

If you have questions or would like additional information on the material covered in this Alert, please contact the author:

**Susan A. Edwards**

Associate, Washington, D.C.

+1 202 414 9261

sedwards@reedsmith.com

...or any other member of the Reed Smith Life Sciences Health Industry group with whom you work.

## CMS Issues Guidance on Elder Justice Act Reporting of 'Reasonable Suspicion' of Crimes in Long-Term Care Facilities

The Elder Justice Act ("EJA"), enacted as part of the Patient Protection and Affordable Care Act ("Affordable Care Act" or "ACA"), authorized a comprehensive range of initiatives aimed at combating elder abuse, neglect, and exploitation in long-term care facilities. Section 6703(b)(3) of the ACA added section 1150B to the Social Security Act ("Section 1150B"), establishing mandatory notification and reporting requirements and steep penalties for violations of the reporting requirements. The law also prohibits employee retaliation for good-faith reporting. Section 1150B's goal is to promote the discovery of crimes against residents of long-term care facilities.

On June 17, 2011, the Centers for Medicare & Medicaid Services ("CMS") issued a Survey and Certification ("S&C") memorandum to State Survey Agency Directors entitled "Reporting Reasonable Suspicion of a Crime in a Long-Term Care Facility (LTC): Section 1150B of the Social Security Act." The guidance, which is effective immediately, is posted at [http://www.cms.gov/Surveycertificationgeninfo/downloads/SCLetter11\\_30.pdf](http://www.cms.gov/Surveycertificationgeninfo/downloads/SCLetter11_30.pdf).

The purpose of the memorandum is to "inform [State Survey Agencies] of the new section 1150B of the Act, which was established by section 6703(b)(3) of the Affordable Care Act." Notably, CMS acknowledges in the memorandum that "[a]t the present time there are no CMS regulations that apply specifically to section 1150B responsibilities of covered individuals or facilities.... CMS is drafting guidance about the civil money penalty component of 1150B and information will be forthcoming." Further, the memorandum states that CMS is "explaining 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." This language indicates that CMS will release further guidance regarding the civil money penalty component of the law, and possibly other components of Section 1150B, at some point in the future.

Section 1150B, entitled "Reporting to Law Enforcement of Crimes Occurring in Federally Funded Long-Term Care Facilities," applies to long-term care facilities that received at least \$10,000 in annual federal funds during the preceding year. The ACA defines a "long-term care facility" as a "residential care provider that arranges for, or directly provides, long-term care." In turn, the ACA defines "long-term care" as "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." However, CMS's S&C memorandum specifies that the reporting obligation applies only to: (1) nursing facilities ("NFs"); (2) skilled nursing facilities ("SNFs"); (3) hospices that provide services in long-term care facilities; and (4) Intermediate Care Facilities for the Mentally Retarded ("ICFs/MR") (collectively, "long-term care facilities" or "LTC facilities"). Thus, while Section 1150B could seemingly apply to other facilities, such as assisted living facilities receiving Medicaid waiver funds, it appears that CMS's position at present is that the requirements only apply to the four types of LTC facilities listed above.

The S&C memorandum lists the responsibilities of LTC facilities, including both "required functions" and "additional advisable functions." First, the memorandum states that a Medicare- or Medicaid-participating LTC facility *must*:

- Determine annually whether the facility received at least \$10,000 in federal funds in the preceding fiscal year;
- Annually notify each covered individual, defined as "an owner, operator, employee, manager, agent, or contractor of the long-term care facility" of reporting obligations;
- Conspicuously post, in appropriate locations, a notice for employees specifying the employees' rights, including a statement that an employee may file a complaint with the state survey agency

against an LTC facility that retaliates against an employee for reporting a reasonable suspicion of a crime; and

- Not retaliate against an individual who lawfully reports a reasonable suspicion of a crime under 1150B.

Second, the memorandum states that a Medicare- or Medicaid-participating LTC facility “that effectively implements section 1150B will”:

- Coordinate with the facility’s state and local law enforcement agencies to determine what actions are considered crimes in their political subdivision;
- Review existing facility protocols to ensure adherence to existing CMS and state policies and procedures for reporting incidents and complaints; and
- Develop and maintain policies and procedures that ensure compliance with section 1150B, including the employee retaliation prohibition.

The memorandum also provides guidance to State Survey Agencies regarding how to process reports of reasonable suspicion of a crime. CMS instructs State Survey Agencies to follow the “standard CMS protocols for assessing and, as appropriate, investigating all reported complaints and incidents.”

Further, the memorandum reiterates the two time limits, specified in Section 1150B, for the reporting of reasonable suspicion of a crime. First, if the events that cause the reasonable suspicion result in serious bodily injury to a resident, the covered individual must report the suspicion immediately, but not later than two hours after forming the suspicion. Second, if the events that cause the reasonable suspicion do not result in serious bodily injury to a resident, the covered individual must report the suspicion not later than 24 hours after forming the suspicion.

Finally, the memorandum outlines the possible deficiency citations to which LTC facilities could be subject under current federal reporting requirements. For example, possible deficiency citations for a SNF/NF might include: § 483.13(c)-F226- Failure to develop and/or implement its policies and procedures for reporting abuse/neglect; or § 483.75(d)-F493-Governing body- Failure to establish/ implement facility policies regarding the management and operation of the facility.

The S&C memorandum provides helpful guidance to facilities in meeting their obligations under Section 1150B. In particular, it resolves one fundamental question under the law: that reporting should be made to the State Survey Agency, not to CMS or the Secretary of Health and Human Services directly. It also seems clear that, for now, no CMPs will be issued for failure to report until that separate rulemaking is finalized by CMS. At the same time, however, key issues remain unresolved. For example, CMS chose not to specify the form of notice to be posted in the facility (although the law directs the Secretary to do so). More importantly, there is no further guidance on what constitutes “reasonable suspicion” of a crime or what “crimes” are to be reported, leaving that to the states and local law enforcement. We believe these and likely other operational issues will need to be addressed in the future. In the meantime, however, facilities should adopt the required functions and develop and implement policies and procedures to attain compliance with Section 1150B.

### About Reed Smith

Reed Smith is a global relationship law firm with more than 1,600 lawyers in 22 offices throughout the United States, Europe, Asia and the Middle East. Founded in 1877, the firm represents leading international businesses, from Fortune 100 corporations to mid-market and emerging enterprises. Its lawyers provide litigation and other dispute resolution services in multi-jurisdictional and other high-stakes matters; deliver regulatory counsel; and execute the full range of strategic domestic and cross-border transactions. Reed Smith is a preeminent advisor to industries including financial services, life sciences, health care, advertising, technology and media, shipping, energy trade and commodities, real estate, manufacturing, and education. For more information, visit [reedsmith.com](http://reedsmith.com).

This *Alert* is presented for informational purposes only and is not intended to constitute legal advice.

© Reed Smith LLP 2011. All rights reserved.

“Reed Smith” refers to Reed Smith LLP, a limited liability partnership formed in the state of Delaware.

**ReedSmith**

**The business of relationships.™**

NEW YORK  
LONDON  
HONG KONG  
CHICAGO  
WASHINGTON, D.C.  
BEIJING  
PARIS  
LOS ANGELES  
SAN FRANCISCO  
PHILADELPHIA  
PITTSBURGH  
OAKLAND  
MUNICH  
ABU DHABI  
PRINCETON  
N. VIRGINIA  
WILMINGTON  
SILICON VALLEY  
DUBAI  
CENTURY CITY  
RICHMOND  
GREECE