VERMONT

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DEPARTMENT OF DISABILITIES, AGING AND INDEPENDENT LIVING

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Memorandum

To: Nursing Home Administrators

From: Frances Keeler, RN, MSN, DBA FK
State Survey Agency Director

Date: January 10, 2013

Subject: Reporting Requirements for Nursing Homes

This memorandum is intended to provide clarification to nursing homes on the reporting requirements under federal CMS regulations (42 C.F.R. 483.13(c)(2) - (4)), the Affordable Care Act, and Vermont Licensing and Operating Rules for Nursing Homes. This memorandum does NOT include specific guidance about Adult Protective Services reporting requirements.

Vermont State Requirements:

(1) Whenever a licensee plans to discontinue all or part of its operation or change its ownership or location, and such change in status would necessitate the discharge or transfer of residents, the administrator shall notify the licensing agency and the State Long Term Care Ombudsman at least 90 days prior to the proposed date of the change. [2.8(a)]

(2) At any time a fire occurs in the home, regardless of the size or damage, the licensing agency and the Department of Labor and industry [now the Division of Fire Safety] must be notified by the next business day. A written report must be submitted to both departments by the next business day. A copy of the report shall be kept on file in the facility. [2.9(a)]

(3) Any untimely death that occurs as a result of an untoward event, such as an accident that results in hospitalization, equipment failure, use of restraint, etc., shall be reported to the licensing agency by the next business day, followed by a written report that details and summarizes the event. [2.9(b)]

(4) Any unexplained or unaccounted for absence of a resident for a period of more than 30 minutes shall be reported promptly to the licensing agency. A written report must be submitted by the close of the next business day. [2.9(c)]

(5) Any breakdown or cessation to the facility's physical plant that has a potential for harm to the residents, such as a loss of water, power, heat or telephone communications, etc., for four hours or more, shall be reported within 24 hours to the licensing agency. [2.9(d)] ***Note**: this would also include essential equipment failures such as elevators, stair chair lifts, hoyer lifts (if no back up equipment available to provide the same function), etc.

(6) A nursing facility shall report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other facility staff to the Vermont State Nurse Assistants Registry or the appropriate licensing authority and the licensing agency. Actions by a court of law which indicate unfitness for service include a charge of abuse, neglect or exploitation substantiated against an employee or conviction of an offense for actions related to bodily injury, theft or misuse of funds or property, or other crimes inimical to the public welfare, in any jurisdiction within or outside the State of Vermont. [3.17(e)] ***Note**: actions by a court are interpreted to include any conviction of any misdemeanor or felony crimes.

(7) The facility must ensure that all alleged violations involving mistreatment, neglect, exploitation, or abuse, including injuries of unknown source and misappropriation of resident property are reported immediately to the administrator of the facility and the licensing agency and Adult Protective Services in accordance with 33 V.S.A. Chapter 69. [3.17(f)]

(8) The facility must provide written notice to the state agency responsible for licensing the facility, at the time of any change, if a change occurs in:
   (a) persons with an ownership or control interest of 5% or more, or who have been convicted of Medicaid fraud;
   (b) the officers, directors, agents or managing employees;
   (c) the corporation, association or other company responsible for the management of the facility; or
   (d) the facility's administrator or director of nursing. [17.2(a-d)]

In addition to these reporting requirements, please see **3.14(L)(3)** for instances where permission is required from the licensing agency for emergency discharges.

Federal Requirements:

These sections address the facility's obligations to report allegations (and then subsequently the results of the facility's investigation of the allegations) involving mistreatment, neglect, abuse (including injuries of unknown source) and misappropriation of resident property.

As specified in 42 CFR 483.13(c)(2) - (4), the following alleged violations must be reported immediately to the administrator of the facility, other officials in accordance with state law, and the state survey and certification agency. These alleged violations are defined as follows:

> ***Note:** The requirement that all alleged violations must be reported immediately is interpreted by CMS to mean as soon as possible, but not to exceed 24 hours. In order to prevent unnecessary calls to your facility, this report should identify the nature of the incident, the name of all residents involved, and the name of all staff members involved and any immediate actions taken by the facility.

(1) Neglect - Failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness (42 C.F.R. §488.301).

(2) Abuse - The willful infliction of injury, unreasonable confinement, intimidations, or punishment with resulting physical harm, pain or mental anguish (42 C.F.R. §488.301).

> ***Note** that the federal definition of abuse indicates that the act needs to be "willful" and that it needs to have resulted in physical or psychosocial harm to the resident, or would be expected to have caused harm to a "reasonable person" if the resident cannot provide a response. "Willful" means that the individual intended the action itself that he/she knew or should have known could cause physical harm, pain, or mental anguish. Even though a resident may have a cognitive impairment, he/she could still commit a willful act.

(3) Injuries of unknown source - An injury should be classified as an "injury of unknown source" when both of the following conditions are met:

> -The source of the injury was not observed by any person **or** the source of the injury could not be explained by the resident or after assessment by the staff
>
> **AND**
>
> -The injury is suspicious because of the extent of the injury **or** the location of the injury (e.g., the injury is located in an area not generally vulnerable to trauma) **or** the number of injuries observed at one particular point in time **or** the incidence of injuries over time.

(4) Misappropriation of resident property - The deliberate misplacement, exploitation, or wrongful, temporary or permanent use of a resident's belongings or money without the resident's consent (42 C.F.R. §488.301).

(5) The regulations then require the results of all investigations be reported to the state agency within 5 working days of the incident. This report should identify the investigative steps taken, along with the disciplinary and/or preventative actions taken by the facility. The information should be thorough enough to provide clear explanation that the facility has considered all possible concerns and implemented actions to safeguard the individual resident and other residents at risk.

(6) Reporting Reasonable Suspicion of a Crime in a Long-Term Care Facility (LTC): Section 1150B of the Social Security Act (see attached S&C letter for further details)

Reporting Suspicion of a Crime: Section 1150B of the Social Security Act (the Act), as established by section 6703(b)(3) of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act), requires specific individuals in applicable long-term care facilities to report any reasonable suspicion of crimes committed against a resident of that facility.

Reporting to State Survey Agencies (SAs) and Law Enforcement: Reports must be submitted to at least one law enforcement agency of jurisdiction and the State Survey Agency.

Section 1150B establishes two time limits for the reporting of reasonable suspicion of a crime, depending on the seriousness of the event that leads to the reasonable suspicion.

a. *Serious Bodily Injury – 2 Hour Limit:* If the events that cause the reasonable suspicion result in serious bodily injury to a resident, the covered individual shall report the suspicion immediately, but not later than 2 hours after forming the suspicion;

b. *All Others – Within 24 Hours:* If the events that cause the reasonable suspicion do not result in serious bodily injury to a resident, the covered individual shall report the suspicion not later than 24 hours after forming the suspicion.

