

TO DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Center for Clinical Standards and Quality/Survey & Certification

Ref: S&C: 14-04-ALL

DATE: October 25, 2013

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Questions + Answers for State Recovery after the Federal Government Shutdown

Memorandum Summary

On October 16, 2013 Congress enacted Public Law 113-46, providing for a continuing appropriation until January 15, 2014, with retroactive authority back to October 1, 2013.

Attached are responses to questions we received from States and providers with regard to the manner in which survey & certification activities should accommodate the effects of the federal government shutdown that occurred from October 1, 2013 through October 16, 2013.

On October 16, 2013 Congress enacted Public Law 113-46, providing for a continuing appropriation (“continuing resolution”) through January 15, 2014, with retroactive authority back to October 1, 2013. Attached are answers to questions we received after the shutdown ended. The answers provide special procedures applicable only to the period of the federal government shutdown and subsequent steps necessary to recover from the shutdown.

We appreciate that Congress provided for retroactive application of the continuing resolution. This enables States to be reimbursed for normal survey activities conducted during the shutdown period. Such action provides critical support to States that continued to maintain vital public protections despite the federal government shutdown, including support for the many States that advanced State-only funds to continue survey & certification functions without serious disruption.

Thank you for your patience during this time of uncertainty, and for your daily diligence in offering Medicare and Medicaid beneficiaries the protections and quality assurance upon which they rely.

Effective Date: October 1, 2013. This policy should be communicated to all survey and certification staff, their managers and the State/Regional Office training coordinators immediately. Questions regarding this communication should be sent to bettercare@cms.hhs.gov.

/s/

Thomas E. Hamilton

cc: Survey and Certification Regional Office Management

Questions + Answers for Survey & Certification (S&C) Recovery
from the
FY2014 Federal Government Shutdown of Oct. 1, 2013 through Oct. 16, 2013

A. Fiscal Effects for Activities Conducted During the Federal Government Shutdown

A.1. Recertification Surveys during the Shutdown: We appreciate that States were not guaranteed to be paid for initial or recertification surveys conducted during the federal government shutdown, since CMS was not authorized to incur fiscal obligations for such work at that time. However, our State elected to continue to do full surveys during the shutdown under the State's own licensure authority. Because our State requirements are the same as the federal requirements, we assessed facility compliance with all federal requirements and used the federal process for such surveys. We were prepared to shoulder the full cost of the surveys as State-only licensure surveys. In light of the retrospective nature of the continuing resolution:

- (a) May the cost of full initial or recertification surveys conducted during the federal government shutdown be appropriately shared among all pertinent payers (e.g., Medicare, Medicaid, and State only) when the surveys covered both State and federal requirements?
- (b) If the SA continued to do non-essential federal work (e.g. standard surveys), will federal enforcement remedies be available when warranted and will these surveys be recognized as federal surveys of record?

Yes, expenses incurred by States for all State survey activity that would normally have been paid by the federal government are reimbursable retroactive to October 1, 2013. CMS may recognize such surveys as federal surveys of record. Federal enforcement remedies are also available to the extent warranted on the basis of deficiency findings found as a result of such surveys. The existing processes for CMS enforcement actions should be followed.

Section 116 of Public Law 113-46 provides, in pertinent part, that "(a) If a State (or another Federal grantee) used State funds (or the grantee's non-Federal funds) to continue carrying out a Federal program or furloughed State employees (or the grantee's employees) whose compensation is advanced or reimbursed in whole or in part by the Federal Government—(1) such furloughed employees shall be compensated at their standard rate of compensation for such period; (2) the State (or such other grantee) shall be reimbursed for expenses that would have been paid by the Federal Government during such period had appropriations been available...."

This means, for example, that activities that are jointly federal and State and that comprise legitimate Medicare functions that were conducted during the period of the federal government shutdown are reimbursable, even if the activities were not on the excepted list specified in section B of S&C-14-02-ALL (Oct. 1, 2013). For example, if the State conducted surveyor training or a survey not referenced in section B, but that normally would be a shared expense with appropriate portions charged to Medicare, Medicaid and State-only funds, then Medicare and Medicaid would be chargeable for their fair share.

We appreciate that Congress has made this allowance to support States that continued to maintain vital public protections despite federal budget uncertainties, including the many States that advanced State-only funds to continue survey & certification functions without serious disruption.

