

Center for Medicaid, CHIP, and Survey & Certification/Survey & Certification Group

Ref: S&C: 11-42-NH

DATE: September 30, 2011
TO: State Survey Agency Directors
FROM: Director
Survey and Certification Group
SUBJECT: Use of Civil Money Penalty (CMP) Funds by States

Memorandum Summary

Centers for Medicare & Medicaid Services (CMS) Approval: States must obtain CMS approval for the use of any CMP funds through either:

- **Categorical Approval:** The use has been identified by CMS via written policy as an acceptable use that does not require prior approval. See Section D for the initial list of categorically-approved uses, or;
- **Prior Approval:** States must receive prior approval from CMS for any CMP use that is not currently on the list of pre-approved categorical uses.

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

A. Background

Section 6111 of the Patient Protection and Affordable Care Act, (the Affordable Care Act) (Pub. L. 111-148), enacted on March 23, 2010, amended sections 1819(h) and 1919(h) of the Social Security Act (the Act) to incorporate specific provisions pertaining to the imposition and collection of CMPs when nursing homes do not meet Medicare and Medicaid requirements for Long Term Care Facilities. A portion of collected Federal CMP funds may be used to support activities that promote quality care and the well-being of nursing home residents in certified nursing homes.

In addition, the Affordable Care Act makes it clear that the specific use of CMP funds collected from skilled nursing facilities (SNFs), nursing facilities (NFs), or dually-certified SNF/NF facilities as a result of federally imposed CMPs must be approved by CMS. 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.

We previously provided information about the administrative rule implementing the new Affordable Care Act provisions affecting CMPs (see S&C Memorandum S&C-11-16-NH). The final rule (“Civil Money Penalties for Nursing Homes”) was published in the Federal Register on March 18, 2011, at <http://edocket.access.gpo.gov/2011/pdf/2011-6144.pdf>.

The information provided in this memorandum supersedes earlier guidance¹ 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

States must obtain CMS approval for the use of any Federal CMP funds through either:

- ***Conformance with Pre-Approved Categories of Use:*** The use has been identified by CMS via written policy as an acceptable use that does not require prior approval. See section D of this memo for the initial list of pre-approved uses of CMP funds.
- ***Prior Approval:*** States must receive prior approval from CMS for any CMP use that is not clearly within one of the CMS pre-approved categories of use.

Requests for approval must be sent to the appropriate CMS Regional Office (RO) for review by survey & certification staff. 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 needed by both the State and CMS.

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

We periodically publish updated guidance in the State Operations Manual (SOM, available at http://www.cms.hhs.gov/manuals/downloads/som107_Appendixtoc.pdf), and S&C Memoranda (at: <http://www.cms.hhs.gov/SurveyCertificationGenInfo/PMSR/list.asp#TopOfPage>). We will incorporate this letter and other information in the SOM, including a list of standard CMP fund uses which would not require pre-approval from CMS. In the interim, States should rely on section D of this memo as the initial list of pre-approved categorical uses.

Content of Requests for Approval

For uses and projects that are not included in CMS’s list of pre-approved categories, States must submit electronically to CMS a description of the proposed use/project that includes:

1. ***Purpose and Summary:*** Project title, purpose, and project summary;

¹ Memoranda S&C-02-42 and S&C-09-44

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 expects to be contributed to the project;
8. **Responsible Organization:** Organization that the State expects to carry out and be responsible for the project (if known);
9. **Contacts:** Name of the State contact person responsible for the project and contact information.

If there are CMP projects that a State has approved in the past but which do not fully conform to the requirements in this policy, and immediate discontinuance or non-renewal of the project would cause significant hardship, the State may propose a phase-out schedule for CMS consideration that would mitigate any negative impact.

C. Many Qualified Entities May Receive CMP Funds to Improve Quality of Care

States may use collected Federal CMP funds to 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 approved project(s);
- Not in any conflict of interest relationship with the nursing home(s) whose residents will benefit from the program improvement project;
- Not a recipient of a contract or grant or other payment from Federal or State sources for the same purpose or project;
- Not paid by a State or Federal source to perform the same function as the CMP quality improvement project. CMP funds, for example, may therefore not be used to enlarge an existing appropriation or statutory purpose that is substantially the same as the approved project.

States may therefore 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, such as consumer advocacy organizations, resident or family councils, professional or State nursing home associations, State ombudsmen programs, quality improvement organizations, private contractors, etc.

D. Categorically-Permitted Uses: *Prior approval from CMS is not required if the use conforms to one of the following categories:*

- 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 in 2010 for a State-wide culture change coalition conference and a culture change newsletter.

- 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; that assist resident and family councils in effective advocacy on their family members' behalf; that develop materials and training sessions for resident and family councils on state implementation of new federal or

state legislation; that advocate with and on behalf of residents on specific federal and state initiatives. 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.

Minnesota – used CMP funds to host a conference for family members that will highlight quality improvement success stories in MN nursing homes for consumers.

Connecticut –has 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 or Resident Protection:** CMP funds may be used for any project that is designed to directly improve care processes or protections for nursing home residents of multiple nursing homes. Examples:

New York has used CMP funds to promote:

- A user-friendly electronic care documentation system for use by nurse aides that simplifies documentation and helps caregivers follow resident conditions and progress of treatment.
- 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.

Example: Improve cultural competence: See HHS Office of Minority Health, for a discussion of cultural competency (<http://minorityhealth.hhs.gov/templates/browse.aspx?lvl=2&lvlID=11>).

- 4. Quality Improvement Resources (publicly available or available at no charge):** CMP funds may be used to develop quality improvement resources that are useful in quality improvement projects. Examples:

Wisconsin: Used CMP funds to develop the Wisconsin Clinical Resource Center and access the American Medical Directors Association Clinical Practice Guidelines (the only place that these have been provided electronically and without charge) for all nurses in Wisconsin nursing homes.

- 5. 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. Example:

Example: 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.ltcoho.org/consumer/index.asp>.

- 6. Resident Transition due to Facility Closure or Downsizing:** CMS funds may be used 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. CMP funds may also be used to improve the State's preparedness for transition residents in the event of facility closure or to make improvements in the State's process for such transitions.

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.

- 7. Transition Preparation:** CMP funds may be used 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.
- 8. Temporary Manager Infrastructure:** States may use CMP funds to recruit, train, or retain a cadre of skilled temporary managers. Once engaged in active temporary management of a specific facility, however, the salary of the temporary manager must be paid by the involved facility rather than through CMP funds.
- 9. Training:** 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 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.

E. 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. **Ineligible Recipients:** There are no categorically-approved uses of CMP funds for a nursing facility that was cited in its previous standard survey with immediate jeopardy, or harm at deficiency level H or I. Use of CMP funds that would benefit such a nursing home requires prior CMS approval.
3. **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.
4. **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.*
5. **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 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.
6. **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). However, recruitment, training, and retention of a cadre of temporary managers may be paid by CMP funds (see D.8 above).
7. **Expansion of Statutory Programs:** CMP funds may not be used to update a State's Long Term Care Ombudsman program's (LTCOP) consumer education materials, or recruit or train Ombudsman staff or volunteers, or investigate complaints. These are all existing responsibilities of Ombudsman programs under the federal Older American's Act, 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 one of the categorically-approved projects identified in section D above, or to carry out other quality

improvement projects that are not within the Ombudsman program's existing set of responsibilities. 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.

F. Annual Reports

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

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.

Training: This information should be shared with all appropriate survey and certification managers and staff.

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

cc: Survey and Certification Regional Office Management