

# ENFORCEMENT

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# Covered Topics

- ❖ Changes to SOM Chapter 7, §§7304-7400.6.2
- ❖ CMP Policy Revisions and the CMP Analytic Tool
- ❖ Public Release of Nursing Home Enforcement Data
- ❖ Special Focus Facility Initiative

# Available Enforcement Remedies

## Category 1 (Cat.1)

Directed Plan of  
Correction  
State Monitoring  
Directed In-Service  
Training



























## Category 2 (Cat.2)

Denial of Payment for New Admissions  
Denial of Payment for All Individuals imposed only  
by CMS  
Civil money penalties:  
*Lower range per day*  
*Per instance*

## Category 3 (Cat.3)

Temp. Mgmt.  
Termination  
Civil money  
penalties:  
*Upper range per day*  
*Per instance*

Category 1 remedies may be both recommended to CMS by the State Agency OR directly imposed by the State Agency (this is not new).

Immediate jeopardy to resident health or safety	<b>J</b>  PoC  Required: Cat. 3 Optional: Cat. 1 <i>and</i> Cat. 2 	<b>K</b>  PoC  Required: Cat. 3 Optional: Cat. 1 and Cat. 2 	<b>L</b>  PoC  Required: Cat. 3 Optional: Cat. 1 and Cat. 2 
Actual harm that is not immediate	<b>G</b> PoC Required Cat. 2 Optional: Cat. 1	<b>H</b>  PoC  Required Cat. 2 Optional: Cat. 1 	<b>I</b>  PoC  Required Cat. 2 Optional: Cat. 1 and Temporary Mgmt.
No actual harm with potential for more than minimal harm that is not immediate jeopardy	<b>D</b> PoC Required* Cat. 1 Optional: Cat. 2	<b>E</b> PoC Required* Cat. 1 Optional: Cat. 2	<b>F</b>  PoC  Required* Cat. 2 Optional: Cat. 1 
No actual harm with potential for minimal harm	<b>A</b>  No PoC  No remedies Commitment to Correct  Not on CMS-2567	<b>B</b>  PoC  <i>No remedies</i> 	<b>C</b>  PoC  <i>No remedies</i> 
	<b>Isolated</b>	<b>Pattern</b>	<b>Widespread</b>

# Substantial Compliance

- ❖ “A level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.”
- ❖ “Substantial compliance constitutes compliance with participation requirements (42 CFR §488.301).”

❖ What does the asterisk \* mean?

“Required only when a decision is made to impose enforcement remedies instead of or in addition to termination.”

# Mandatory Immediate Imposition of Remedies

- ❖ Remedy imposed immediately, with no opportunity correct
- ❖ Must meet notice requirements in SOM §7305
- ❖ State Survey Agency and State Medicaid Agency DO NOT have authority to change this policy
- ❖ Criteria explained in §7304.1

# Criteria for Mandatory Imposition of Remedies

- ❖ Immediate Jeopardy identified on the current survey
  - ✧ “Current” means “whatever Health and/or Life Safety Code survey is currently being performed, i.e., standard, revisit, or complaint
- ❖ Non-IJ Substandard Quality of Care on the current survey
- ❖ Actual Harm identified on the current survey in areas that would be SQC at S/S F, H or above:
  - ✧ Resident Behavior and Facility Practices; 42 CFR §483.13;
  - ✧ Quality of Life; 42 CFR §483.15;
  - ✧ Quality of Care; 42 CFR §483.25
- ❖ Double G’s (does NOT mean two level G deficiencies on the same survey); OR Facility in SFF program with level “F” or above in the current *health* survey or level “G” or above in the current *life safety code* survey.

