



Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C 18-04-NH

DATE: November 24, 2017

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Temporary Enforcement Delays for Certain Phase 2 F-Tags and Changes to *Nursing Home Compare*

Memorandum Summary

- **Temporary moratorium on imposing certain enforcement remedies for specific Phase 2 requirements:** CMS will provide an 18 month moratorium on the imposition of certain enforcement remedies for specific Phase 2 requirements. This 18 month period will be used to educate facilities about specific new Phase 2 standards.
- **Freeze Health Inspection Star Ratings:** Following the implementation of the new LTC survey process on November 28, 2017, CMS will hold constant the current health inspection star ratings on the *Nursing Home Compare* (NHC) website for any surveys occurring between November 28, 2017 and November 27, 2018.
- **Availability of Survey Findings:** The survey findings of facilities surveyed under the new LTC survey process will be published on NHC, but will not be incorporated into calculations for the *Five-Star Quality Rating System* for 12 months. CMS will add indicators to NHC that summarize survey findings.
- **Methodological Changes and Changes in Nursing Home Compare:** In early 2018, NHC health inspection star ratings will be based on the two most recent cycles of findings for standard health inspection surveys and the two most recent years of complaint inspections.

Background

On September 28, 2016, CMS revised the SNF and NF Requirements for Participation, which became effective on November 28, 2016, and have a three-part phase-in of implementation dates over three years. Phase 1 became effective on November 28, 2016. Implementation of the new regulations for nursing homes under Phase 2 will become effective on November 28, 2017 (see S&C memo: 17-36-NH, dated June 30, 2017).

We also published revised interpretive guidance for Appendix PP of the SOM with the June 30, 2017 memo reflecting the new regulatory changes, which includes renumbering the nursing home F-Tags to correspond with the new regulatory sections. Implementation of Phase 2 reforms is scheduled to occur simultaneously with a new, computer-based LTC survey process in which we are incorporating the new regulatory requirements as well as combining the Traditional and Quality Indicator Survey processes.

To address concerns about the implementation of the new requirements and new LTC survey process, CMS will be making specific policy and process adjustments to the enforcement system and results posted on Nursing Home Compare. These changes are described in more detail below.

Temporary Moratorium on Imposition of Certain Enforcement Remedies

To address concerns regarding the scope and timing of the revised requirements (42 CFR part 483, subpart B), there will be a 18-month moratorium on the imposition of civil money penalties (CMPs), discretionary denials of payment for new admissions (DPNAs) and discretionary termination where the remedy is based on a deficiency finding of one of the specified Phase 2 F-tags noted below. CMS is not extending the moratorium to F608 which addresses reporting reasonable suspicion of a crime due to the concerns about significant resident abuse going unreported. CMS will use this 18-month moratorium period to educate surveyors and the providers to ensure they understand the health and safety expectations that will be evaluated through the survey process since these Phase 2 requirements are associated with unique and separate tags where specialized efforts and technical assistance may be needed. Previous communication indicated that the moratorium would be in effect for 12 months; that has been extended to 18 months to ensure provider understanding and readiness. Deficiency findings for all other F-tags will follow the standard enforcement process which includes all available enforcement remedies. Please note, facilities cited for any noncompliance with Phase 1 or Phase 2 requirements (beginning November 28, 2017), or both, will continue to be subject to statutorily-required provisions (mandatory DPNA and termination for failure to achieve substantial compliance within the required timeframes). Further note that this 18 month moratorium on the imposition of remedies does not change the implementation date for the Phase 2 provisions and state survey agencies should cite these tags as appropriate and continue to forward their findings to the RO as normal.