A.2. LSC Portion of Standard Surveys: We completed the health portion of three nursing home recertification surveys at the end of September 2013. During the federal government shutdown, we conducted the life safety code (LSC) portion, using the federal requirements and survey process. Is it allowable to charge the federal government for a portion of the costs? If we de-linked the LSC from the health portion of the survey and deferred performance of the LSC portion, should we conduct the LSC portion now even though a number of weeks has already gone by?

Yes. Please see the answer to A.1. Also, any survey activity deferred due to the shutdown should be performed now.

A.3. Other Allowable Activities: We conducted other activities (such as training and independent dispute resolutions), in accordance with federal requirements and federally-prescribed processes, during the federal government shutdown that would normally be reimbursed. Is it allowable to charge the federal government for its share of costs, starting October 1, 2013, that would normally be incurred and reimbursable, even though they were not listed among the excepted activities during the shutdown?

Yes. Please see the answer to A.1.

A.4. Applicability of Findings: Will deficiencies identified during any surveys conducted during the federal government shutdown, including surveys described in A.3, be considered federal citations if the citations are for non-compliance with federal requirements?

Yes. If the deficiencies are for non-compliance with federal requirements identified by federally-qualified State surveyors through a survey process conforming to the required federal process, then the citations apply.

A.5. Dually-Certified Facilities Certification: During the federal government shutdown, States were able to continue to certify new Medicaid-only nursing facilities. But some facilities were seeking dual status to participate in both Medicare and Medicaid. If a new facility was surveyed for all (Medicare + Medicaid) requirements during the shutdown and was found to be in substantial compliance with such requirements, but was only certified for Medicaid, can the Medicare certification occur on the basis of the survey already conducted, or is a new survey required? If a new survey is not required, can the Medicare certification effective date be the same as the Medicaid certification date?

If the facility submitted an appropriate Medicare enrollment application, met all Medicare requirements, and the State survey found substantial compliance with CMS requirements for non-deemed facilities, and the Medicare Administrative Contractor (MAC) had recommended approval as of the survey completion date, then the Medicare certification date could be retroactive to the date that CMS requirements were found to be met. The exact date of the certification would be the last date on which all Medicare requirements were met, with the understanding that the date of the onsite survey could be used as the survey date for both Medicaid and Medicare.

A.6. Fiscal Effects: We are approaching our payroll deadline and need to know if we need to leave our timesheet labor account codes the same so that federal funds are charged for the 10/1/13 through 10/16/13 time period, or should we deviate and charge staff salaries to state funds as we planned to do during the shutdown when we were only doing state work (except for IJ complaints and authorized revisits)?

Medicare- and Medicaid-qualifying expenses may be charged to the pertinent federal sources. See the answer to question A.1 to the extent that federal regulations normally permit.

A.7. Level of Funding: Until January 15th, is the funding in PL 113-46 for the first quarter of FY2014 at the equivalent rate provided for the final FY2013 appropriation?

Yes. PL 113-46 is a continuing resolution that continues the FY2013 level of funding into FY2014.

B. Enforcement Actions and Processing of Survey Findings

B.1. Surveys with Low Level or No Deficiencies: We were advised during the shutdown to hold off on processing survey findings in which there was no deficiency finding, or where deficiency findings did not find serious deficiencies. Should we forward to the RO the Form CMS-2567 now and keep the survey date the same?

Yes.

B.2. Enforcement Dates in General: We are now preparing the Statement of Deficiencies and letter for the facility. Should we continue to use the survey completion date as the date to calculate the enforcement period, potential termination, and nursing home sanctions such as a denial of payment for new admission (DPNA)?

The enforcement cycle begins with the survey completion date. For non-deemed providers or suppliers, for example, the 90-day remedial action period for Condition-level non-IJ deficiencies should be measured from the survey completion date. Similarly, for nursing homes, the mandatory DPNA (at 3 months) and mandatory termination (at 6 months) dates are calculated from the survey completion date.

However, with the exception of civil monetary penalties and State monitoring (where applicable), the effective dates of imposed sanctions may not be earlier than the date permitted by any applicable advance notice requirement. Examples of such requirements include:

- *SNF IJ Deficiencies – 2-day advance notice of Medicare termination or other discretionary sanctions except CMPs or State monitoring (42 CFR 488.402(f)(3) and 489.53(2)(ii))*
- *SNF Non-IJ deficiencies – 15 day advance notice for all discretionary sanctions except CMPs or State monitoring (42 CFR 488.402(f)(4))*
- *Other Providers or Situations Involving Termination - 15-day advance notice before the effective date of the termination (42 CFR 489.53(d)).*

As explained below in B.3, there is no advance notice requirement for CMPs or State monitoring in nursing homes.