# CMS is Not Required to Follow SA's Recommendation

- ❖ CMS is required to impose a remedy or remedies regardless of the SA's recommendation, based on:
  - ❖ Initial Assessment of the seriousness (i.e., scope and severity) of the deficiency or deficiencies;
  - ❖ “Other factors which may be considered in choosing a remedy within a remedy category”
    - ❖ For example, whether to choose a per instance vs. a per day Civil Money Penalty
- ❖ Other factors *MAY* be considered:
  - ❖ The relationship of one deficiency to others
  - ❖ Facility's compliance history, both in general and specifically with reference to the cited deficiencies

# Effective Date of Remedies

- ❖ Effective as of the date of the notice letter

This does NOT mean that a CMP cannot start before the date of the notice letter. The CMP starts on the first day non-compliance is identified

- ❖ Immediate Jeopardy:

- ❖ Read Appendix Q
- ❖ CMS has discretion to rescind termination remedy if the IJ is removed prior to the 23<sup>rd</sup> day – this means they may or may not rescind termination as a remedy
- ❖ CMPs will not be rescinded absent legal proceedings

# Civil Money Penalties

- ❖ Adjusted Upwards for Inflation – effective for penalties assessed on or after February 3, 2017 for violations that occurred after November 2, 2015
- ❖ Subject to CMS Analytic Tool (effective July 17, 2017), how to use per day vs. per instance CMPs
- ❖ “Intended to promote swift return to substantial compliance *for a sustained period of time, preventing future non-compliance*” (S&C Memo 17-37-NH)
- ❖ Two types:
  - ❖ Per day
    - ❖ Upper level applied to IJ
    - ❖ Lower level applied to actual harm or the potential for more than minimal harm
  - ❖ Per instance

# Civil Money Penalties

- ❖ Per instance CMPs
  - ❖ Will be imposed by CMS for past noncompliance – noncompliance that occurred and was fully addressed and corrected before the current survey
  - ❖ Are the default CMP type for noncompliance that started prior to the current survey and still exists at the time of the survey

# Civil Money Penalties

## ❖ Per day CMPs

- ❖ A resident suffers actual serious harm at the IJ level
- ❖ Abuse
- ❖ Persistent deficient practices
- ❖ Default for noncompliance identified during the survey and remaining after the survey “because there is an urgent need to promote a swift return to substantial compliance for a sustained period of time, preventing future noncompliance.”
- ❖ Exceptions to the default rule: per instance CMPs will be permitted for facilities with “good compliance histories, and where a single isolated incident causes harm to a resident”  
**UNLESS THE FACILITY IS CITED WITH ABUSE.**

# Civil Money Penalties

- ❖ “Good Compliance History” means:
  - ❖ Not in Special Focus Program
  - ❖ No deficiencies of G or above within past 3 years (except for past noncompliance)
  - ❖ Facility has a history/pattern of achieving substantial compliance at the time of the first revisit
  - ❖ History/pattern of no repeat deficiencies

# Annual Adjustments to CMP Maximums

- ❖ Civil Money Penalties Inflation Adjustment Law – CMS codifies at 42 CFR 102
- ❖ Increases minimum and maximum CMP levels every year, consistent with inflation
- ❖ <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/LTC-HHA-CLIA-Specific-CMP-Adjustments-2017.pdf>

# CMP ANALYTIC TOOL

- ❖ Does not address deficiencies of scope and severity “D” or “E”, although the RO may impose CMPs for level “D” and “E” deficiencies
- ❖ Version 1.3 Currently in Effect
- ❖ User’s Guide Summarized in the following slides

# CMP ANALYTIC TOOL OVERVIEW



# CMP ANALYTIC TOOL

- ❖ 2.2 Select Calculation Type
  - ❖ Preliminary or Final
  - ❖ Final selected if facility is either in compliance or terminated from the program
- ❖ 2.4 Select CMP Type (Not a Complete List)
  - ❖ Per Instance for Past Noncompliance
  - ❖ Per Instance for prior to start of survey, if per day factors not present
  - ❖ Per day for prior to the start of survey
  - ❖ IJ; Abuse; Double G; H or I actual harm
  - ❖ Per instance for during the survey
- ❖ 2.5 Select CMP Start and End Dates
- ❖ 2.6 Select CMP Base Amount
  - ❖ Defined within the Analytic Tool

