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FROM: Director
Survey and Certification Group
Center for Medicaid and State Operations

SUBJECT: Use of Civil Money Penalty (CMP) Funds by States

TO: Associate Regional Administrators, DMSO
State Survey Agency Directors

The purpose of this memorandum is to provide information regarding how states may use CMP funds collected from nursing homes that have been out of compliance with Federal requirements. It has come to our attention that guidance is needed to ensure that states use CMP funds in accordance with the law and in a consistent manner, while maintaining some flexibility in the use of those funds.

Background – States collect CMP funds from Medicaid nursing facilities and from the Medicaid part of dually-participating skilled nursing facilities (SNFs) that have failed to maintain compliance with Federal conditions of participation. These CMP funds are state, not Federal funds. CMP funds collected from Medicare-participating SNFs and the Medicare part of dually-participating SNFs are Federal funds and are returned to the Medicare Trust Fund.

Section 1919(h)(2)(A)(ii) of the Social Security Act (the Act) provides that CMP funds collected by a state as a result of certain actions by nursing facilities or individuals must be applied to the protection of the health or property of residents of nursing facilities that the state or the Secretary finds deficient. These actions include CMPs assessed against:

- (1) A nursing facility that is not in compliance with Federal requirements in sections 1919(b), (c), (d) of the Act;
- (2) An individual who willfully and knowingly certifies a material and false statement in a resident assessment (section 1919(b)(3)(B)(ii)(I) of the Act);
- (3) An individual who willfully and knowingly causes another individual to certify a material and false statement in a resident assessment (section 1919(b)(3)(B)(ii)(II) of the Act); and
- (4) An individual who notifies (or causes to be notified) a nursing facility of the time or date on which a standard survey is scheduled to be conducted (section 1919(g)(2)(A)(i) of the Act).

The Act cites three examples of uses for CMPs:

- (1) Payment for the costs of relocation of residents to other facilities;
- (2) Maintenance of operation of a facility pending correction of deficiencies or closure;
and
- (3) Reimbursement of residents for personal funds lost.

The regulations, at 42 CFR 488.442(g), contain similar language, with some very minor wording changes that make it clear that the costs of relocation of residents to other facilities are for state costs. The regulations also indicate that the personal funds lost at a facility are the result of actions by the facility or by individuals used by the facility to provide services to residents. Section 7534B of the State Operations Manual (SOM) contains similar language, but specifies that the funds must be used to protect the health or property of residents of deficient facilities.

In the preamble to the final enforcement regulations published on November 10, 1994, we indicated that the law suggests that CMP revenues be applied to administrative expenses rather than direct care costs, although it is clear that states have broad latitude to determine which of these types of expenses best meet the needs of their residents (page 56210 of the Federal Register, Volume 59, No. 217). Further, the preamble is very clear that the Act permits each state to implement its own procedures with respect to the use of CMPs. Our previous direction to CMS regional offices has been that the specified uses of CMP funds in the Act and section 488.442(g) are not exhaustive, that states need flexibility in determining the appropriate use of funds, and that regional offices have some oversight responsibility. Beyond this, we have not provided general guidance to all states and regional offices on what is considered appropriate use of these funds within the scope of the law and regulations. Due to the lack of guidance, a number of states have been reluctant to use a majority of the money. As a result, some states have a significant amount of money on deposit and this amount is continuously growing.

Flexibility in Use of CMP Funds -- While the Act provides states with much flexibility to be creative in the use of CMP funds, this flexibility is limited by the requirement that CMP funds are to be focused on facilities that have been found to be deficient. However, the law does not specify when a facility must have been determined to be deficient to qualify for benefits under a state project funded by CMPs. Most nursing facilities have had one or more deficiencies either recently or in the past. Rather than setting forth rigid criteria on when it is that a facility must have been deficient to be an eligible target for the application of CMP revenues, we believe that the best course is to offer states maximum flexibility to make this determination. Apart from this, we believe that projects funded by CMP collections should be limited to funding on hand and should be relatively short-term projects.

Each state is responsible for ensuring that CMP funds are applied in accordance with the law. Regional oversight should be general in nature, responding to questions from states or commenting on the occasional project proposal submitted for regional office input, but there is no requirement that a regional office review and approve each state project before it is implemented.

Appropriate CMP Fund Use --As we stated in the preamble to the 1994 final enforcement regulations, CMP revenues should be spent on administrative expenses, rather than direct care costs, as applied to deficient facilities. If the purpose of the state project is related to deficient practice, the CMP funds could be used to prevent continued noncompliance by nursing facilities through educational or other means. For example, to address particular areas of noncompliance, a state could develop videos, pamphlets, or other publications providing best practices, with these educational materials being distributed to all deficient nursing facilities. Other uses could include, for example, the development of public service announcements on issues directly related to the identified deficient area, and employment of consultants to provide expert training to deficient facilities. North Carolina and other states have issued grants to several nursing facilities to fund Eden Alternative Projects, which provide training and other services necessary to support the use of animals in nursing facilities for therapeutic purposes. Because CMP funds collected by a state are state funds, the state may use the money for any project that directly benefits facility residents, in accordance with section 1919(h)(2)(A)(ii) of the Act, including funding an increase in ombudsman services.

Inappropriate CMP Fund Use – We believe that it is not appropriate for states to use CMP funds for a loan to a deficient facility that is having financial difficulty meeting payroll or paying vendors. As pointed out in the preamble, if the CMP is used by the facility to correct the noncompliance that led to its imposition, it is, in effect, not a remedy.

If you believe that a state is not spending collected CMPs in accordance with the law or regulations, or not at all, you should refer this matter to your regional office account representative so that he or she may discuss this matter with the state.

Effective Date: This guidance is effective on the date of issuance.

Training: This policy should be shared with all survey and certification staff, surveyors, their managers and the state/regional training coordinator.

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