The following F-Tags included in this moratorium are:

- F655 (Baseline Care Plan); **§483.21(a)(1)-(a)(3)**
- F740 (Behavioral Health Services); **§483.40**
- F741 (Sufficient/Competent Direct Care/Access Staff-Behavioral Health); **§483.40(a)(1)-(a)(2)**
- F758 (Psychotropic Medications) related to PRN Limitations **§483.45(e)(3)-(e)(5)**
- F838 (Facility Assessment); **§483.70(e)**
- F881 (Antibiotic Stewardship Program); **§483.80(a)(3)**
- F865 (QAPI Program and Plan) related to the development of the QAPI Plan; **§483.75(a)(2)** and,
- F926 (Smoking Policies). **§483.90(i)(5)**

For surveys identifying noncompliance of both Phase 1 and the Phase 2 tags specified above, the CMS Regional Office (RO) will follow standard enforcement procedures related to the Phase 1 tag if the Phase 1 tag(s) necessitates the imposition of remedies. For example, if a survey conducted during the moratorium period cites deficiencies both for infection control practices at tag F880 and antibiotic stewardship at tag F881 and the RO determines enforcement remedies are warranted, the RO may impose appropriate remedies as it relates to F880; however, only a Directed Plan of Correction (DPOC) and/or Directed In-Service training (DIST) remedy could be imposed for the findings related to tag F881. Once the temporary moratorium period is over, enforcement for all cited tags will return to the normal enforcement policies. The following chart explains how the enforcement remedies will be applied during the 18month moratorium time period.

Application of Discretionary Enforcement Remedies During 18 Month Moratorium

Discretionary Enforcement Remedies	Phase 1 Tags Only	Both Phase 1 and Phase 2 Tags	Phase 2 Tags Only
Normal Enforcement Policies Apply <u>Or</u> 18 Month Moratorium Enforcement Policies Apply (DPOC/DIST)	Normal Enforcement Policies Apply	Normal Enforcement Policies Apply for the Phase 1 tag(s); and DPOC/DIST only may be imposed for Phase 2 tag(s)	18 Month Moratorium Enforcement Policies Apply (DPOC/DIST)

Directed Plan of Correction

A Directed Plan of Correction (as defined in 42 CFR §488.424) is an enforcement remedy developed by CMS, the State Survey Agency (or a temporary manager if applicable) requiring a facility to take action within specified timeframes to correct cited non-compliance. For these Phase 2 F-Tags identified above, we expect that the Directed Plan of Correction would address the structures, policies and processes needed by the facility to demonstrate and maintain substantial compliance.

A Directed Plan of Correction is completed when 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 can be verified by CMS without an on-site visit. Surveyors are expected to go back on-site to review compliance when there is a credible allegation of compliance by the facility if any of the F-tags cited are Substandard Quality of Care (SQC), or when tags are at the actual harm or immediate jeopardy levels. See § 7317.2 of the CMS State Operations Manual (SOM) for information concerning on-site revisits and § 7500 for information concerning Directed Plans of Correction.

Directed In-Service Training

Directed In-Service Training is an enforcement remedy that may be used when CMS or the State, (or the temporary manager if applicable) believes that education is likely to correct the deficiencies and help the facility achieve and sustain substantial compliance. For this remedy to be used effectively and appropriately, the deficiency finding should demonstrate that a knowledge deficit significantly contributed to the deficiency. This remedy requires the relevant staff of the facility to attend an in-service training program that will address a demonstrated knowledge deficit. The purpose of directed in-service training is to provide the information necessary for the facility to achieve and maintain substantial compliance. Facilities should use programs developed by well-established centers of geriatric health services education such as schools of medicine or nursing, centers for the aging, and area health education centers which have established programs in geriatrics and geriatric psychiatry. If it is willing and able, a State may provide special consultative services for obtaining this type of training. The State or CMS RO may also compile a list of resources that can provide directed in-service training and could make this list available to facilities and interested organizations. Facilities may also utilize their state's ombudsman program to provide training about residents' rights and quality of life issues.

After the directed in-service training has been completed, CMS RO or the State will assess whether substantial compliance has been achieved either through an on-site visit or by examining credible written evidence that it can be verified without an on-site visit. See § 7317.2 of the SOM for information concerning on-site revisits and § 7502 for information concerning Directed In-Service Training.

Statutorily Mandated Remedies not affected by Temporary Moratorium

The temporary moratorium described above does not include remedies that are required by federal law such as the Denial of Payment for New Admissions (DPNA) if the facility has not achieved compliance within 3 months of the finding under sections 1819(h)(2)(D) and 1919(h)(3)(C) of the Social Security Act (Act) and Termination after 23 days for immediate jeopardy under sections 1819(h)(4) and 1919(h)(5) of the Act or termination after 6 months for non-immediate jeopardy noncompliance under sections 1819(h)(2)(C) and 1919(h)(2)(D) of the Act.