Web address for S&C letter: http://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/SCLetter11_30.pdf

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Center for Medicaid, CHIP, and Survey & Certification/Survey & Certification Group

Ref: S&C: 11-30-NH
REVISED 01.20.12

DATE: **June 17, 2011**

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Reporting Reasonable Suspicion of a Crime in a Long-Term Care Facility (LTC): Section 1150B of the Social Security Act

****Revised to include updated versions of the Questions and Answers and Appendix One documents****

Memorandum Summary

- **Reporting Suspicion of a Crime:** Section 1150B of the Social Security Act (the Act), as established by section 6703(b)(3) of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act), requires specific individuals in applicable long-term care facilities to report any reasonable suspicion of crimes committed against a resident of that facility.
- **Reporting to State Survey Agencies (SAs) and Law Enforcement:** Reports must be submitted to at least one law enforcement agency of jurisdiction and the SA (in fulfillment of the statutory directive to report to the Secretary).
- **Applicability of This Memo:** This memorandum discusses applicability of this provision to the following Medicare and Medicaid participating long-term care provider types that are collectively referred to as "facilities" or "LTC facilities" in this memorandum:
  - Nursing facilities (NFs),
  - Skilled nursing facilities (SNFs),
  - Hospices that provide services in LTC facilities, and
  - Intermediate Care Facilities for the Mentally Retarded (ICFs/MR).
- **Processing Reports about Suspected Crimes:** SAs should process reports received under Section 1150B of the Act in accordance with existing Centers for Medicare & Medicaid Services (CMS) and State policies and procedures for reporting incidents and complaints to SAs.
- **LTC Facility Policies and Procedures:** LTC facilities should have policies and procedures to comply with this law. The obligations of the facility are different than the obligations of a covered individual.

This memorandum informs SAs of the new section 1150B of the Act, which was established by section 6703(b)(3) of the Affordable Care Act and is entitled "Reporting to Law Enforcement of Crimes Occurring in Federally Funded Long-Term Care Facilities."

In order to promote timely application of the protections offered by section 1150B of the Act for LTC facility residents, we are explaining now the current obligations of LTC facilities to comply with the law as it is plainly written, without any delay that might be occasioned by waiting for any administrative rule-making process that might further clarify application of the law.

A. Background

Section 6703(b)(3) of the Affordable Care Act, in part, amends Title XI of the Act by adding a new section 1150B. Section 1150B requires LTC facilities that receive at least $10,000 in Federal funds under the Act during the preceding year to annually notify each covered individual of their obligation to report to the Secretary (now assigned to the SA) and at least one local law enforcement entity "any reasonable suspicion of a crime," as defined by local law, committed against an individual who is a resident of, or is receiving care from, the facility. A "covered individual" is defined at section 1150B(a)(3) of the Act as each individual who is an owner, operator, employee, manager, agent, or contractor of such LTC facility.

Effective implementation of section 1150B of the Act may promote a timely response to potential crimes, thereby protecting residents of such facilities. The statute requires that:

- Covered individuals timely report any reasonable suspicion of a crime against a resident of, or who is receiving care from, a LTC facility;
- If the events that cause the reasonable suspicion result in serious bodily injury, the report must be made immediately after forming the suspicion (but not later than two hours after forming the suspicion). Otherwise, the report must be made not later than 24 hours after forming the suspicion;
- Covered individuals are subject to civil money penalty and exclusion sanctions for failure to meet the reporting obligations of the statute;
- LTC facilities are ineligible to receive Federal funds for any period that they employ an individual classified as an excluded individual under sections 1150B(c)(1)(B) or 1150B(c)(2)(B) of the Act; and
- LTC facilities are also subject to civil money penalty and exclusion sanctions for retaliating against any employee who makes a lawful report, causes a lawful report to be made, or for taking steps in furtherance of making a lawful report pursuant to the statute.

B. LTC Facility Responsibilities

1. Required Functions: A Medicare- or Medicaid-participating LTC facility must:

   a) ***Determine Applicability:*** Determine annually whether the facility received at least $10,000 in Federal funds under the Act during the preceding fiscal year;

b) ***Notify Covered Individuals:*** Annually notify each covered individual of that individual's reporting obligations described in section 1150B(b) of the Act, if the facility determines that it received at least $10,000 in Federal funds under the Act during the preceding fiscal year.

c) ***Post Conspicuous Notice:*** Conspicuously post, in an appropriate location, a notice for its employees specifying the employees' rights, including the right to file a complaint under this statute. The notice must include a statement that an employee may file a complaint with the SA against a LTC facility that retaliates against an employee as specified above, as well as include information with respect to the manner of filing such a complaint.

d) ***Eschew Retaliation:*** The facility may not retaliate against an individual who lawfully reports a reasonable suspicion of a crime under section 1150B. A LTC facility may not discharge, demote, suspend, threaten, harass, or deny a promotion or other employment-related benefit to an employee, or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts done by the employee, or file a complaint or a report against a nurse or other employee with the appropriate state professional disciplinary agency because of lawful acts done by the nurse or employee.

2. Additional Advisable Functions: A facility that effectively implements section 1150B will:

a) ***Coordinate with Law Enforcement:*** Coordinate with the facility's State and local law enforcement entities to determine what actions are considered crimes in their political subdivision.

b) ***Review Adherence to Existing CMS Policies:*** Review existing facility protocols and procedures to ensure adherence to existing CMS and State policies and procedures for reporting incidents and complaints. For example, participating nursing homes are already required to have policies and procedures in place to report abuse, neglect or misappropriation of resident property. During the course of a standard survey or complaint investigation, the identification of a possible crime may trigger a review of the LTC facility's policies and procedures for reporting as required under the Federal conditions and requirements for that provider type, and a review of the actions taken to make any required incident report.

c) ***Develop Policies and Procedures for Section 1150B:*** Develop and maintain policies and procedures that ensure compliance with section 1150B, including the prohibition of retaliation against any employee who makes a report, causes a lawful report to be made, or takes steps in furtherance of making a lawful report pursuant to the requirements of the statute.

C. Covered Individual Reporting

SAs receiving more than one report regarding the same incident may process and/or investigate the allegation as a single complaint or incident. Multiple covered individuals, each of whom has a reporting responsibility, may file a single report that includes information about the suspected crime from each covered person. It remains the responsibility of each covered individual to ensure their individual reporting responsibility is fulfilled, so it is advisable for any multiple-person report to include identification of all individuals making the report.