B.3. Immediate Jeopardy (IJ) Special Situations: Certain IJ situations may present a special challenge if the provider was not notified of the IJ and 23-day remediation period due to the federal government shutdown. What do we do in such a case, since we were put on furlough and did not get out some of these notifications?

For any survey completed immediately prior to the federal government shutdown for which no CMS-2567 was issued despite an IJ finding, or any survey conducted during the shutdown for which no timely CMS-2567 was issued, States and CMS proceed as follows:

- *Issue the CMS-2567 and companion notifications as a top priority if not already issued, treat the issuance date as the survey completion date, and ensure that all required notifications and processes for 23-day terminations are followed;*
- *Conduct a revisit, as a matter of top priority, as soon as an acceptable plan of correction and credible allegation of compliance are received. CMS will not terminate Medicare participation if the revisit confirms that the IJ has been abated within 23 days that the CMS-2567 and companion letter were issued.*
- *CMS will terminate Medicare participation if the IJ is not abated within 23 days of the date that the CMS-2567 and companion letter were issued (as these will constitute the adjusted date of completion, adjusted to account for the effects of the shutdown).*

If the CMS-2567 was issued timely to the provider, but it was the revisit survey itself that was delayed beyond the 23-day time period as a result of the shutdown, conduct the revisit as a matter of top priority. CMS may consider the IJ to have been abated earlier than the date of the revisit if the agency finds that:

1. *The revisit confirms that the IJ has been abated, and;*
2. *The facility has provided adequate documentation that the IJ was abated on a specific date during or after the federal government shutdown, in sufficient detail that CMS concludes it is possible to confirm IJ abatement on a date before the revisit date that was eventually conducted.*

B.4. Nursing Home Per Day CMPs Start Date: What should be the start date for a recommendation of a civil monetary penalty (CMP) if a survey was delayed due to the federal government shutdown?

Please follow normal procedures. For example, CMS regulations at 42 CFR 488.440(f)(1) specify that for a nursing home with noncompliance that does not pose immediate jeopardy, “the daily accrual of per day civil monetary penalties is imposed for the days of noncompliance prior to the notice specified in 488.434 and an additional period of no longer than 6 months....” If the State is recommending a CMP or DPNA, the State bases the recommendation on the survey findings. The CMS Regional Office will make the final determination. To the extent that there is evidence that noncompliance preceded the survey dates, existing regulations permit CMS to establish a CMP start date that precedes the survey dates.

B.5. Nursing Home Per Day CMP and DPNA End Dates: Revisit surveys for purposes of stopping an imposed DPNA or CMP were not among the excepted activities during the federal government shutdown. Some facilities sent us a credible allegation of compliance during the shutdown which we could not verify by a revisit during the shutdown. Is it possible that a CMP and/or DPNA end date could be established earlier than the date of the revisit that we are now planning to conduct?

Imposed sanctions, such as a per day CMPs or denial of payment for new admissions (DPNA), continue to apply and accrue during the period of the federal government shutdown. In accordance with 42 CFR 488.454(a)(1), CMPs and DPNAs continue until “The facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that it can verify without an on-site visit...”

Due to the unique situation created by the federal government shutdown, for credible allegations of substantial compliance that were received by the State before or during the period of the federal government shutdown, where the shutdown delayed the revisit survey, the end date of an alternative sanction may be earlier than the date of the revisit survey only if certain conditions are met, as described below:

(a) Per Day CMP- if a per day CMP was imposed prior to or during the shutdown and a revisit was not conducted due to the shutdown, consider the available evidence as to exactly when the facility achieved substantial compliance. The end date of the per day CMP is the date that a revisit¹, conducted prior to, during or after the end of the federal government shutdown, finds that the facility is in substantial compliance with federal requirements in accordance with the State Operations Manual (SOM) at Chapter 7, sections 7317 and 7518. However, notwithstanding section 7317.2 of the SOM and only for those limited cases affected by the federal government shutdown, CMS may permit the per day CMP to end at an earlier date if CMS determines that the facility:

- 1. Has submitted a credible allegation of compliance, and;*
- 2. Is in substantial compliance with federal requirements, confirmed by an onsite or paper/desk revisit as appropriate, and;*
- 3. Has provided adequate documentation that compliance was restored on a specific date during or after the federal government shutdown, in sufficient detail that CMS concludes it is possible to set a specific CMP end date after receipt of the credible allegation of compliance but before the date of the revisit that was eventually conducted.*

Once this date is determined, process the CMP under current CMS procedures in Chapter 7 of the SOM.

