



Center for Clinical Standards and Quality/Survey & Certification Group

Ref: Admin Info: 13-21-NH

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 States¹ 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 changed² CMP imposed on a facility within a noncompliance cycle³. 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.

Attachment #1

Instructions for Use and Completion of the Civil Money Penalty (CMP) Tool Calculator

All CMS Regional Offices (ROs) are required to use the following guidance and CMP Analytic Tool as a guide to choose the appropriate type of CMP to be imposed and to calculate the baseline CMP amount, when the RO determines that a CMP is an appropriate remedy to impose. The RO must complete all sections of the tool that apply to the type of CMP selected.

ROs must evaluate each case and consider whether or not to impose a CMP in addition to or instead of other remedies for deficiencies with a Scope and Severity (S/S) of “G,” or above, and for deficiencies with a S/S of “F” when Substandard Quality of Care (SQC) is cited. For deficiencies cited at other S/S levels, the RO should consider imposing alternative remedies other than a CMP.

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. ROs must use this tool in the calculation of each new or changed¹ CMP imposed on a facility within a noncompliance cycle². Each time a survey is conducted within an already running noncompliance cycle and a civil money penalty is imposed, the facility is given appeal rights and may exercise its waiver of right to a hearing (refer to section 7526 of the SOM, Chapter 7).

This tool is not dispositive, and does not replace professional judgment or the application of other pertinent information in arriving at a final CMP form and amount. However, 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.

¹ 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.

² 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.

Choosing the Type of CMP to be imposed

After making a determination that a CMP will be imposed against a facility, ROs must use the following guidance in order to decide whether to impose a Per-Instance (PI) CMP versus a Per-Day (PD) CMP, regardless of the State Survey Agency's recommendation.

Per Day CMP – Choose a PD CMP when one or more of the following factors are present.

1. Findings of current/ongoing noncompliance that are SQC;
2. Findings of current/ongoing noncompliance at a S/S of "G" or greater;
3. Findings of past noncompliance when dates of noncompliance **CAN** be determined at a S/S of "G" or greater or SQC findings at a S/S of "F"; OR
4. Other (briefly explain the factors and rationale for choosing this factor).

CMS regulations specify a per day CMP range from \$50 to \$10,000 for each day a facility is noncompliant, from \$50 to \$3,000 for non-immediate jeopardy noncompliance, and \$3,050 to \$10,000 for immediate jeopardy noncompliance.

Per Instance CMP – Choose a PI ONLY when one or more of the following factors are present:

1. Findings of current/ongoing noncompliance that are isolated findings (singular event) of actual harm at a S/S at "G" or "J";
2. Findings of current/ongoing noncompliance at a S/S of "G" or above, or SQC findings at a S/S of "F" where a facility has an opportunity to correct;
3. Findings of current/ongoing noncompliance at a S/S of "G" or above, or SQC findings at "F" but where a facility has a good compliance history; OR
4. Findings of past noncompliance when dates of noncompliance **CANNOT** be determined at a S/S of "G" or above or SQC findings at a S/S of "F".

Per instance³ CMPs range from \$1,000 to \$10,000 per instance of noncompliance. While multiple per instance CMPs can be imposed for deficiencies identified during a survey, the total amount of the CMP imposed for a survey cannot exceed \$10,000.

NOTE: The per day and the per instance CMP cannot be used simultaneously during a specific survey (i.e., standard, revisit, complaint), but both types of CMPs may be used during a noncompliance cycle if more than one survey takes place and the per day CMP was not the CMP initially imposed. However, when a per day CMP is the CMP initially imposed, a per instance CMP cannot be imposed on a subsequent survey within the same noncompliance cycle.

³ Unlike for per day CMPs, CMS does not specify a particular per instance CMP amount range for cases of immediate jeopardy. An "instance" is a single deficiency identified by the tag number used as a reference on the CMS-2567 and in Appendix PP of the SOM.