If, after a report is made regarding a particular incident or suspicion of a crime, additional covered individuals become aware of the same incident or form a similar suspicion based on the same reported events, the original report may be supplemented with additional information including the names of the additional covered individuals along with the date and time of their awareness of such incident or suspicion.

However, in no way will a single or multiple-person report preclude a covered individual from making an individual report separately, in his/her own words, to the SA and at least one law enforcement entity. While facilities may establish an efficient process for avoiding unnecessary duplication and easing administrative burdens, they cannot prohibit individual reporting directly by a covered individual.

SAs will follow the standard CMS protocols for assessing and, as appropriate, investigating all reported complaints and incidents.

D. Time Period for Individual Reporting

Section 1150B establishes two time limits for the reporting of reasonable suspicion of a crime, depending on the seriousness of the event that leads to the reasonable suspicion.

1. ***Serious Bodily Injury – 2 Hour Limit:*** If the events that cause the reasonable suspicion result in serious bodily injury to a resident, the covered individual shall report the suspicion immediately, but not later than 2 hours after forming the suspicion;

2. ***All Others – Within 24 Hours:*** If the events that cause the reasonable suspicion do not result in serious bodily injury to a resident, the covered individual shall report the suspicion not later than 24 hours after forming the suspicion.

E. Survey Guidance

It is useful to distinguish between three types of possible allegations;

1. ***Events Giving Rise to a Suspected Crime:*** As SAs receive reports of suspected crimes under this requirement, they must intake, record information about the event(s) giving rise to the suspicion, prioritize the complaints based on those underlying, alleged events, and, and as appropriate, investigate in accordance with existing CMS policies and

procedures for addressing complaints or incidents. Any deficiency citations against a LTC facility that may result will be ones that are currently specified in existing CMS regulations and guidance.

2. ***Allegations of Individual Failure to Report:*** With regard to any allegation that a covered individual had a duty to report under this requirement, but did not do so, SAs must take certain actions focused on the underlying event(s) that gave rise to the allegation:

   a) ***Intake:*** SAs must intake and record the allegation according to existing CMS policies and procedures for complaints or incident reporting. An allegation that a covered individual failed to report a reasonable suspicion of a crime will generally contain some information about the health and safety conditions in the LTC facility at issue. The SA must assess the allegation with respect to what it may reveal about those underlying conditions and the facility's compliance with existing CMS conditions and requirements.

   b) ***Prioritize and Investigate:*** If the allegation contains sufficient information, then the SA must prioritize and, as appropriate, investigate the facility's compliance with CMS conditions and requirements in accordance with existing CMS policies and procedures for addressing complaints or incidents (per part E.1 above).

3. ***Allegations of Facility Failure to Comply with Section 1150B:*** With respect to any allegation that a LTC facility failed to comply with any of the requirements of section 1150B (outlined in part B.1 of this Memorandum), SAs must take certain actions focused on determining the facility's compliance with existing CMS conditions and requirements.

   c) ***Intake:*** SAs must intake and record the allegation according to existing CMS policies and procedures for complaints or incident reporting. An allegation of facility failure to comply with this requirement will generally contain some information about the health and safety conditions in the LTC facility and facility management or actions. The SA must assess the allegation with respect to what it may reveal about the facility's compliance with existing CMS regulations.

   d) ***Prioritize and Investigate:*** If the allegation contains sufficient information, then the SA must prioritize and, as appropriate, investigate the facility's compliance with CMS conditions and requirements in accordance with existing CMS policies and procedures for addressing complaints or incidents (per part E.1 above).

For example, an allegation that covered individuals did not report or were not informed of their duty to report under 1150B of the Act could lead to a determination that the facility did not comply with existing Federal requirements for reporting incidents, or provide training and have certain policies and procedures in place. For example, possible deficiency citations in a SNF/NF, might include, but are not limited to:

- §483.13(c)-F226- Failure to develop and/or implement its policies and procedures for reporting abuse/neglect;

- §483.75(d)-F493- Governing body – failure to establish/implement facility policies regarding the management and operation of the facility.

For example, possible deficiency citations for a hospice provider might include, but are not limited to:

- §418.52(b)(4)-L508-The hospice must ensure that all alleged violations involving mistreatment, neglect, or verbal, mental, sexual, and physical abuse, including injuries of unknown source, and misappropriation of patient property by anyone furnishing services on behalf of the hospice, are reported immediately by hospice employees and contracted staff to the hospice administrator.

- §418.112 (c)(8)-L771-The hospice and SNF/NF or ICF/MR must have a written agreement that includes a provision stating that the hospice must report all alleged violations involving mistreatment, neglect, or verbal, mental, sexual, and physical abuse, including injuries of unknown source, and misappropriation of patient property by anyone unrelated to the hospice to the SNF/NF or ICF/MR administrator within 24 hours of the hospice becoming aware of the alleged violation.

For example, potential deficiency citations in an ICF/MR might include, but are not limited to:

§483.420 (d)(2)-W153-The facility must ensure that all allegations of mistreatment, neglect or abuse, as well as injuries of unknown source, are reported immediately to the administrator or to other officials in accordance with State law through established procedures.

At the present time there are no CMS regulations that apply specifically to section 1150B responsibilities of covered individuals or facilities. Consequently, SAs will focus on (a) the events giving rise to reports made under this requirement and (b) the LTC facility's responsibilities under existing CMS conditions and requirements to report incidents, prevent abuse or neglect, provide quality care and a safe environment, train staff, and similar duties of direct relevance to safety and quality of care.

Questions concerning this memorandum may be addressed to Alice Bonner at alice.bonner@cms.hhs.gov or Akosua Ghailan at Akosua.Ghailan2@cms.hhs.gov.

Effective Date: Immediately. Please ensure that all appropriate staff members are fully informed within 30 days of the date of this memorandum. CMS is drafting guidance about the civil money penality component of 1150B and information will be forthcoming.

Training: The information contained in this letter should be shared with all survey and certification staff, their managers, nursing homes, and the State/RO training coordinators.

/s/
Thomas E. Hamilton

Attachments

cc: Survey and Certification Regional Office Management

Appendix One

Definitions Included in the Affordable Care Act or Referenced from Other Sources for Purposes of Section 1150B of the Act

Agent: Title 42 of the Code of Federal Regulations, Part 455.101 defines "agent" as any person who has been delegated the authority to obligate or act on behalf of a provider.

Contractor: The term "contractor" is defined in Black's law library as any person who enters into a contract, but is commonly reserved to designate one who, for a fixed price, undertakes to procure the performance of works on a large scale, or the furnishing of goods in large quantities, whether for the public or a company or individual.

