

# What Should You Do If the Government Comes Knocking?

BY DREW BARNHOLTZ

## “Knock, Knock.

Who’s there? The Government. The Government Who? The Government, who’s here to collect all of your computers and paperwork to see if you committed fraud.” This is a terrible Knock Knock joke! No long-term care provider ever wants to look through the proverbial peephole in their front door and see a representative from the Office of the Inspector General (OIG), Department of Justice (DOJ) or Ohio Department of Health (ODH) staring back at them. Long-term care providers and their ancillary providers (i.e., Skilled Nursing Facilities (SNFs), Hospices, Home Health Agencies, transportation providers) can prepare themselves for routine and unannounced audits and investigations by ensuring they implement strong compliance programs, policies and procedures and training. This article will provide nuts-and-bolts ideas for ensuring SNFs and their ancillary providers avoid an investigation/enforcement action and the best response if they are the subject of an investigation or audit.

### A List of the Top Compliance Issues

Everyone would love to have a crystal ball that looks into the future and tells them what the top ten compliance issues are and how to best comply. While we don’t have an actual crystal ball, there are published resources that give us a pretty strong hint.

**According to the Advisory Board for BNA’s Health Care Fraud Report, the following are the top issues to watch in 2015:** (1) Increase in False Claims Act cases involving Stark issues, Medicare Advantage and managed care and pharmaceuticals; (2) Increase in prosecutions

of health-care executives; (3) Increase in cases alleging fraud within the insurance exchanges; (4) Expansion of fraud enforcement into Medicare Part C and Part D; (5) Increased scrutiny of Open Payments data and the CMS Part B database; (6) Increase in litigation resulting from the publication of the final 60-day repayment rule; (7) Growth in state False Claims Act enforcement; (8) Growth in state Medicaid enforcement; (9) Increased use of CMS enforcement tools, such as payment suspensions and moratoria; and (10) An increase in data breach and cybersecurity investigations. (See “A Look Into The Crystal Ball for Health-Care Fraud Trends for 2015” available at <http://www.bna.com/look-crystal-ball-b17179921946>).

In addition to this list of global compliance issues, for long-term care providers, survey citations are a strong indicator of where to best focus compliance efforts and resources.

### The top ten citations in Ohio in 2014 were:

(1) F-371 (Sanitary Food); (2) F-441 (Infection Control); (3) F-323 (Fall Management); (4) F-309 (Quality of Care); (5) F-329 (Unnecessary Drugs); (6) F-279 (Develop Comprehensive Care Plans); (7) F-431 (Labeling and Storage of Drugs and Biologics); (8) F-241 (Dignity); (9) F-280 (Care Planning and Comprehensive Care Plans); and (10) F-332 (Medication Error Rates). This data came from the 739 standard surveys and 2,052 complaint surveys performed in 2014. On average, the ODH cited 3.9 deficiencies per standard survey and .6 deficiencies per complaint survey.

### The top ten deficiencies cited in 2014 included the following:

(1) K0062 (Sprinkler Maintenance); (2) K0147 (Electrical Wiring and Maintenance); (3) K0029 (Hazardous Areas – Separation); (4) K0018 (Corridor Doors); (5) K0038 (Exit Access); (6) K0025 (Smoke

Partition Construction); (7) K0056 (Automatic Sprinkler System); (8) K0050 (Fire Drills); (9) K0144 (Generators Inspected/Tested); and (10) K0052 (Testing of Fire Alarm).

### The top ten citations at a scope and severity of G or above in 2014 were as follows:

(1) FO323 (Free of Accident Hazards/Supervision/Devices); (2) F0314 (Treatment/Svcs to Prevent/Heal Pressure Sore); (3) F0309 (Provide Care/Services for Highest Well Being); (4) F0223 (Free From Abuse/Involuntary Seclusion); (5) F0224 (Prohibit Mistreatment/Neglect/Misappropriation); (6) F0226 (Develop/Implement Abuse/Neglect, Etc. Policies); (7) F0225 (Investigate/Report Allegations/Individuals); (8) F0315 (No Catheter, Prevent UTI, Restore Bladder); (9) F0333 (Residents Free of Significant Med Errors); and (10) F0157 (Notify of Changes (Injury/Decline/Room, etc.)). Ohio’s average per day remedy amount in effect was \$1,700,166 in 2014, with an average time in effect of twenty-eight (28) days. So we’re not talking about small potatoes here — this is serious business.

### In addition to the ODH, long-term care providers need to be aware of the OIG’s agenda, commonly referred to as the Work Plan

(available at <http://oig.hhs.gov/reports-and-publications/archives/workplan/2015/FY15-Work-Plan.pdf>). For 2015, the OIG has identified billing for high level therapy even though beneficiary characteristics remained largely unchanged as a high priority item. The OIG will identify questionable billing patterns associated with nursing homes and Medicare providers for Part B services provided to nursing home residents during stays not paid for under Part A (for example, stays during which benefits are exhausted or a 3-day prior-inpatient-stay requirement is not met). The OIG will also determine the extent to which Medicare beneficiaries residing in nursing homes are hospitalized as a result of conditions thought to be manageable or preventable in the nursing home. Finally, the OIG will look at the delivery of hospice care in assisted living facilities, as well as the use of general inpatient hospice care (both of which are only available for residents with a terminal illness). Home health agencies will be reviewed for compliance with various aspects of the home health prospective payment system, and ensuring home health agencies are not employing individuals with criminal convictions.

### The Best Offense is a Good Defense

So, if that bad knock knock joke becomes a reality and the OIG, DOJ, ODH or one of a host of reimbursement auditors appears at your doorstep, what should you do? *First, don't panic.*

#### Second, follow these tips:

1. **Be courteous**, but don't provide any details or documents until speaking with your attorney.
2. **Be cooperative**, but don't turn over all documents and let the investigators move freely throughout your facility.
  - a. Never leave an investigator alone
  - b. Don't allow the investigator access to areas beyond the scope of the inspection
  - c. Get the documents yourself that the investigator requests

### 3. Have a designated person (*Vice President (or higher level officer) or Legal Counsel*) guide the investigators

- a. Examine the investigators' credentials
- b. Ask what type of inspection is taking place
- c. Write down pertinent information *and*
- d. Never mislead an investigator

#### What should you have done before the investigator appeared at your door?

Have a living, breathing Compliance Program and policies & procedures that you follow, train to, monitor, and routinely audit. Be proactive and do your own monitoring and auditing as if the investigator were looking over your shoulder. Look beyond the specific issues that the investigators found (*or have found through past audits & investigations*), and evaluate the processes and operations associated with the

deficiencies to ensure you implement a holistic solution. Always remember that just because you fixed something an investigator cited you for previously doesn't give you a pass to slack off now. Make compliance at your facility a market differentiator and hallmark of quality.



*Drew Barnholtz joined Schneider, Smeltz, Ranney & LaFond in 2013. Drew serves as an outside general counsel and compliance officer for skilled nursing facilities, hospice providers, home health providers, physician practice groups, durable medical equipment companies, pharmacies, lab companies, and start-up businesses. He has been a CMBA member since 2013. He can be reached at (216) 696-4200 ext. 141 or dbarnholtz@ssrl.com.*