# 2.6 CMP BASE AMOUNTS

## PER DAY

- ❖ D or E -- \$105
- ❖ F -- \$405
- ❖ G -- \$505
- ❖ H -- \$1255
- ❖ I -- \$2055
- ❖ J -- \$6394
- ❖ K -- \$8444
- ❖ L -- \$10,494

## PER INSTANCE

- ❖ F -- \$5,000
- ❖ G -- \$10,000
- ❖ H -- \$12,500
- ❖ I -- \$15,000
- ❖ J no harm -- \$10,000
- ❖ J harm -- \$17,000
- ❖ K no harm -- \$12,500
- ❖ K harm -- \$18,000
- ❖ L no harm -- \$15,000
- ❖ L harm -- \$20,000

## 2.7 Added Amount for History of Noncompliance

- ❖ History or pattern of noncompliance at S/S “G” or above for surveys conducted in the past 3 calendar years
- ❖ Amount selected based upon pattern or trend of the noncompliance history
- ❖ Per day: \$205, \$405, \$605, \$805 or \$1,005
- ❖ Per instance: \$1,000, \$2,500, or \$5,000

## 2.8 Added Amount for Repeat Deficiencies

- ❖ Deficiencies within the same regulatory grouping under which deficiencies were cited at the last survey and subsequently corrected – note, the deficiency and the facts supporting the deficiency do not have to be the same
- ❖ Per day:
  - ❖ F -- \$105
  - ❖ G, H, I -- \$205
  - ❖ J, K, L -- \$305
- ❖ Per instance:
  - ❖ F -- \$1,000
  - ❖ G, H, I -- \$2,500
  - ❖ J, K, L -- \$5,000

## 2.9 Added Amounts for Multiple Deficiencies

- ❖ Used for surveys identifying greater than five deficiencies, in consideration of the scope and severity
- ❖ Per day amounts: \$100, \$300, \$500, \$700, \$900, \$1,100, \$1,300, \$1,500
- ❖ Per instance amounts: \$2,500, \$3,000, \$3,500, \$4,000, \$4,500, \$5,000, \$5,500, \$6,000, \$6,500, \$7,000, \$7,500, \$8,000, \$8,500, \$9,000, \$9,500, \$10,000

## 2.10 Amounts Added if Facility Culpability is a Factor

- ❖ Culpability add-ons are applied if an amount above the base level is warranted, specifically (but not limited to) the presence of neglect, indifference or disregard for resident care, comfort or safety.
- ❖ Ranges from \$205 to \$4,500 in \$200 increments and based on scope and severity

Once the CMP analysis is complete, final adjustments are made based on whether the final amount exceeds the regulatory maximum, the facility's financial condition

# CMP Discounts

- ❖ 35% discount for waiving the right to appeal
- ❖ 50% discount for self-reporting AND waiving the right to appeal

# CMP Reinvestment

- ❖ <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Examples-CMP-Funded-Projects.pdf>
- ❖ Sample application:  
<https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Example-Application-For-Use-of-CMP-Funds.pdf>

# CMP Reinvestment

- ❖ To apply for participation in a CMP Reinvestment project:

Jeanette Bergeron, Executive Assistant  
Health Facility Survey & Field Operations  
NJ Department of Health  
PO Box 367  
Trenton, NJ 08625-0367  
(609) 826-3749  
[Jeanette.Bergeron@doh.nj.gov](mailto:Jeanette.Bergeron@doh.nj.gov)

# Public Release of Nursing Home Enforcement Data

- ❖ Data available online covering period through 12/31/14
- ❖ Aggregated by region and state
- ❖ S&C 16-27-NH dated June 3, 2016

# Special Focus Facility Initiative

- ❖ Updated September 21, 2017 – no additional slots this FY
- ❖ CMS not shy about terminating the provider agreements of facilities that cannot “graduate” from the SFF program
- ❖ Graduation requires 2 consecutive standard surveys with no deficiencies at or above level “F” (or “G” if LSC deficiencies) and no intervening complaint investigations with deficiencies at or above level “F” (or “G” if LSC deficiencies)
- ❖ Termination of the provider agreement is discretionary