Covered Individual: A "covered individual" is defined in section 1150B(a)(3) of the Act as anyone who is an owner, operator, employee, manager, agent or contractor of the LTC facility;

Crime: Section 1150B(b)(1) of the Act provides that a "crime" is defined by law of the applicable political subdivision where a LTC facility is located. Applicable facilities must coordinate with their local law enforcement entities to determine what actions are considered crimes within their political subdivision;

Excluded Entity: An "excluded entity" means a long term care facility that been determined by the Secretary under section 1150B(d)(2) of the Act to be excluded for a period of 2 years pursuant to section 1128(b) of the Act;

Excluded Individual: An "excluded individual" means a covered individual who has been determined by the Secretary to be excluded from participation in any Federal health care program (as defined in section 1128B(f) of the Act) under sections 1150B(c)(1)(B) or 1150B(c)(2)(B) of the Act;

Exploitation: The term "exploitation" is defined in section 2011(8) of the Act (as added by section 6703(a)(1)(C) of the Affordable Care Act) as the fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an elder for monetary or personal benefit, profit, or gain, or that results in depriving an elder of rightful access to, or use of, benefits, resources, belongings, or assets;

Law Enforcement: "Law enforcement" is defined in section 2011(13) of the Act (as added by section 6703(a)(1)(C) of the Affordable Care Act) as the full range of potential responders to elder abuse, neglect, and exploitation including: police, sheriffs, detectives, public safety officers; corrections personnel; prosecutors; medical examiners; investigators; and coroners;

Long-Term Care: The term "long-term care" is defined in section 2011(14) of the Act (as added by section 6703(a)(1)(C) of the Affordable Care Act) and means supportive and health services specified by the Secretary for individuals who need assistance because the individuals have a loss of capacity for self-care due to illness, disability, or vulnerability;

Long-Term Care (LTC) facility: A "long-term care facility" is defined in section 2011(15) of the Act (as added by section 6703(a)(1)(C) of the Affordable Care Act) as a residential care provider that arranges for, or directly provides long term care;

Loss of capacity for self care: The term "loss of capacity for self-care" is defined in section 2011(14)(B) of the Act (as added by section 6703(a)(1)(C) of the Affordable Care Act) and means an inability to engage in one or more activities of daily living, including eating, dressing, bathing, management of one's financial affairs, and other activities the Secretary determines appropriate;

Neglect: The term "neglect" is defined in section 2011(16) of the Act (as added by section 6703(a)(1)(C) of the Affordable Care Act) as —(A) the failure of a caregiver or fiduciary to provide the goods or services that are necessary to maintain the health or safety of an elder; or (B) self-neglect. "Neglect" is also defined at 42 CFR 488.301 as the failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness;

Political subdivision: CMS believes a political subdivision would be a city, county, township or village, or any local unit of government created by or pursuant to State law.

Retaliate against an employee: The term "retaliate against an employee" is referenced in Section 6703(d)(1)(A) of the Act and states: When the employer discharges, demotes, suspends, threatens, harasses, or denies a promotion or any other employment-related benefit to an employee, or in any other manner discriminates against an employee within the terms and conditions of employment because the employee has met their obligation to report a suspicion of a crime.

Self-Neglect: The term "self-neglect" is defined in section 2011(18)(A) of the Act (as added by section 6703(a)(1)(C) of the Affordable Care Act) to mean an adult's inability, due to physical or mental impairment or diminished capacity, to perform essential self-care tasks including—

(A) obtaining essential food, clothing, shelter, and medical care;
(B) obtaining goods and services necessary to maintain physical health, mental health, or general safety; or
(C) managing one's own financial affairs;

Serious Bodily Injury: The term "serious bodily injury" is defined in section 2011(19)(A) of the Act (as added by section 6703(a)(1)(C) of the Affordable Care Act) as an injury involving extreme physical pain; involving substantial risk of death; involving protracted loss or impairment of the function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization, or physical rehabilitation;

In the case of "criminal sexual abuse" which is defined in section 2011(19)(B) of the Act (as added by section 6703(a)(1)(C) of the Affordable Care Act), serious bodily injury/harm shall be considered to have occurred if the conduct causing the injury is conduct described in section 2241 (relating to aggravated sexual abuse) or section 2242 (relating to sexual abuse) of Title 18, United States Code, or any similar offense under State law.

Appendix Two - Excerpts – Section 6703 - Elder Justice Act –Reporting Reasonable Suspicion of a Crime

REPORTING TO LAW ENFORCEMENT OF CRIMES OCCURRING IN FEDERALLY FUNDED LONG-TERM CARE FACILITIES

Section 6703(b)(3) LONG-TERM CARE FACILITIES.—Part A of title XI of the **Social Security Act** (42 U.S.C. 1301 et seq.), as amended by section 6005, is amended by inserting after section 1150A the following new section: **SEC. 1150B**

(a) DETERMINATION AND NOTIFICATION.—

(1) DETERMINATION.—The owner or operator of each long term care facility that receives Federal funds under this Act shall annually determine whether the facility received at least $10,000 in such Federal funds during the preceding year.

(2) NOTIFICATION.—If the owner or operator determines under paragraph (1) that the facility received at least $10,000 in such Federal funds during the preceding year, such owner or operator shall annually notify each covered individual (as defined in paragraph (3)) of that individual's obligation to comply with the reporting requirements described in subsection (b).

(3) COVERED INDIVIDUAL DEFINED.—In this section, the term 'covered individual' means each individual who is an owner, operator, employee, manager, agent, or contractor of a long-term care facility that is the subject of a determination described in paragraph (1).

(b) REPORTING REQUIREMENTS.—

(1) IN GENERAL.—Each covered individual shall report to the Secretary and 1 or more law enforcement entities for the political subdivision in which the facility is located any reasonable suspicion of a crime (as defined by the law of the applicable political subdivision) against any individual who is a resident of, or is receiving care from, the facility.

(2) TIMING.—If the events that cause the suspicion—

(A) result in serious bodily injury, the individual shall report the suspicion immediately, but not later than 2 hours after forming the suspicion; and

(B) do not result in serious bodily injury, the individual shall report the suspicion not later than 24 hours after forming the suspicion.

(c) PENALTIES.—

(1) IN GENERAL.—If a covered individual violates subsection (b)—

(A) the covered individual shall be subject to a civil money penalty of not more than $200,000; and

(B) the Secretary may make a determination in the same proceeding to exclude the covered individual from participation in any Federal health care program (as defined in section 1128B(f)).

(2) INCREASED HARM.—If a covered individual violates subsection (b) and the violation exacerbates the harm to the victim of the crime or results in harm to another individual—42 USC 1320b–25.

(A) the covered individual shall be subject to a civil money penalty of not more than $300,000; and

(B) the Secretary may make a determination in the same proceeding to exclude the covered individual from participation in any Federal health care program (as defined in section 1128B(f)).

