Introduction

The passage of the Elder Justice Act, which was part of the Patient Protection and Affordable Care Act of 2010 (“PPACA”), included a requirement that certain “covered individuals” report “any reasonable suspicion of a crime” against any individual who is receiving care from a long term care facility to government regulators and at least one law enforcement agency. Though the crimes reporting requirement has been law since March 23, 2010, the date that PPACA became law, Federal and State regulators just recently issued guidance to the long term care community regarding the scope and applicability of the requirement.

On June 17th, 2011, the Centers for Medicare and Medicaid Services ("CMS") released Survey and Certification Memorandum 11-30-NH (the “CMS Memorandum”) that provides guidance to State Survey Agencies (“SSA”) regarding the reporting of reasonable suspicions of crimes in long term care facilities (“LTC”). CMS updated the CMS Memorandum on August 12th, 2011, to include a Questions and Answers section, at pages 13-18, and guidance on the content of required notice regarding anti-retaliation provisions (see Exhibit A for the CMS Memorandum).

On August 31, 2011, the Indiana State Department of Health (“ISDH”) issued ISDH Program Advisory LTC 2011-01 (the “ISDH Program Advisory”) (see Exhibit B) that contains further guidance for LTC facilities in the State of Indiana. The ISDH Program Advisory addresses many of the same issues contained in the CMS Memorandum, but gives specific guidance on the reporting process and contact information for submitting reports to the ISDH, gives recommendations for implementation of the reporting requirements, includes templates for required and recommended postings, includes a revised Incident Report Form, and also includes an ISDH Questions and Answers document.

Summary of the CMS Memorandum

- **Scope and Applicability**

The CMS Memorandum has been long expected by the LTC industry and serves as the only official guidance from CMS on the suspicion of crimes reporting requirement. CMS acknowledges that there are “no CMS regulations that apply specifically to section 1150B [the reporting requirements]” and the CMS Memorandum serves to explain the requirements of the new law so that it is implemented without any delay that may be caused due to the rule-making process. CMS notes further guidance will be released that addresses implementation of the Civil Monetary Penalty component of the law.

The reporting requirement applies to all LTC facilities that received at least $10,000 in federal funds during the preceding year. The CMS Memorandum specifies that the reporting obligation applies to Nursing Facilities, Skilled Nursing Facilities, hospices that provide services in long-term care facilities and ICFs/MR. The reporting requirements appear not apply to assisted living facilities receiving Medicaid waiver funds. Under the new law, a covered long term care facility must:

---

1. Determine each year whether it received at least $10,000 in Federal funds in the preceding year;
2. Annually notify all covered individuals of the individual’s reporting obligation (covered individuals are owners, operators, employees, managers, agents or contractors of the facility);
3. Post a notice in appropriate and conspicuous locations for employees that details employees’ rights, including information on how to file a complaint with the SSA if an employee is retaliated against for making a report to the SSA pursuant to the reporting requirement;
4. Not retaliate against a covered individual who lawfully reports a reasonable suspicion of a crime under Section 1150B.

The CMS Memorandum then goes on to discuss functions that will be executed by a “facility that effectively implements section 1150B,” which are:

1. Coordination with State and local law enforcement to determine what actions are considered crimes;
2. Review existing facility policies and procedures to ensure compliance with existing CMS and State requirements for reporting incidents and complaints (i.e. policies and procedures in place for reporting of abuse, neglect or misappropriation of resident property); and
3. Develop and maintain policies and procedures to ensure compliance with Section 1150B.

Civil Monetary Penalty and exclusion sanctions may apply to covered individuals who fail to comply with the reporting requirements and to LTC facilities that retaliate against an employee who makes a lawful report, and LTC facilities are ineligible to receive Federal funds for any period they employ an excluded individual due to certain violations of the new law.

• **Covered Individual Reporting**

Covered individuals (owners, operators, employees, managers, agents or contractors of the facility) are required to report reasonable suspicions of crimes to the SSA and at least one local law enforcement agency. The required reporting time period depends on whether the reasonable suspicion was based on events that result in serious bodily injury; these suspicions must be reported immediately and no later than 2 hours after the suspicion was formed. All other events giving rise to a reasonable suspicion of a crime must be reported no later than 24 hours after the suspicion was formed.