CMS expects that the non-compliance for covered Phase 2 requirements would be corrected in advance of the statutorily-mandated timeframes as occurs with most cited deficiencies.

Temporary Freeze of Health Inspection Five-Star Ratings

Most facilities will be surveyed for compliance with Phase 2 requirements using the LTC revised survey process within one year after the November 28, 2017 Phase 2 implementation date. Due to the differing standards and process between those facilities surveyed under the new survey process compared to prior surveys, CMS will be holding constant, or "freezing," the health inspection star rating for health inspection surveys and complaint investigations conducted on or after November 28, 2017. We expect this freeze to begin in early 2018, and last approximately one year. Note that recent health surveys and complaint investigations conducted before November 28, 2017, will continue to be calculated in a facility's star rating, including any revisit

or changes based on informal dispute resolutions (IDR) or independent IDR. *Examples of when ratings can change include:*

- 1) A standard health inspection survey and revisit is conducted within the month of October 2017, and is closed after November 28, 2017. The survey results will be used in the nursing home's star rating as a survey conducted before the ratings freeze. Similar actions will take place for complaint investigations conducted prior to the ratings freeze.
- 2) A request for an IDR is received prior to the freeze and completed after November 28, 2017 with a change in scope/severity for at least one citation. The change will be reflected in the nursing home's star rating as a change prior to the ratings freeze.

Additionally, the health inspection star rating will no longer use information of the third (oldest) cycle of health inspection survey and complaint investigation data that is part of a nursing home's health inspection score. The weighted health inspection score and star rating for all nursing homes will then be based on the two most recent cycles of survey data. This change is to account for the fact that the data would have been dropped from the health inspection score because of its age, as part of the normal update process. This change will also occur in early 2018 for all facilities. At that time, the most recent cycle of data will be weighted at 60 percent and the prior cycle of data will receive a 40 percent weighting. We will be updating the *Five Star Quality Rating System* Technical User's Guide to reflect these changes.

CMS will continually monitor survey activity during the one year period to determine if any changes to the freezing methodology need to be made.

Other Changes to Nursing Home Compare

In addition to the items listed above, CMS is implementing other adjustments to ensure transparency. In addition to freezing the health inspection star rating on *Nursing Home Compare*, CMS plans to provide summaries of a facility's most recent survey findings, such as the total number of deficiencies cited, and the highest scope and severity level cited. This also includes identifying nursing homes with deficiency-free surveys. We also will post the full report of each survey (Form CMS-2567), which provides more details about the survey findings. We expect to implement these changes in early 2018, concurrent with the changes to the *Five Star Quality Rating System*.

CMS is aware that multiple programs (e.g., accountable care organizations (ACOs), bundled payment models, Medicare Advantage plans) use the *Five-Star Quality Rating System* as a component of their program. We have communicated information about changes to the rating system noted in this memorandum to these programs so they can evaluate any potential impact, and make any changes they feel warranted. The *Nursing Home Compare* website will also display information about the changes to the ratings system. For questions about how the *Five-Star Quality Rating System* is used or may impact one of these or other programs, we encourage individuals to communicate directly with the program's specific organizational or primary contact.

The changes explained in the memorandum serve a temporary need to accommodate the implementation of the first major regulatory change to the LTC requirements in over 25 years.

These types of changes are rare, and the *Five Star Quality Rating System* and *Nursing Home Compare* website remain an excellent source for information about nursing homes. In addition to survey findings, consumers can find information about quality measures and staffing to help support their decision making. We're also looking forward to future improvements, such as the inclusion of new staffing data from the Payroll-Based Journal program. That said, we believe the website and ratings system is one source of information about nursing homes, but consumers should seek other sources as well. For example, we encourage families to visit the facility and speak to the administrator, other staff, current residents, or the family or resident council. Also, speak with their physician or friends who have had similar situations.

Contact: For questions or concerns, please contact NHSurveyDevelopment@cms.hhs.gov

Effective Date: November 28, 2017. This policy should be immediately communicated to all survey and certification staff, their managers and the State/Regional Office training coordinators.

/s/
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cc: Survey and Certification Regional Office Management