(3) EXCLUDED INDIVIDUAL.—During any period for which a covered individual is classified as an excluded individual under paragraph (1)(B) or (2)(B), a long-term care facility that employs such individual shall be ineligible to receive Federal funds under this Act.

(4) EXTENUATING CIRCUMSTANCES.—

''(A) IN GENERAL.—The Secretary may take into account the financial burden on providers with underserved populations in determining any penalty to be imposed under this subsection.

''(B) UNDERSERVED POPULATION DEFINED.—In this paragraph, the term 'underserved population' means the population of an area designated by the Secretary as an area with a shortage of elder justice programs or a population group designated by the Secretary as having a shortage of such programs. Such areas or groups designated by the Secretary may include—

(i) areas or groups that are geographically isolated (such as isolated in a rural area);

(ii) racial and ethnic minority populations; and

(iii) populations underserved because of special needs (such as language barriers, disabilities, alien status, or age).

(d) ADDITIONAL PENALTIES FOR RETALIATION.—

(1) IN GENERAL.—A long-term care facility may not—

(A) discharge, demote, suspend, threaten, harass, or deny a promotion or other employment-related benefit to an employee, or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts done by the employee; or

(B) file a complaint or a report against a nurse or other employee with the appropriate State professional disciplinary agency because of lawful acts done by the nurse or employee, for making a report, causing a report to be made, or for taking steps in furtherance of making a report pursuant to subsection (b)(1).

(2) PENALTIES FOR RETALIATION.—If a long-term care facility violates subparagraph (A) or (B) of paragraph (1) the facility shall be subject to a civil money penalty of not more than

$200,000 or the Secretary may classify the entity as an excluded entity for a period of 2 years pursuant to section 1128(b), or both.

(3) REQUIREMENT TO POST NOTICE.—Each long-term care facility shall post conspicuously in an appropriate location a sign (in a form specified by the Secretary) specifying the rights of employees under this section. Such sign shall include a statement that an employee may file a complaint with the Secretary against a long-term care facility that violates the provisions of this subsection and information with respect to the manner of filing such a complaint.

(e) PROCEDURE.—The provisions of section 1128A (other than subsections (a) and (b) and the second sentence of subsection (f)) shall apply to a civil money penalty or exclusion under this section in the same manner as such provisions apply to a penalty or proceeding under section 1128A(a).

(f) DEFINITIONS.—In this section, the terms 'elder justice', 'long term care facility', and 'law enforcement' have the meanings given those terms in section 2011.

Questions & Answers

Reporting Reasonable Suspicion of a Crime in Long Term Care Facilities

January 20, 2012

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Reporting Reasonable Suspicion of a Crime in Long Term Care Facilities

A. Background

A.1. What are the provisions in section 6703 of the Affordable Care Act, part of the Elder Justice Act?

Subtitle H of the Patient Protection and Affordable Care Act (Affordable Care Act) of 2010 is also known as the Elder Justice Act of 2009. Section 6703(b)(3) of the Affordable Care Act (which is located in this subtitle) amends the Social Security Act (the Act) by establishing new section 1150B of the Act entitled, "Reporting to Law Enforcement of Crimes Occurring in Federally Funded Long-Term Care Facilities." Section 1150B of the Act requires certain individuals in federally funded long-term care facilities to timely report any reasonable suspicion of a crime committed against a resident of that facility. Those reports must be submitted to at least one law enforcement agency of jurisdiction and the State Survey Agency (SA), in fulfillment of the statutory directive to report to the Secretary. Individuals who fail to report under section 1150B(b) shall be subject to various penalties, including civil monetary penalties. Section 1150B(d) of the Act also prohibits a long-term care facility from retaliating against any individual who makes such a report.

A.2. What is the effective date of the section 6703(b)(3) requirements?

The amendments made to Title XI of the Act by section 6703(b)(3) of the Affordable Care Act became effective on March 23, 2011. Therefore, the requirements and provisions of that section are currently in effect.

B. Facility Responsibilities

B.1. What are a long term care facility's responsibilities under section 1150B of the Act?

There are three specified responsibilities for long term care facilities in section 1150B of the Act: (1) to notify covered individuals annually of their reporting obligations, (2) to prevent retaliation if an employee makes a report, and (3) to post information about employee rights, including the right to file a complaint if a long term care facility retaliates against anyone who files a report. Reporting obligations of crimes themselves fall on covered individuals, not the facility as an entity. In other words, each owner, operator, employee, manager, agent or contractor of a long term care facility is responsible to meet the reporting requirements of this provision.

Facility policies and procedures should address the mechanism for documenting that all covered individuals have been notified annually of their reporting obligations. Examples of such documentation may include a copy of a notice or letter sent to covered individuals or a completed training/orientation attendance sheet specifying reporting obligations.

B.2. Section 1150B requires long term care facilities to conspicuously post notice of employee rights posters in a form specified by the Secretary- is this form available?

There is no specified template or form for the posting of this information at this time.. Rather, the required information and elements to be included in such a sign are described in CMS's survey and certification memorandum S&C: 11-30-NH dated June 17, 2011. This S&C Memo is available online at:

http://www.cms.gov/Surveycertificationgeninfo/downloads/SCLetter11_30.pdf

B.3. What types of facilities must conform to the requirements under section 1150B of the Act?

"Long-term care facility" is defined in section 2011 of the Act as a residential care provider that arranges for, or directly provides, long-term care (i.e., supportive and health services for individuals who need assistance because the individuals have a loss of capacity for self-care due to illness, disability, or vulnerability). Facilities that receive at least $10,000 of Federal funds annually and that meet the definition of long-term care facility include the following: nursing facilities (NFs), skilled nursing facilities (SNFs), hospice programs operating in SNF/NFs, and intermediate care facilities for the mentally retarded (ICF/MR). Assisted living facilities are not included under this statute at this time.

B.4. Who is considered a "covered individual?"

A "covered individual" is anyone who is an owner, operator, employee, manager, agent or contractor of the long term care facility (Section 1150B(a)(3) of the Act).

B.5. Who are "excluded individuals" that we should not employ?

If a long term care facility employs any covered individual who has been excluded from participating in any Federal health care program under sections 1150B(c)(1)(B) or (c)(2)(B) due to failure to meet the reporting requirements of this provision, then that facility will be ineligible to receive Federal funds under the Act. CMS is currently working with the Office of the Inspector General on a database that will include a list of such excluded individuals.

B. 6. Does section 1150B cover only those with first-hand knowledge of the suspicion of a crime?

The law does not specify "first-hand knowledge." The law states that each covered individual must report any reasonable suspicion of a crime against a resident of a long term care facility. However, if during the course of an investigation of a complaint or incident there is evidence gathered from individuals with first-hand knowledge of the suspicion of the crime, this additional information may be considered under section 1150B, even if those individuals did not file a separate report.