While each covered individual has the right and duty to report to the SSA and at least one local law enforcement agency, multiple covered individuals may file a single report that includes information about the suspected crime from each covered individual. Each covered individual that joins a multiple-person report should be specifically identified. A multiple-person report may be further supplemented with additional information should additional covered individuals become aware of the incident or events giving rise to a reasonable suspicion of a crime. Though the multiple-person reporting mechanism may be instituted by a facility, a facility may not prohibit an individual from directly reporting to the SSA or a local law enforcement agency.

• **Survey Agency Actions Based on Reports Received**

The CMS Memorandum also provides SSAs with guidance on distinguishing between types of allegations that it may receive from covered individual reports. The allegation categories specified by CMS are (1) Events Giving
Rise to a Suspected Crime; (2) Allegations of Individual Failure to Report; and (3) Allegations of Facility Failure to Comply with Section 1150B. In each case, if an SSA receives a report that falls into any of the above three categories, the SSA must assess the reported information and investigate based upon existing CMS policies and procedures for addressing complaints or incidents. Any deficiency citations issued will be ones that are currently specified in existing CMS regulations and guidance.

For example, the CMS Memorandum states that an allegation that a covered individual did not report or were not informed of their duty to report could lead to a F226 tag (failure to develop and/or implement policies and procedures for reporting abuse/neglect) or an F493 tag (failure to develop and/or implement policies and procedures regarding management and operation of the facility).

Additional Guidance in the ISDH Program Advisory

The ISDH Program Advisory includes additional guidance to LTC facilities to assist with implementation of the reporting requirement (see Exhibit B). While the ISDH Program Advisory does not stray too far from the CMS Memorandum, there are a several passages and attachments that provide additional context and detail to the reporting requirement.

- Formation of a Reasonable Suspicion of a Crime

On page 3 of the ISDH Program Advisory, timing of reports of reasonable suspicions of crimes is discussed. The ISDH notes that it is the formation of the reasonable suspicion of a crime that triggers the duty to report and that the time clock (2 hours for serious bodily injury; 24 hours for all other crimes) for such a report. The ISDH also notes that covered individuals may form a reasonable suspicion of a crime at different times based on the same event.

In addition, at Question 2 on page 1 of Attachment D to the ISDH Program Advisory (the ISDH Questions and Answers document) the ISDH further explains that it believes a covered individual must have credible information in order to form a reasonable suspicion of a crime. The ISDH attempts to distinguish between the “rumor mill” that may produce information that is not credible, and therefore is not the basis for a reasonable suspicion of a crime, and more reliable information that does serve as the basis for a reasonable suspicion.

To be certain, this is a grey area. Formation of a reasonable suspicion is an individualized concept, which the ISDH acknowledges at Question 5 on page 3 of Attachment D to the ISDH Program Advisory. Even so, due to the harsh penalties that may be levied upon a covered individual for failure to report the most prudent course of action for any covered individual is to report nearly any incident that may be considered a crime.

- How to Report a Reasonable Suspicion of a Crime to the ISDH

The ISDH notes there is no prescribed form for reporting a reasonable suspicion of a crime, but the ISDH has provided a revised Incident Report Form (see Exhibit C) that includes a new section at the beginning of the form for reporting of a reasonable suspicion of a crime. In addition, the ISDH provides an email address, fax number and phone number for covered individuals to use in order to report a reasonable suspicion of a crime (see page 3, ISDH Program Advisory). The ISDH also developed a notice that facilities may, and probably should, post that
includes the ISDH contact information and provides a space for facilities to fill-in contact information for reporting to local law enforcement (see ISDH Program Advisory, Attachment B).

- **Required Posting of Notice to Covered Individuals**

The ISDH has provided a sample form for facilities to post in the facility, as required by the statute, that provides information to covered individuals regarding the duty to report a reasonable suspicion of a crime, timing requirements for the report and the right of covered individuals to file a complaint against a facility that retaliates against the covered individual for filing a report pursuant to the requirement (see ISDH Program Advisory, Attachment A).

