DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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Office of Clinical Standards and Quality/ Survey & Certification Group

Ref: S&C: 12-13-NH

DATE: **December 16, 2011**

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Use of Federally Imposed Civil Money Penalty (CMP) Funds by States - **Update**
Supersedes S&C: 11-42-NH

Memorandum Summary

Centers for Medicare & Medicaid Services (CMS) Approval: Beginning January 1, 2012, States must obtain prior approval from CMS for the use of federally imposed CMP funds, as follows:

- Effective January 1, 2012 CMS approval is required for any new project, new grantee, or new use of federally imposed CMP funds, as well as for any previously State-approved use or project that is planned or approved for a period that will endure more than 36 months from December 31, 2011.
- Current State-approved CMP projects or uses that a State has in effect prior to January 1, 2012 do not require retrospective CMS approval so long as the project, grantee, use or purpose is not planned to endure for a period of more than 36 months from December 31, 2011. If the period of performance is planned or approved for a period of more than 36 months, then the project must receive CMS approval.
- This memorandum replaces a previous version of S&C: 11-42-NH dated September 30, 2011. Please disregard the September 30, 2011 version.

State Options to Enlist Many Entities: States may direct collected CMP funds to a variety of capable organizations as long as funds are used in accordance with statutory intent, the use is consistent with Federal law and policy, and the use is approved by the CMS.

A. Background

Sections 1819(h)(2)(B)(ii)(IV)(ff) and 1919(h)(3)(C)(ii)(IV)(ff) of the Social Security Act (the Act) incorporate specific provisions of the Patient Protection and Affordable Care Act, (the Affordable Care Act) (Pub. L. 111-148) pertaining to the collection and uses of CMPs imposed by CMS when nursing homes do not meet requirements for Long Term Care Facilities.

The Act provides that collected CMP funds may be used to support activities that benefit residents, including assistance to support and protect residents of a facility that closes (voluntarily or involuntarily) or is decertified (including offsetting costs of relocating residents to home and community-based settings or another facility), projects that support resident and family councils and other consumer involvement in assuring quality care in facilities, and facility improvement initiatives approved by the Secretary (including joint training of facility staff and surveyors, technical assistance for facilities implementing quality assurance programs, the appointment of temporary management firms, and other activities approved by the Secretary).

The specific use of CMP funds collected from Long Term Care Facilities as a result of federally imposed CMPs must be approved by CMS on behalf of the Secretary. CMPs levied for deficiencies that are not Federal, and instead are imposed exclusively under State licensure authority, are not subject to the statutory requirements or procedures in this memorandum.

The information provided in this memorandum supersedes earlier guidance[1] to States for directing CMP funds toward efforts that will benefit nursing home residents except for the guidance in S&C-11-12-NH.

B. CMS Approval Process

Effective January 1, 2012, CMS approval is required for any new project, new grantee, or new use of federally imposed CMP funds, as well as any previously State-approved use or project that is planned or in effect for a period that will endure more than 36 months after December 31, 2011. States must obtain prior approval from CMS except for temporary use in the case of sudden nursing home relocations, natural disasters, or similar emergencies. In such emergency cases, the State must seek CMS approval within 10 working days of the emergency use.

Current CMP projects or uses that a State has in effect prior to January 1, 2012 do not require retrospective CMS approval as long as the project, grantee, use or purpose is not planned for a period of more than 36 months from December 31, 2011. If the period of performance is planned or is State-approved for a period of more than 36 months, then the project must receive CMS approval.[2]

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[1] Memoranda **S&C-02-42, S&C-09-44 and the September 30, 2011 version of S&C-11-42**

[2] We further indicated in the final rule (p. 15123) that "we do not plan to approve uses that lock in civil monetary penalty funding to very long term programs that would create the reality or the appearance of an on-going revenue demand so strong that it could affect the judgment of the State or CMS in imposing civil monetary penalties, or to fund programs for which Congress has provided another on-going funding source." In the notice of proposed rule-making we also indicated that our sense of "long term" was 36 months. While it is not likely that we will approve projects of longer duration, we reserve the right to make exceptions to this general policy based on very unusual or emergency circumstances or causes if we also find that the project does not raise the prospect of conflict of interest.

Requests for approval must be sent to the appropriate CMS Regional Office (RO) for review and final approval. CMS will respond no later than 45 calendar days after receiving a request with either:

1. Approval;
2. Denial, with explanation; or
3. Request for more information. If CMS requests more information within the 45-day period, then the period needed for project approval will be extended and will depend on the nature of the information needed and the response turnaround time by the State. If CMS requests additional information from the State, CMS will undertake further review and a final decision will be provided to the State by the CMS Regional Office within 30 calendar days of the date CMS receives the additional information.