B.7. In a Continuing Care Retirement Community that includes independent living and assisted living as well as nursing care, is the expectation that the facility post notice in all areas of the community, or just the nursing care unit?

The requirement is to post notice in each applicable long term care facility. In this example, it would be the SNF/NF.

B.8. What is the difference between reporting incidents to the SA and reporting the suspicion of a crime to the SA and local law enforcement?

Current regulation requires a facility to report incidents: §483.13(c)(2) The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency). This requirement has not changed and the mechanics of complying with this regulation are the same as they have been. Reporting the suspicion of a crime is the responsibility of "covered individuals." There may be instances where an occurrence will require both the facility to report the alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source and misappropriation of resident property and "covered individuals " must report the suspicion of a crime to the State Survey Agency and to local law enforcement.

C. Reporting Requirements

C.1. All reasonable suspicions of a crime have to be reported to the State Survey Agency. Is there a specific form? What number should we call?

No, the statute does not require the use of a specific form for reporting suspicions of a crime. Reporting may be done by telephone, electronic mail, fax or other means within the specified timeframes of the law. States may choose to adopt use of a specific form. Unless otherwise specified, the State Survey Agency contact number is the same number that you use to report complaints against a facility to the Survey Agency. It is important to keep in mind that the time frames for reporting the suspicion of a crime are different and more stringent than time frames related to reporting an incident under CMS regulations.

C.2. If a covered individual reports a suspicion of a crime directly to law enforcement and the survey agency, can the facility's policy require that individual to report the concern/incident to his/her facility supervisor or the administrator as well?

Covered individuals have an independent obligation to report the suspicion of a crime against a long term care facility resident directly to local law enforcement and the State Survey Agency.

In order to encourage reporting of the suspicion of a crime, facilities should promote a culture of safety and performance improvement in the work environment. This includes freedom from fear of retaliation if an employee reports the suspicion of a crime, an open and just culture where feedback and communication are encouraged, and the ability for staff to speak up about problems or issues that they identify.

Thus, it would be prudent that a facility policy not require disclosure of whether or not a covered individual has reported a suspicion of a crime to local law enforcement and the State Survey Agency. It is important to note, however, that Federal regulations do require SNFs and NFs to ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency) (42 C.F.R. §483.13(c)(2)). See also C3 below.

C.3. When a skilled nursing facility has a case of abuse, we submit a 24-hour report and then a 5-day report specific to abuse reporting. Do we also need to report this to the Secretary and local law enforcement?

Reports of suspicions of crimes committed against a resident must be submitted to at least one law enforcement agency of jurisdiction and the State Survey Agency (in fulfillment of the statutory directive to report to the Secretary). If there is reasonable suspicion that a crime has occurred (crime being defined by laws of the applicable political subdivision where the facility is located), then in addition to reporting the allegation of abuse to the State Survey Agency, the individual must also report this to local law enforcement.

C.4. Section 1150B specifies reporting time frames of 2 hours or 24 hours when there is a reasonable suspicion of a crime; is this business hours? For example, if the suspicion occurs on a Saturday, must it be reported then, or can it wait until Monday?

No. Reporting requirements are based on real (clock) time, not business hours. Section 1150B(b)(2) provides that if the events that cause the suspicion result in serious bodily injury, the individual must report this immediately (but not later than 2 hours after forming the suspicion); otherwise, the individual must report the suspicion not later than 24 hours after forming the suspicion. State Survey Agencies should have a reporting mechanism available 24/7 (e.g., hotline, answering machine that may receive a message, live person, fax, etc.).

For example, if a reasonable suspicion of a crime that results in serious bodily harm occurs on a Saturday, the timing obligation for reporting this would be satisfied if the individual who formed the suspicion both left a message on the State Survey Agency answering machine and notified local law enforcement on that same day within two hours of forming the suspicion.

C.5. Is it safe to assume that falls that result in a hospitalization, unless directly related to a witnessed act of abuse, do not have to be reported to law enforcement?

A fall resulting in a hospitalization of a resident would generally be reported to the State Survey Agency under current incident reporting guidelines and State licensure regulations. A fall would only have to be reported to law enforcement (as well as the State Survey Agency under section 1150B) if there was a reasonable suspicion of a crime related to that event or incident.

C.6. Does section 1150B require reporting of acts committed by a resident of a nursing facility that has dementia? We often have resident to resident altercations on our Alzheimer's Unit that could constitute assault. Would we now need to report assault by a resident with dementia to local law enforcement?
This will be case specific and should be addressed through discussions among facilities, State Survey Agencies and local law enforcement. Crime is defined by the law of the applicable political subdivision. Not every resident to resident altercation will be appropriate to report to local law enforcement; however, some cases may be reportable. CMS expects long term care facilities to take any necessary action to prevent resident-to-resident altercations to every extent possible.

C.7. Should facilities or State Survey Agencies meet with local law enforcement officials to determine which actions they consider to be crimes and which issues should be reported to law enforcement?

This is advisable. CMS encourages community partnerships through discussions between State Survey Agencies and local law enforcement. We encourage the participation of long term care ombudsmen, resident advocates, and worker representatives as well.

C.8. Does an unusual bruise require reporting to law enforcement?

Not necessarily. Each event or suspicion will be case specific. A bruise or injury of unknown source should be reported to the State Survey Agency through the usual incident reporting processes. However, if there is a reasonable suspicion that the injury is the result of a crime, it should be reported to law enforcement as well.

C.9. If a suspicion of a crime is reported by a covered individual, and the occurrence also meets the requirements for incident reporting, must the facility report the incident using the usual incident reporting mechanisms?

Current regulation requires a facility to report incidents: §483.13(c)(2) The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency). This requirement has not changed and the mechanics of complying with this regulation are the same as they have been. Reporting the suspicion of a crime is the responsibility of "covered individuals." There may be instances where an occurrence will require both the facility to report the alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source and misappropriation of resident property and "covered individuals " must report the suspicion of a crime to the State Survey Agency and to local law enforcement.

C.10. To what number or numbers is the suspicion of abuse reported? Are there different numbers for reporting when there has been serious injury?

Reporting may be done by telephone or by fax within the specified timeframes of the law. Unless otherwise specified, the State Survey Agency contact number is the State Agency that conducts the Medicare and Medicaid certification Surveys. It is important to keep in mind that the time frames for reporting the suspicion of a crime are different and more stringent than time frames related to reporting an incident.

C.11. If our State mandated Resource Management Plan requires staff make a direct report to one of three designated staff, does this preclude that requirement or may we assist staff in making the required reports to the SA and Law Enforcement?