- **Development of Policies and Procedures**

The ISDH specified eight (8) elements within facility policies and procedures that ISDH Surveyors will expect to see (see page 9, ISDH Program Advisory). The elements are:

  i. **A process for annually determining receipt of Federal funds in excess $10,000**
  ii. **A process for providing annual notice to covered individuals**
  iii. **Evidence of a plan for training covered individuals**
  iv. **Steps that a covered individual must take to make a report to the ISDH and local law enforcement when the covered individual forms a reasonable suspicion of a crime (when to report, what to report, who to report to)**
  v. **Steps taken to coordinate with local law enforcement regarding reporting and determination of crimes**
  vi. **Information on where the posting of notice to employees regarding employee rights to be free from retaliation for complying with the reporting requirement**
  vii. **Prohibition of retaliation against an employee for making a report, causing a report to be made, or for taking steps in furtherance of making a report pursuant to the Act.**
  viii. **Employment of an individual who has been determined to be excluded participation in any Federal health care program.**

It is recommended that each facility expressly cite these elements in policies and procedures and even go so far as to use the exact language above as headings of policies and procedures so that ISDH Surveyors are easily able to identify facility compliance.

- **Effective Date and Timing of Facility Implementation**

The ISDH provides a timeline of steps for implementation of the reporting requirement in Attachment C to the ISDH Program Advisory. The deadlines are:

  **September 15, 2011:** Facilities must determine whether more than $10,000 in Federal funds was received in the preceding fiscal year.

  **September 30, 2011:** Facilities must coordinate with local law enforcement regarding the mechanics of reporting reasonable suspicions of crimes to the law enforcement agency, discuss actions that are crimes and potential training opportunities.
Facilities must annually notify each covered individual of that individual’s reporting obligation, develop policies and procedures regarding the reporting requirement, and develop procedures for training of additional covered individuals who begin providing care or services at the facility during the year.

**October 31, 2011:** Covered Individuals must begin reporting reasonable suspicions to the ISDH and local law enforcement no later than this date.

Facilities must review and revise existing incident reporting policies and procedures regarding abuse, neglect and misappropriation of resident property.

Facilities must develop and maintain policies and procedures to ensure compliance with the reporting requirement.

The ISDH notes in the ISDH Program Advisory that the CMS intends the reporting requirement to be in effect, without delay. Although the ISDH implementation timeline indicates that surveyors will begin surveying for compliance with all of the requirements of the new law on November 1, 2011, the ISDH also expects “facilities will immediately begin implementation and demonstrate continued progress towards complete implementation” (page 10, ISDH Program Advisory).

**Conclusion**

There is relationship between current requirements regarding reporting of incidents and unusual occurrences within LTC facilities and the reporting of reasonable suspicions of crimes. There is nearly an unending list of reportable incidents and unusual occurrences that may also give rise to a reasonable suspicion of a crime. LTC facilities must wrestle with the difficult cases of resident to resident abuse, perhaps between residents with dementia or Alzheimer’s, and whether that “abuse” that is reportable as an incident would also be reportable as a suspected crime (assault, battery). Because of the steep penalties that could be levied by the government for non-compliance, there will likely be a tendency to over-report reasonable suspicions of crimes.

Training of covered individuals regarding their individual duty under the requirement is critical. Each facility will want to be sure that each covered individual understands his/her responsibility, how to make a report, how to join a group report if a group report is being made, that the individual is not to be retaliated against for making a report to the ISDH or local law enforcement and if retaliation occurs how the individual can make a report regarding such retaliation.

LTC facilities need to reach out to their local law enforcement agency, either the county sheriff or city/town police, as applicable, regarding communication of reports. Establishing a relationship with local law enforcement for purposes of reporting reasonable suspicions and understanding what constitutes a crime in the local jurisdiction are key components to implementation.

*This article was written by Zach Cattell, JD, IHCA General Counsel*