Factors to consider when determining “a good compliance history” might include but are not limited to:

- The facility is not a Special Focus Facility;
- The facility has not had findings that are Immediate Jeopardy within the past three (3) calendar years, unless they were cited as past noncompliance;
- The facility has a history/pattern of achieving compliance prior to or at the time of the first revisit; and/or
- The facility has a history/pattern of sustaining compliance with previously cited deficiencies (i.e., no repeat deficiencies).

Choosing the Per Day CMP Start Date

A PD CMP should begin on the first day noncompliance at the cited S/S level is documented, even if that date precedes the first day of the current survey (unless determined to be past noncompliance) and if the facility cannot demonstrate that it corrected the noncompliance prior to the current survey. If the team cannot document the first day of noncompliance, then the CMP should start on the date the noncompliance was observed and documented at the time of the current survey.

For example, a survey begins on May 1 and on that date the survey team finds evidence of immediate jeopardy. If the survey team is able to document that the immediate jeopardy began on April 1, the CMP start date is April 1. However, if the survey team is unable to document the first day of noncompliance at the immediate jeopardy level, the CMP would start on May 1.

CMPs for Past Non-Compliance

Past noncompliance identified during the current survey means a deficiency citation at a specific survey data tag (F-tag or K-tag) (with a S/S at "G" or above, or SQC findings at a S/S at "F") that meets **all** of the following three criteria:

- 1) The facility was not in compliance with the specific regulatory requirement(s) (as referenced by the specific F-tag or K-tag) at the time the situation occurred;
- 2) The noncompliance occurred after the exit date of the last standard (recertification) survey and before the survey (standard, complaint, or revisit) currently being conducted; AND,
- 3) There is sufficient evidence to support that the facility corrected the noncompliance and is in substantial compliance at the time of the current survey for the specific regulatory requirement(s), as referenced by the specific F-tag or K-tag.

Required Central Office Prior Approval for Any Adjustment to Calculated Baseline CMPs More than Thirty-five percent (35%)

If the RO believes that the circumstances involved in the specific case require an adjustment to the baseline CMP amount which was calculated using this Tool, the RO may increase or reduce the CMP by NO MORE THAN 35 percent. If the RO makes such an adjustment, in each instance it must provide a rationale for that adjustment when completing the tool. An adjustment to the CMP is not the same thing as imposing a different CMP based on different or new deficiencies. Whenever such an adjustment is made, the analyst will annotate the tool that was

used when calculating the original baseline CMP to explain why an adjustment was made. For a newly imposed or revised CMP within the same noncompliance cycle, a separate tool is to be completed.

NOTE: If the RO believes that a calculated CMP should be adjusted by more than 35 percent, it must consult with and obtain prior approval from CMS Central Office before making the adjustment to the calculated CMP using this tool.

A 35 percent adjustment that the RO may make is not the same as, and does not affect, the 35 or 50 percent reductions made to the total CMP amount based on §§488.436 and 488.438. The facility will receive a 35 percent reduction if it timely waives its right to an Administrative Hearing. The facility should be notified that it will receive a 50 percent reduction if **all** of the following conditions are met:

- The facility must have self-reported the noncompliance to CMS or the State before it was identified by CMS or the State and before it was reported to CMS or the State by means of a complaint lodged by a person other than an official representative of the nursing home;
- Correction of the noncompliance must have occurred on the earlier of either 15 calendar days from the date of the self-reported circumstance or incident that later resulted in a finding of noncompliance or 10 calendar days from the date (of CMS' notice to the facility) that a CMP was imposed;
- The facility waives its right to a hearing;
- The noncompliance that was self-reported and corrected did not constitute a pattern of harm, widespread harm, immediate jeopardy, or result in the death of a resident;
- The CMP was not imposed for a repeated deficiency that was the basis of a CMP that previously received a reduction; and
- The facility has met mandatory reporting requirements for the incident or circumstance upon which the CMP is based as required by Federal and State law.

If you have any questions regarding the memorandum, Analytic 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.