(b) Denial of Payment for New Admissions (DPNA) – see SOM, Chapter 7, section 7506. If a mandatory or discretionary DPNA was imposed prior to or during the furlough, a revisit² will need to be conducted to determine whether or not the facility has achieved substantial compliance.

If it is determined, on the basis of a revisit, that the facility is now in substantial compliance, CMS ends the DPNA and notifies all appropriate parties following current CMS procedures. The end date for the DPNA will generally be the date the revisit survey was completed that found substantial compliance, but could be earlier than the date of that revisit if CMS determines that the three criteria, specified in answer B.5(a) were all fulfilled for those facilities affected by the shutdown.

*If it is determined that the facility is **NOT** in substantial compliance, the DPNA remains in effect.*

B.6. Dating a 90-Day Remedial Action and Enforcement Period: During the government shutdown, our State agency did not issue Statements of Deficiencies (SoDs) for all surveys of hospitals and non-long term care providers. What date should we use for the 90 day period during which a provider must demonstrate compliance for non-IJ Condition-level deficiencies? Normally the facility would have 90

¹ Per the SOM, conduct an on-site revisit if deficiencies are at a Scope/Severity of “G” or greater or at an “F” with Substandard Quality of Care. Otherwise conduct a “Paper/Desk” revisit as appropriate.

² Per the SOM, conduct an on-site revisit if deficiencies are at a Scope/Severity of “G” or greater or at an “F” with Substandard Quality of Care. Otherwise conduct a “Paper/Desk” revisit as appropriate.

days from the survey completion date to demonstrate substantial compliance. Should we still use that date or should we use October 17, 2013 as the 90-day period start date when sending these SoDs?

For non-deemed providers, the date of survey completion is the operative start date for enforcement actions. Use that date to calculate all 90-day remedial action and enforcement periods. Note that in some unusual situations, the survey completion date is not the exit conference date.

For deemed providers/suppliers where CMS Regional Office review is needed before the CMS-2567 can be issued, the enforcement clock starts when the complaint 2567 and CMS letter removing deemed status are issued.

B.7. Plan of Correction Dates: State surveyors exited some surveys prior to the federal closure and the surveys found noncompliance with federal requirements. Then we were furloughed and did not get out the CMS-2567. We are now sending the Statement of Deficiencies. How long should we give the providers to submit their Plan of Correction (PoC) in those cases where a PoC is required?

Please provide the normal 10-day period for submission of the PoCs.

C. State Performance Expectations

C.1. Adjustments: During the federal shutdown, we were not able to conduct statutorily-required nursing home or home health agency surveys, and we missed our performance expectations. Will CMS make adjustments to the State performance expectations for FY2014 to reflect these factors outside of State control?

Yes. We will make adjustments and communicate with States in advance of finalizing such adjustments.

D. Validation Surveys for Deemed Facilities

D. 1. 60-Day Window for Validation Surveys: With respect to validation surveys of a representative sample of deemed facilities, must State SAs adhere to the requirement that the validation survey be completed within 60 days of the accrediting organization survey, since validation surveys during the federal government shutdown were not included in the exceptions list? In addition, States are now trying to catch up on revisits that may avert termination of certain providers, and the validation surveys should be a lower priority than revisits that will avert termination of providers that have submitted a credible allegation of compliance.

CMS is not able to use the results of any SA representative sample validation survey conducted more than 60 days after the accrediting organization's survey for calculating the disparity rate contained in its annual Report to Congress. Accordingly, this timeframe will not be extended. However, if a SA anticipates that a survey assigned prior to October 1st cannot be completed within the 60-day timeframe, it should notify the RO as soon as possible, so that CMS Central Office staff may cancel that selection and make a new, replacement selection. The overall representative validation sample survey workload for FY 2014 will remain the same, assuming current funding levels continue, and CMS will compensate for the effects of the furlough, including the fact that no selections were made in October, by adjusting future selections accordingly.