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Center for Clinical Standards and Quality /Survey & Certification Group

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DATE: **March 22, 2013**

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Consistency in the Application of Enforcement Remedies for Nursing Homes - Civil Money Penalties (CMPs) and Use of a CMP Analytic Tool

Memorandum Summary

- **Enhanced Enforcement Consistency –** The Centers for Medicare & Medicaid Services (CMS) is issuing the following guidance to promote more consistent application of enforcement remedies for skilled nursing facilities (SNFs), nursing facilities (NFs), and dually-certified facilities (SNF/NFs) (collectively referred to as "nursing homes" or "facility(ies)").
- **CMP Analytic Tool & Guidance on Choice of Remedy –** When the CMS Regional Office (RO) determines that a CMP is an appropriate enforcement remedy, all ROs will use the attached CMP Analytic Tool as a guide to choose, impose, and calculate CMPs. Also included is guidance for the RO to consider when determining whether to impose a CMP or an alternate remedy regardless of whether or not the State Survey Agency recommended a CMP.

Background

CMS ensures that nursing home residents receive appropriate care by setting health, safety and quality requirements that facilities must meet in order to participate in the Medicare and Medicaid programs. CMS has agreements with States to routinely inspect nursing homes to ensure compliance with the requirements of participation. Congress has authorized CMS to impose certain enforcement remedies in order to promote a facility's compliance with these requirements. Sections 1819(h)(2)(B) and 1919(h)(3)(C) of the Social Security Act (the Act) provide that sanctions should be designed to minimize the time between the identification of violations and the final imposition of sanctions. CMS and States[1] may use a variety of remedies to encourage compliance. These remedies range from directing the specific actions and timeframes needed to correct a deficiency under a directed plan of correction to those that provide facilities with financial incentives to return to and maintain compliance.

[1] In addition to Federal remedies, States may impose their own sanctions under their state licensure authority.

Selecting Enforcement Remedies: (refer to 42 CFR §488.404 and section 7400 in Chapter 7 of the State Operations Manual (SOM))

ROs must evaluate each case and consider whether or not to impose an enforcement remedy or multiple remedies as appropriate. When choosing enforcement remedies, CMS and the State must consider the following:

(1) The Scope and Severity (S/S) of the deficiency(ies);
(2) The relationship of one deficiency to other deficiencies resulting in noncompliance;
(3) A facility's prior history of noncompliance; and
(4) The likelihood that the selected remedy(ies) will achieve correction and continued compliance.

The severity of the remedy should increase with the severity of the deficiency(ies), (see 42 CFR §488.408 through §488.414). For example, for noncompliance that is cited at the immediate jeopardy level, S/S levels J, K, and L, the regulations require that either a facility is terminated within 23 days or temporary management is imposed to remove the immediate jeopardy within 23 days. Additionally, CMPs from $3,050 to $10,000 per day or $1,000 to $10,000 per instance of noncompliance may also be imposed. Similarly, noncompliance that is actual harm (S/S levels G, H, and I), require one or a combination of the following remedies:

- Temporary management;
- Denial of Payment for New Admissions (DPNA);
- Per day CMP of $50 to $3,000; or
- Per instance CMP of $1,000 to $10,000 per instance of noncompliance.

In addition to these required remedies, additional remedies may be imposed for noncompliance that is actual harm. For example, depending on the severity of the deficiency and a facility's compliance history, a combination of state monitoring, DPNA, and a CMP may be imposed.

Failure of a State to recommend a CMP or other remedy, or a State policy of not recommending CMPs, are not acceptable reasons for not imposing such remedies. In such a case, the RO must on its own review the survey findings and impose the appropriate remedy.

Use and Imposition of CMPs as an Enforcement Remedy

To promote more consistent application of all remedies, we are issuing the attached guidance and CMP Analytic Tool specifically when a CMP is one of the selected remedies. Beginning April 1, 2013, all ROs must use the attached Guidance and CMP Analytic Tool when the RO has determined that a CMP is an appropriate enforcement remedy.

For deficiencies with a S/S of "G" or above and for deficiencies with a S/S of "F" when substandard quality of care (SQC) is cited, ROs must evaluate each case and consider whether or not to impose a CMP in addition to or instead of other available remedies. For deficiencies cited at other S/S levels, the RO should consider imposing alternative remedies other than a CMP.

ROs must use this tool to calculate each new or changed[2] CMP imposed on a facility within a noncompliance cycle[3]. However, the attached tool is not dispositive. It does not replace professional judgment or the application of other pertinent information in arriving at a final CMP form and amount. It does provide a logic, a structure, and defined factors for mandatory consideration in the determination of CMPs, together with a protocol for explaining other factors that lead to final CMP amounts that may differ from the literal application the tool itself.

Evaluation of the Application, Effectiveness and Use of Enforcement Remedies

CMS will define specific measures to evaluate the usefulness and overall effectiveness of this Analytic Tool and guidance. At the end of six months, we will assess whether or not the tool and guidance have provided greater consistency in the use and application of CMPs. We also hope to assess whether or not the imposition of CMPs had an effect on a facility's ability to achieve and sustain compliance with Federal requirements. We will make any needed revisions to the tool and guidance as applicable.

If you have any questions regarding this memorandum, tool, or guidance, please contact Akosua Ghailan at (410) 786-5241 or at Akosua.Ghailan2@cms.hhs.gov

Effective Date: April 1, 2013 for all new enforcement cases when the CMS RO determines that a CMP is an appropriate enforcement remedy. This guidance should be communicated to all RO and State Survey Agency survey, certification and enforcement staff, their managers and the State/RO training coordinators within 30 days of this memorandum.

/s/
Thomas E. Hamilton

Attachments
1 - Instructions for Use and Completion of CMP Analytic Tool Calculation Guide
2 - Long Term Care - CMP Analytic Tool Calculation Guide

cc: Survey and Certification Regional Office Management

[2] A CMP is changed when the circumstances initiating the original CMP imposed have changed and an increase or decrease to the original CMP may be warranted. For example, a facility has corrected some but not all of the original deficiencies and is still within its noncompliance cycle and the remaining deficiencies warrant an increase or decrease in the original CMP imposed. See section 7516.3 of the SOM.

[3] A noncompliance cycle begins with a recertification, complaint or temporary waiver revisit survey that finds noncompliance and ends when substantial compliance is achieved or the facility is terminated (or voluntarily terminates) from the Medicare or Medicaid program. The noncompliance cycle cannot exceed 6 months. Once a remedy is imposed, it continues until the facility is in substantial compliance (and in some cases, until it can demonstrate that it can remain in substantial compliance), or is terminated from the programs.