Provider Name: _____	CCN # _____	
	Cycle Start Date _____	
RO CMP Case Analyst Name: _____	Current Date _____	

Part I CALCULATION OF BASELINE CMP TO BE IMPOSED - Use a separate worksheet for each Life Safety Code (LSC) CMP, Health Survey CMP or any new or changed CMP within a noncompliance cycle

Section 1 CMP TYPE - Section 1819(h)(2)(B)(ii) of the Social Security Act

For each instance where a CMP will be imposed for a facility, check only one CMP Type to Be Used - Per Day or Per Instance. The factors to consider in this tool for each type of CMP are intended to determine baseline amounts for each CMP to be imposed. Also, if a LSC deficiency is the basis for the CMP, the whole Tool algorithm applies to the LSC deficiencies, not the health deficiencies. *NOTE: This tool is to be used as a guide to calculate a baseline amount for each new or changed CMP imposed against a facility within a noncompliance cycle.*

PER DAY CMP (PD) - Choose a PD when one or more of the following factors are present. If you impose a PD CMP for "Other", briefly explain the factors involved and the rationale for choosing a PD in these circumstance

CHECK ALL APPLICABLE REASONS: findings of current/on-going noncompliance that are Substandard Quality of Care (SQC) findings of current/ongoing noncompliance at a S/S of "G" or greater; findings of past noncompliance when dates of noncompliance CAN be determined at a S/S of "G" or greater or SQC findings at a S/S of "F"; OR other (provide explanation and rationale)

PER INSTANCE CMP (PI) - Choose a PI CMP ONLY when one or more of the following factors are present.

CHECK ALL APPLICABLE REASONS: findings of current/ongoing noncompliance that are isolated findings (singular event) of actual harm at S/S of "G" or "J"; findings of current/ongoing noncompliance at a S/S of "G" or above, or SQC findings at a S/S of "F" where a facility has an opportunity to correct; findings of current/ongoing noncompliance at a S/S of "G" or above, or SQC findings at "F" but where a facility has a good compliance history; OR findings of past noncompliance when dates of noncompliance CANNOT be determined at a S/S of "G" or above or SQC findings at a S/S of "F"

Section 2 START DATE FOR PER DAY (PD) CMP

A PD CMP should begin on the first day noncompliance at the cited S/S level is documented, even if that date precedes the first day of the current survey (unless determined to be past noncompliance) and if the facility cannot demonstrate that it corrected the noncompliance prior to the current survey. If the survey team cannot document the first date of noncompliance, then the CMP should start on the date the noncompliance was observed and documented at the time of the current survey.

CMP starts on (date)	
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Section 3 CMP BASE AMOUNT - 42 CFR §488.404(b)

CMP GRID	Per Day			Per Instance		
	J - \$3,050	K - \$4,050	L - \$5,050	J - \$3,500	K - \$4,500	L - \$5,500
Immediate Jeopardy	J - \$3,050	K - \$4,050	L - \$5,050	J - \$3,500	K - \$4,500	L - \$5,500
Actual Harm	G - \$ 250	H - \$ 600	I - \$1,000	G - \$1,500	H - \$2,000	I - \$2,500
Potential for More Than Minimal			F - \$ 200			F - \$1,200
	Highest S/S		CMP Base Amount			

Section 4 HISTORY OF FACILITY NONCOMPLIANCE - 42 CFR §488.438(f)(1)

If a facility has a history and/or a pattern of noncompliance at a S/S of "G" or above for surveys (standard, complaint or revisit) conducted in the past 3 calendar years, add one amount between \$100 to \$500 based on the S/S pattern/trend of a facility's noncompliance history. Do not add less than \$100 or more than \$500.

Amount added	
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Section 5 REPEATED DEFICIENCIES - 42 CFR §488.438(d)(2)(3) (Only for PD CMPs)

Complete this section only when a PD CMP is being imposed

"Repeated Deficiencies" are deficiencies within the same regulatory grouping of requirements under which deficiencies were cited at the last survey, subsequently corrected, and cited again at the next survey. Use the chart below to add to the CMP based on the S/S of the repeat deficiencies.