Covered individuals would still have an independent obligation to report the suspicion of a crime directly to local law enforcement and the State Survey Agency. You also may assist staff in making reports to the SA and to law enforcement. In order to encourage reporting of the suspicion of a crime, facilities should promote a culture of safety and performance improvement in the work environment. This includes freedom from fear of retaliation if an employee reports the suspicion of a crime, an open and just culture where feedback and communication are encouraged, and the ability for staff to speak up about problems or issues that they identify.

Additionally, it is important to note, however, that Federal regulations do require skilled nursing facilities (SNFs) and nursing facilities (NFs) to ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency) (42 C.F.R. §483.13(c)(2)).

C.12. Is abuse to be considered as part of this required reporting?

Abuse should be considered under current health and safety standards. Under current requirements, abuse should always be reported; whether it rises to the level of a crime would depend on the specific situation. For example, sexual abuse would be considered a crime; physical assault that leads to physical injury would also be considered a crime. Other types of abuse should always be reported under health and safety standards but may not be considered a crime.

Federal regulations do require SNFs and NFs to ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with State law through established procedures (including to the State survey and certification agency) (42 C.F.R. §483.13(c)(2)).

C.13. Is it acceptable for a facility in its compliance policy to state that covered individuals may either (a) report reasonable suspicion of crime directly to the state survey agency and law enforcement, or (b) report reasonable suspicion of crime to the facility administrator who will then coordinate timely reporting to the state survey agency and law enforcement on behalf of all covered individuals who made the report to the administrator?

Yes, covered individuals may (a) report reasonable suspicion of crime directly to the State Survey Agency and law enforcement, and/or (b) report reasonable suspicion of crime to the facility administrator who will then coordinate timely reporting to the state survey agency and law enforcement on behalf of all covered individuals who made the report to the administrator. Reporting to the administrator would suffice if an individual has clear assurance that the administrator is reporting it. Reports should be documented and the administrator should keep a record of the documentation. Everyone who saw a possible crime has the obligation to report it. The administrator could coordinate the reports submitted, but each person has to report. In addition, facilities cannot prohibit or circumscribe reporting directly to law enforcement even if they have a coordinated internal system.

C.14. Is it sufficient to send notification by fax to Certification as usual or is it required that we contact a person? If it is a person, will that individual be available on nights and weekends? If yes and different from usual contact numbers, please forward that information.

Reporting may be done by telephone, electronic mail, fax or other means within the specified timeframes of the law. Unless otherwise specified, you would contact the State Survey Agency contact number, which is the State Agency that conducts the Medicare and Medicaid certification Surveys. It is important to keep in mind that the time frames for reporting the suspicion of a crime are different and more stringent than time frames related to reporting an incident under CMS regulations.

C.15. In reference to the duty of covered individuals to timely report a suspicion of a crime, I see there are two timelines that must be followed. I also see (if I'm reading the memo correctly) that a covered individual must report not only to law enforcement but also to State Survey agencies. Law enforcement operates 24/7. However, if a covered individual determines that he/she has a reasonable suspicion involving serious bodily injury and it is after business hours for the state agency or the weekend, what procedure should that individual follow to ensure that he/she will not be held responsible for not reporting to the state w/in the 2 hour timeline? Also, is reporting to the law enforcement in addition to reporting of State and FEDS (1 day, 15 day, Immediate and 5 day)?

Section 1150B establishes two time limits for the reporting of reasonable suspicion of a crime, depending on the seriousness of the event that leads to the reasonable suspicion.

1. Serious Bodily Injury – 2 Hour Limit: If the events that cause the reasonable suspicion result in serious bodily injury to a resident, the covered individual shall report the suspicion immediately, but not later than 2 hours after forming the suspicion;

2. All Others – Within 24 Hours: If the events that cause the reasonable suspicion do not result in serious bodily injury to a resident, the covered individual shall report the suspicion not later than 24 hours after forming the suspicion.

Please note: Both types of reporting (incident report to State and crime reporting to LE/SA) must be done if both situations are met.

Reporting requirements are based on real (clock) time, not business hours. Section 1150B(b)(2) provides that if the events that cause the suspicion result in serious bodily injury, the individual must report this immediately (but not later than 2 hours after forming the suspicion); otherwise, the individual must report the suspicion not later than 24 hours after forming the suspicion. State Survey Agencies should have a reporting mechanism available 24/7 (e.g., hotline, answering machine that may receive a message, live person, fax, etc.). For example, if a reasonable suspicion of a crime that results in serious bodily harm occurs on a Saturday, the timing obligation for reporting this would be satisfied if the individual who formed the suspicion both left a message on the State Survey Agency answering machine and notified local law enforcement on that same day within two hours of forming the suspicion.

<u>Please note the State and Federal requirements are listed below:</u>
F225, §483.13(c)(2) The facility must ensure all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property are reported immediately to the administrator of the facility and to other officials in accordance with state law through established procedures (including to the state survey and certification agency).

F225, §483.13(c)(4) The results of all investigations must be reported to the administrator or his designated representative and to other officials in accordance with state law (including to the state survey and certification agency) within 5 working days of the incident, and if the alleged violation is verified appropriate corrective action must be taken.

Immediately: per CMS means as soon as possible but ought not to exceed 24 hours after discovery of the Incident. "As such, states may not eliminate the obligation for any of the above violations (i.e., mistreatment, neglect, abuse, injuries of unknown source, and misappropriation of resident property) to be reported, nor can the state establish longer time frames for reporting than mandated in the regulations…".

Nursing homes must comply with requirements for participation, including reporting requirements set out in 42 C.F.R. §§483.13(c)(2) and (4). *Please note: No state law can override the obligation of a nursing home to fulfill the requirements under 42 C.F.R. §483.13(c), as long as Medicare/Medicaid certification is in place.*

C.16. Under Facility Requirements 1. (c) and (d) I find some information on what to include in the notice that we must conspicuously post. Is there any other information that should be included in the notice re employee's rights?

The notice should include the following:

REQUIREMENTS FOR POSTING:

1. Individual's right to file a complaint with the SA if they feel the facility has *retaliated against an employee or individual* who reported a suspected crime under this statute, and how to file such a complaint with the SA;
2. The sign may be posted in the same area that the facility posts other required employee signs, such as labor management posters.
3. Size and type requirements for the sign should be no less than the minimums required for the other required employment-related signs.

D. Liability

D.1. Can facilities be held liable in a civil or criminal case if a covered individual does not report suspicion of a crime?

This is a question for the courts, not one that CMS can answer. It is beyond the scope of the Act.

E. State Agency's Requirements

E.1. What is the SA's role in enforcing the provisions of § 1150B?