If none of the above three actions occurs within 45 days of confirmed CMS receipt of a complete project description and request for approval package (see item C below), the State should contact both the Regional Office and QualityAssurance@cms.hhs.gov for priority processing.

In our final administrative rule, we expressed an intent to develop categories of pre-approved uses that would not require prior CMS approval, and a previous version of this Memorandum (issued on September 30, 2011) described a number of such uses. However, we received so many questions about the categories of proposed pre-approved uses that we have removed that provision from our procedures at this time. As a general guide to States and others, we have included in Appendix One examples of uses that generally conform to the criteria we will use for review, but wish to be clear that all projects requiring approval will now need to be submitted to the appropriate CMS Regional Office. If this change causes any immediate timing problems for new projects that a State has planned to implement in early CY2012, please consult with your Regional Office as soon as possible and we will make appropriate accommodations.

C. Content of Requests for Approval

States must submit to CMS (and a copy to the email box QualityAssurance@cms.hhs.gov) a description of the proposed use/project that includes:

1. ***Purpose and Summary:*** Project title, purpose, and project summary;
2. ***Expected Outcomes:*** Short description of the intended outcomes, deliverables, and sustainability;
3. ***Results Measurement:*** A description of the methods by which the project results will be assessed (including specific measures);
4. ***Benefits to NH Residents:*** A brief description of the manner in which the project will benefit nursing home residents;
5. ***Non-Supplanting:*** A description of the manner in which the project will not supplant existing responsibilities of the nursing home to meet existing Medicare/Medicaid requirements or other statutory and regulatory requirements;

6. ***Consumer and other Stakeholder Involvement:*** A brief description of how the nursing home community (including resident and/or family councils and direct care staff) will be involved in the development and implementation of the project;
7. ***Funding:*** The specific amount of CMP funds to be used for this project, the time period of such use, and an estimate of any non-CMP funds that the State or other entity expects to be contributed to the project;
8. ***Involved Organizations:*** List all organizations that will receive funds through this project (to the extent known), and organizations that the State expects to carry out and be responsible for the project;
9. ***Contacts:*** Name of the State contact person responsible for the project and contact information.

States must provide information and obtain prior approval from its CMS regional office for any project for which the State wishes to use CMP funds, and CMS reserves the right to disapprove such projects (with prior notice and reconsideration opportunity for the State should CMS disapprove the requested project or use).

D. <u>Many Qualified Entities May Receive CMP Funds to Improve Quality of Care</u>

States may contract with, or grant funds to, any entity permitted under State law provided that the funds are used for CMS approved projects to protect or improve nursing home services for nursing home residents, and provided that the responsible receiving entity is:

- Qualified and capable of carrying out the intended project(s) or use(s);
- Not in any conflict of interest relationship with the entity(ies) who will benefit from the intended project(s) or use(s);
- Not a recipient of a contract or grant or other payment from Federal or State sources for the same project(s) or use(s);
- Not paid by a State or Federal source to perform the same function as the CMP project(s) or use(s). CMP funds may not be used to enlarge or enhance an existing appropriation or statutory purpose that is substantially the same as the intended project(s) or use(s).

States may target CMP resources for projects or programs available through various organizations that are knowledgeable, skilled, and capable of meeting the project's purpose in its area of expertise as long as the above criteria are met and the use is consistent with Federal law and policy. Examples of organizations that could qualify include, but are not limited to, consumer advocacy organizations, resident or family councils, professional or State nursing home associations, State Long-term Care Ombudsman programs, quality improvement organizations, private contractors, etc.

E. <u>Annual Reports</u>

We are finalizing the requirements and specifications for an annual transparency report which will be due no later than January 1st of each year, beginning in 2013. More information will be

provided after further dialogue with States and others. We are providing this information now only to provide advance notice and to aid State plans for record-keeping.

Effective Date: This clarification is effective January 1, 2012. Please ensure that all appropriate staff is fully informed within 30 days of the date of this memorandum.

Questions or Comments: Questions regarding specific proposals or applications for approval of the use of CMPs should be directed to the appropriate CMS regional office, Division of Survey & Certification, Quality Improvement, and State Operations. Questions or comments regarding CMS policy for CMP use may be directed to Lori Chapman at lorelei.chapman@cms.hhs.gov.