S/S Level	F	G - I	J - L	Highest S/S repeated
ADD	\$50	\$100	\$150	Amount added

Section 6 SUBSTANDARD QUALITY OF CARE (SQC) - 42 CFR §488.404(B)

If a SQC deficiency is cited add the amount for the highest S/S based on the chart below. SQC is defined for deficiencies cited at S/S F, H, I, J, K or L within the regulatory groupings of 42 CFR §483.13 (Tags F221-F226), 42 CFR §483.15 (Tags F240-F258), or 42 CFR §483.25 (Tags F309 - F333).

S/S Level	F	H, I	J, K, L	Highest SQC S/S
Add to PD CMP	\$50	\$100	\$500	Amount Added
Add to PI CMP	\$500	\$1,000	\$2,500	

Section 7 Only for PD CMPs - Indicate the total number of F or K tags cited that contributed to the CMP.

Highest S/S - (do not include deficiency(ies) for which the S/S set the base amount - use the next highest S/S - add one amount only)					
Total F or K tags contributing to CMP		F (SQC)	G - I	J - L	
1-6	Add	\$0	\$50	\$400	
7-10	Add	\$0	\$100	\$450	
11- 19	Add	\$0	\$150	\$500	
20 +	Add	\$50	\$200	\$550	Amount Added

Section 8 FACILITY CULPABILITY - 42 CFR §488.438(f)(4)

Add \$100 - \$3,000 if culpability is a factor, this can include neglect, indifference or disregard for resident care, comfort or safety. A facility may be held responsible and culpable for the actions of its management and staff, and contract staff.

Base Culpability Amount (Choose one amount from this chart based on the highest S/S cited)

	F (SQC)	G-I	J-L	
Add	\$100 - \$250	\$300 - \$1,000	\$1,000 - \$2,000	Amount Added

For any additional Culpability Factors add amounts up to:

\$250 for S/S citations at J, K or L. Amount Added

\$500 if it can be documented that the administrator, facility owners, management agency and/or the facility's governing body knew of problems but failed to act. Amount Added

Provide rationale for culpability determination:

CALCULATED BASELINE CMP AMOUNT #REF!

PART II ADJUSTMENTS TO CALCULATED BASELINE CMP AMOUNT

Section 1 CMP Exceeds Maximum Regulatory Amount

If a PI CMP exceeds \$10,000, reduce the CMP Calculated Amount to \$10,000; If daily amount for a PD IJ case exceeds \$10,000, reduce daily CMP Calculated Amount to \$10,000; If daily amount for a PD non-IJ case exceeds \$3,000, reduce daily CMP Calculated Amount to \$3,000; If daily amount for a PD non-IJ case exceeds \$3000 and there is a repeated deficiency, PD CMP remains as calculated.

Section 2 TOTAL CMP ASSESSED

CMP Start Date		CMP End Date*	
Total CMP Days (PD ONLY)	#VALUE!	*For PD - add end date once determined	
Total CMP Assessed & Final CMP Amount if Appeal is Not Waived			#VALUE!
Total CMP after Discount for Waiving Appeal (35%)			#VALUE!
Total CMP after Discount for self reporting (50%) and Waiving Appeal			#VALUE!

NOTE: A facility MAY NOT get both a 35% discount AND a 50% reduction, it is one or the other

Section 3 Facility Financial Condition - 42 CFR §488.438(f)(2) - A facility is responsible for notifying CMS of hardship and providing financial documentation

a) Did a Federal CPA/Accountant review the Financial Information? YES ___ NO ___
 b) Did facility documentation prove that the facility lacks sufficient assets to pay the CMF?
 YES ___ NO ___ If yes, lower calculated CMP =

Final Calculated CMP Base Amount =

Section 4 Rationale for increasing or decreasing the CMP calculated base amount

A CMP base amount calculated with this tool may be adjusted by the RO by no more than 35%. If the base amount is adjusted the RO must provide it's rationale for such adjustment below. NOTE: If the RO believes that a calculated CMP should be adjusted by more than 35% they must consult with and obtain prior approval from CMS Central Office before making any further adjustment to the calculated CMP using this Tool.