We are not asking States to enforce §1150B, however, we expect States to make assessments under the current complaint process. We are not requiring States to make a determination on whether a crime has been committed. SAs must assess reports received under section 1150B following CMS protocols for processing incident reports or complaints, and investigate such reports as appropriate to those protocols. In addition, SAs must assess the long-term care facility's compliance with the facility obligations of section 1150B if either of the following are triggered: (a) during the course of a standard survey or complaint investigation the survey team identifies a report of a suspicion of a crime against an individual who is a resident of, or is receiving care from, the LTC facility, and the incident has not been previously reported to the State SA, or (b) the SA receives

a specific allegation of noncompliance with section 1150B by the facility and the SA assesses the allegation to be credible and serious (including credible allegations of retaliation against an individual who has reported suspicion of a crime). In such a case the SA must review both facility responsibilities under this section and the responsibilities of a covered individual.

E.2. If a facility has complied with its requirements for posting information regarding §1150B and notifying individuals of their reporting obligations, is there any other expectation on the part of the SA?

SAs will follow the standard CMS protocols for assessing and, as appropriate, investigating all reported complaints and incidents.

E.3. Can CMS provide examples of the circumstances in which self-neglect would be a crime?

Examples of what constitutes a crime are defined by the laws within the local jurisdiction of the long-term care facility, as interpreted by local law enforcement entities. However, allowing self-neglect to persist without intervention may result in a facility`s failure to meet Medicare conditions of participation and could result in a deficient practice under federal health and safety regulations. Therefore, with regard to self-neglect, facilities should focus on preventing self-neglect, which is addressed in health and safety standards.

F. ICF/MRs

F.1. I am seeking clarification on who or what agency should the facility call? The memo made mention about the "secretary", are they to continue the 1-800-96abuse hotline or should they be contacting another number.

Unless otherwise specified, you would contact the State Survey Agency contact number, which is the same number that you use to report complaints against a facility to the State Agency that conducts the Medicaid certification surveys. It is important to keep in mind that the time frames for reporting the suspicion of a crime are different and more stringent than time frames related to reporting an incident under CMS regulations.

F.2. I am writing from an ICF facility in El Cajon, CA that provides long-term care to adults with developmental disabilities. I am the agency trainer and just trying to get some slight clarification on the new reporting standard, so I can appropriately provide training within our agency. Currently when reporting an allegation of abuse we do so to the local Ombudsman as well as to state licensing. In this case would the Local Ombudsman be the same as a member of law enforcement?

Reporting to the local ombudsman does not meet the requirement for reporting to local law enforcement. You would contact the State Agency that conducts the Medicaid certification Surveys.

F.3. I am a little confused about the memo I received from DHHS about CMS S&C 11-30-NH- Reporting Reasonable Suspicion of a crime in LTC facility: Section 1150B of Social Security Act. I am the administrator of a provider service; we have 4 group homes for the mentally challenged adults. I am unclear of how the individuals are suppose to report a crime-who is the secretary and how is this person contacted. Is there a phone number or address and is there a form to report on? If so can I get a copy of the form? I understand law enforcement to report it to but what State Agency are individuals suppose to report, Elder or adult protection services? Please help me understand so I can train staff and put proper notification out for staff to read.

The State Agency acts on the behalf of the Secretary for this requirement in fulfillment of the statutory directive to report to the Secretary. Reports must be submitted to at least one law enforcement agency of jurisdiction and the State Agency. Reporting to Elder or Adult Protective Services would not meet the requirement for reporting

to the Secretary. You would report to law enforcement and the State Agency that conducts the Medicaid certification Surveys.

F.4. I work at an ICF, whose policy directs employees to report incidents to management. Management is then required to make all other notifications. Does this new requirement mandate that the employee who suspects a crime (i.e., direct care staff), must be the one who calls the SA and law enforcement or, may the employee choose to continue to notify management with the understanding that management will make these notifications? Also, who do we list as the SA contact (name, phone, email, fax)?

Yes, covered individuals may (a) report reasonable suspicion of crime directly to the state survey agency and law enforcement, and/or (b) report reasonable suspicion of crime to the facility administrator who will then coordinate timely reporting to the state survey agency and law enforcement on behalf of all covered individuals who made the report to the administrator. Reporting to the administrator would suffice if an individual has clear assurance that the administrator is reporting it. Reports should be documented and the administrator should keep a record of the documentation. Everyone who saw a possible crime has the obligation to report it. The administrator could coordinate the reports submitted but each person has to report. In addition, facilities cannot prohibit or circumscribe reporting directly to law enforcement even if they have a coordinated internal system.

In order to encourage reporting of the suspicion of a crime, facilities should promote a culture of safety and performance improvement in the work environment. This includes freedom from fear of retaliation if an employee reports the suspicion of a crime, an open and just culture where feedback and communication are encouraged, and the ability for staff to speak up about problems or issues that they identify. Employee must be given the option of independent reporting, in case they fear retaliation or want to remain anonymous.

Unless otherwise specified, you would contact the State Survey Agency contact number, which is the same number that you use to report complaints against a facility to the State Agency that conducts the Medicaid certification surveys. It is important to keep in mind that the time frames for reporting the suspicion of a crime are different and more stringent than time frames related to reporting an incident under CMS regulations.

G Definitions

G.1. What is the definition of "contractor" and "agent" as used in Section 1150B of the Act?

Please refer to Appendix 1 for the definition of "contractor" and "agent".

G.2. Are employees of contractors, including direct care staff employed by temporary agencies, covered individuals?

Please refer to Appendix 1 for the definition of who is a "covered individual".

G.3. Who is a "covered individual"?

Please refer to Appendix 1 for the definition of who is a "covered individual".

NOTICE REQUIREMENTS FOR REPORTING SUSPECTED CRIMES UNDER SECTION 1150B OF THE SOCIAL SECURITY ACT

Section 1150B of the Social Security Act (the Act), as established by section 6703(b)(3) of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act) requires the reporting of any reasonable suspicion of a crime committed against a resident of, or an individual receiving care from, a long term care facility. Specifically, the Act requires long term care facilities to post a notice in a conspicuous location that informs all *covered individuals,* as defined in S&C Memo 11-30-NH, of their right to file a complaint with the Secretary against a facility that retaliates and the manner of filing such a complaint.

The notice should include the following:

4. Individual's right to file a complaint with the SA if they feel the facility has *retaliated against an employee or individual* who reported a suspected crime under this statute, and how to file such a complaint with the SA;
5. The sign may be posted in the same area that the facility posts other required employee signs, such as labor management posters.
6. Size and type requirements for the sign should be no less than the minimums required for the other required employment-related signs.