/s/
Thomas E. Hamilton

Attachments – Appendix One and Two

cc: Survey and Certification Regional Office Management

Appendix One: Examples of Previous CMP Uses by States[3]:

1. **Culture Change:** "Culture change" is the common name given to the national movement for the transformation of older adult services, based on person-directed values and practices where the voices of elders and those working with them are considered and respected. Core person-directed values are choice, dignity, respect, self-determination and purposeful living. CMP funds may be used to promote culture change in projects that involve multiple nursing homes. Examples:

   Louisiana - *CMPs funded a workforce and culture change project focusing on achieving staffing stability in nursing homes, and a culture change conference in the State.*

   Illinois - *enabled the Long-Term Care Ombudsman Program (LTCOP) to promote the Pioneer Movement.*

   New York - *funded projects that facilitated nursing homes' implementation of culture change.*

   Georgia - *used CMP funds for "Culture Change in Nursing Homes Symposia" to educate providers and develop public policy recommendations; for scholarships on behalf of long –term care ombudsman to attend Culture Change summit of Georgia; and for development of web-based training modules for ombudsman staff and volunteers focused on culture change principles and practices.*

   Massachusetts - *used CMP funds for a State-wide culture change coalition conference, a culture change newsletter and a 2-year project with several nursing homes on Quality Improvement and consistent staff assignments.*

2. **Resident or Family Councils:** CMP funds may be used for projects by not-for-profit resident advocacy organizations that:
   - Assist in the development of new independent family councils;
   - Assist resident and family councils in effective advocacy on their family members' behalf;
   - Develop materials and training sessions for resident and family councils on state implementation of new federal or state legislation;

   For example, CMP funds could be used to support facilitators, involvement of knowledgeable experts in council meetings, or other initiatives to engage residents and families in the development and implementation of quality improvement programs. Examples:

   Maryland - *provided a multi-year grant to the National Citizens' Coalition for Nursing Home Reform (NCCNHR, now "Consumer Voice") to support the development of family councils in the State, including resources and information such as a DVD on family councils and an informational booklet.*

[3] These are only intended as previous examples of how States have used CMP funds in the past. Beginning January 1, 2012, States must provide information and obtain prior approval from CMS for any project or use that the State considers for use of CMP funds, regardless of whether the use was conducted in the past.

Appendix One: Examples of Previous CMP Uses by States[4]:

Minnesota - *used CMP funds to host a conference for family members that highlighted quality improvement success stories in MN nursing homes for consumers.*

Connecticut - *used CMP funds to support their VOICES program which brings together presidents of resident councils to share their thoughts and to bring the concerns and ideas of residents to the attention of public officials who can assist in addressing problems.*

3. **Direct Improvements to Quality of Care:** CMP funds may be used for projects designed to directly improve care processes for nursing home residents of multiple nursing homes. Examples:

New York - *has used CMP funds to promote:*

- *Hiring of independent consultants to train nursing home staff on four "life enrichment modules:" Therapeutic Small Group Activities, Soft Sensory Programming (to relate to dementia residents through aromatherapy, music and gentle touch), Roving Cart Activities (provide individualized activities to residents) and a Dignity and Sensitivity Boot Camp (exposes staff to life as their residents experience it).*
- *A project to improve resident balance and mobility and decrease falls using innovative exercise and balance programs that include Tai Chi and Yoga.*
- *Several projects to enable facilities to substantially improve their residents' dining experiences. One project funded a fine dining project. The facility committed its own funds for renovations, while the project funds paid for training of all staff in fine dining procedures, steam tables, music systems for the dining rooms, elegant linens, etc. The project incorporated staff, resident, and family satisfaction.*

Resource on improving cultural competence*:* HHS Office of Minority Health, a discussion of cultural competency http://minorityhealth.hhs.gov/templates/browse.aspx?lvl=2&lvlID=11.

4. **Consumer Information:** CMP funds may be used to develop and disseminate information that is directly useful to nursing home residents and their families in becoming knowledgeable about their rights, nursing home care processes, and other information useful to a resident. Examples:

- *Use CMP funds to develop and distribute printed and Web-based toolkits for residents, families and caregivers on how to identify mental health issues, such as depression and anxiety, and treatment options so that individuals can overcome stigma, understand their options and take control of their mental health care.*

- ***Ohio -*** *funded start-up of Ohio's consumer guide Web site http://www.ltcohio.org/consumer/index.asp.*

[4] These are only intended as previous examples of how States have used CMP funds in the past. Beginning January 1, 2012, States must provide information and obtain prior approval from CMS for any project or use that the State considers for use of CMP funds, regardless of whether the use was conducted in the past.

