to ensure that they accurately reflect beneficiaries' needs.

► In a newly identified focus for fiscal year 2012, the OIG will be investigating quality of care and the safety of beneficiaries as they are transferred from acute care settings to SNFs. This will include

evaluations of the transfer process, rates of adverse events, and preventable hospital readmissions. This new focus on the postacute care transfer process is the result of the OIG's identification of communication and collaboration between acute- and postacute-care providers as critical to safe transitions.

► In 2007, the OIG determined that 35% of hospitalizations of residents in skilled nursing facilities were caused by poor quality of care or fragmentation of services. As part of its focus on improving quality of care, the OIG will review hospitalization and rehospitalization rates of Medicare beneficiaries in skilled nursing, and will examine the CMS's oversight of facilities with high rates of hospitalization for their residents.

► The OIG will analyze the use of enforcement mechanisms to evaluate and improve the quality of care in poorly performing SNFs. The OIG also will examine the CMS' and states' actions to ensure that poorly performing facilities are meeting federal requirements for participation in Medicare and Medicaid.

### Payments

In addition to continuing scrutiny of nursing facilities' compliance with coverage requirements, the OIG has expressed its intent to more closely examine certain billing patterns that it has identified as questionable.

► The OIG's reviews of Medicare Part A payments to SNFs will focus on medical necessity, proper coding, and proper documentation. In a past report, the OIG found that 26% of claims were for Resource Utilization Groups ("RUGs") that were not supported by medical records, representing \$542 million in potential overpayments. Based on the large potential value of these claims, SNFs must be prepared for strict scrutiny of Part A payments received and must remain diligent in ensuring that they are properly documenting and coding all services.

► In a new focus area, the OIG has announced its plan to examine the extent to which ancillary providers bill Medicare Part B for services during residents' non-Part A stays. Particular areas of focus will include podiatry, ambulance transport, and laboratory and imaging services. This announcement underscores the OIG's emphasis throughout the 2012 Work Plan on preventing and recouping overpayments by Medicare and Medicaid.

► In addition to focusing on quality of care and payments, the OIG has placed

a heightened emphasis on SNFs' compliance plans. Specifically, the OIG says it will review SNFs' implementation of compliance plans as part of their day-to-day operations, and will focus on whether these compliance plans contain the elements identified by the OIG in previous guidance. The Affordable Care Act requires SNFs to implement specific compliance and ethics programs by 2013, and the OIG will be assessing the development of such programs and whether the CMS has incorporated compliance requirements into conditions of participation in Medicare and Medicaid.

### Disaster Preparedness

The OIG's focus on emergency preparedness arose in response to the devastation in Gulf states in the aftermath of Hurricane Katrina, including highly publicized incidents involving nursing homes. After the storm, the OIG reported that many nursing homes in the area did not have adequate emergency plans. Since then, the OIG has expanded its emphasis to ensuring that SNFs are prepared for all types of natural disasters, and the office is continuing to review SNFs' emergency plans to ensure they meet federal requirements.

More than ever before, the fiscal year 2012 Work Plan makes clear that the OIG will be stepping up its scrutiny of nursing homes and their care providers, and that both should understand and address the investigative and enforcement priorities set forth in the document.

Typically, each of the areas highlighted in an OIG Work Plan results in continuing enforcement actions, significant changes in CMS policy, or both. To the extent your organization is not in compliance with laws and regulations covered by any of the target areas outlined in the 2012 Work Plan, you should take immediate action to avoid costly investigations, recoupments, and penalties.

The OIG Work Plan for fiscal year 2012 is available at <http://oig.hhs.gov/reports-and-publications/archives/workplan/2012/Work-Plan-2012.pdf>. 

*This column is not to be substituted for legal advice. The writer, Janet K. Feldkamp, practices in various aspects of health care, including long-term care survey and certification, certificate of need, health care acquisitions, physician and nurse practice, managed care and nursing related issues, and fraud and abuse. She is affiliated with Benesch Friedlander Coplan & Aronoff LLP of Columbus, Ohio.*

## Medical Expert Perspective

Most of what's in the inspector general's Work Plan should improve the care we provide to our patients. Acknowledgement of culture change in care plans (to be increasingly resident centered) is laudable.

Transitions of care are also explicitly on the OIG's radar for the first time, and this gives us yet another reason to improve this error-prone component of our work. One can only hope that implementation of bundling and accountable care organizations in the years to come will help in that area. AMDA continues to work with other stakeholders on this vital element of care.

For our facilities, a couple of important messages: Don't overcall RUG rates, and don't do unnecessary Part B therapy on custodial residents just to keep your therapists busy.

While Recovery Audit Contractors (RACs) haven't landed in our sector in a serious way yet, I suspect they may soon. And for facilities and chains that are hiring full-time medical directors to improve postacute care, keep in mind that medical visits have to be reasonable and necessary. So an uncomplicated post-knee-replacement patient who gets daily physician visits in a skilled nursing facility may also receive some (not unwarranted) scrutiny. Our care should be reasonable but not excessive.

Take a look at the report. It won't take as long as you think. Nobody wants to hear from the OIG, and this record of the office's priorities should help us be proactive while we strive to improve the care we provide.

—Karl Steinberg, MD, CMD  
Editor in Chief