Appendix One: Examples of Previous CMP Uses by States[5]:

5. **Resident Transition due to Facility Closure or Downsizing**: CMP funds may be considered for use for the temporary support and/or protection of residents of a facility that closes or is decertified (including offsetting costs of relocating residents to home and community-based settings or another facility), or to transition residents to alternate settings for a facility downsizing that requires a reduction in facility census. Example:

   Michigan - *funded a CMP project to pull together a workgroup (1½ years) to figure out the underlying factors of facility closure and come up with creative ideas to address closure issues and their impact on residents.*

6. **Transition Preparation:** CMP funds may be considered for use to fund an initial home visit for a nursing home resident to help him or her evaluate the appropriateness of a potential transition to another living arrangement or home or community based setting. See S&C Memorandum 11-12-NH for more details.

7. **Training:** CMP funds may be considered for training in facility improvement initiatives that are open to multiple nursing homes, including joint training of facility staff and surveyors, technical assistance for facilities implementing quality assurance programs, training for resident and/or family councils, LTC ombudsman or advocacy organizations and other activities approved by CMS. For example, this effort might include a statewide pressure ulcer or fall prevention collaborative that includes joint training of surveyors and facility staff from multiple nursing homes that are committed to implementing effective fall prevention programs.

[5] These are only intended as previous examples of how States have used CMP funds in the past. Beginning January 1, 2012, States must provide information and obtain prior approval from CMS for any project or use that the State considers for use of CMP funds, regardless of whether the use was conducted in the past.

Appendix Two: Examples of Prohibited Uses of CMP Funds

1. **Conflict of Interest Prohibitions:** CMS will not approve projects for which a conflict of interest exists or the appearance of a conflict of interest. Similarly, we will generally not approve uses that commit CMP funding to very long term projects (greater than 3 years). By obliging the State to fund a long and large multi-year expense, we consider such projects to raise the appearance of a conflict of interest where the levy of future CMPs could be construed to be done for the purpose of raising revenue rather than for the statutory purpose of deterring or sanctioning poor quality. We will, however, consider each project in light of the specifics of each individual case. Large projects may avoid the appearance of conflict, for example, to the extent that the State is able to demonstrate a plan for sustaining the project on a long term basis without CMP funds.

2. **Duplication:** States may not use CMP funds to pay entities to perform functions for which they are already paid by State or Federal sources. CMP funds, for example, may not be used to enlarge an existing appropriation or statutory purpose that is substantially the same as the CMP project. Also, CMP funds may not be used to fund State legislative directives for which no or inadequate state funds have been appropriated.

3. **Capital Improvements:** CMP funds may not be used to pay for capital improvements to a nursing home, or to build a nursing home, as the value of such capital improvement accrues to a private party (the owner). Federal and State payments also already acknowledge the expense of capital costs, so the use of CMP funds for such a purpose would duplicate an existing responsibility of the nursing home. Examples of prohibited uses:
    - *Building or Capital Redesign: CMP funds may not be used to build or redesign a nursing home, including conversion to a Green House.*
    - *Capital Expense: Replacing an aging boiler.*

3. **Nursing Home Services or Supplies:** CMP funds may not be used to pay for nursing home services or supplies that are already the responsibility of the nursing home, such as laundry, linen, food, heat, staffing costs, etc. This prohibition, however, does not prevent the temporary payment of salary for an individual who will work in the nursing home as part of an evaluated demonstration of a new service, skill set, or other innovation that the nursing home has not previously had in place and which the nursing home may sustain after the demonstration if resources permit. Examples might include new use of a wound specialist and adoption of new skin care techniques, new uses of advance practice nurses, new methods of retention and training for certified nurse assistants, etc.

4. **Temporary Manager Salaries:** CMP funds may not be used to pay the salaries of temporary managers who are actively managing a nursing home, as this is the responsibility of the involved nursing home in accordance with 42 CFR §488.415(c).

5. **Supplementary Funding of Federally Required Services:** For example, CMP funds may not be used to recruit or provide Long-Term Care Ombudsman certification training for staff or volunteers or investigate and work to resolve complaints as these are among the responsibilities of Long-Term Care Ombudsman programs under the federal Older Americans Act (OAA), regardless of whether funding is adequate to the purpose. On the other hand, there is no prohibition to an Ombudsman program receiving CMP funds to

conduct or participate in approved projects, or to carry out other quality improvement projects that are not within the Ombudsman program's existing set of responsibilities under the OAA. Nor is there any prohibition to Ombudsman program staff or volunteers to participate in training that is paid by CMP funds but open to a broad audience, such as nursing home staff, surveyors, consumers, or others**.**