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Client Advisory
CMS Issues Instructions to States on Implementing the
Special Focus Facility (Sff) Program
By Robert Harrison Gibbs, Esq., Mellette PC

Watch out for the Scarlet Letter. On November 2, 2007, the Centers for Medicaid & Medicare Services (CMS) issued a memorandum to state survey agency directors that seeks greater enforcement of CMS' Special Focus Facility (SFF) program. The recent memorandum provides additional direction regarding the SFF notice requirements and reminds the state survey agencies of this initiative to highlight nursing facility noncompliance. CMS intends for state survey agencies to implement the new SFF policy as soon as possible or, at the latest, by January 1, 2008. However, Virginia's Office of Licensure and Certification has stated that it will not be ready to implement the changes until January 1, 2008.

What's New. CMS's November 2nd memorandum changes notification procedures to apprise all "accountable parties" of the seriousness of being selected as an SFF and the need for corrective action. For the first time, CMS will make public the list of all SFF designated nursing facilities on its website. Finally, based on the SFF program's focus on quality of care and quality of life issues, CMS has removed consideration of life safety code deficiencies from the formula used to create its list of SFF candidates.

Background. Originally conceived in 1998, the SFF program seeks to decrease the number of persistently poor performing nursing facilities by focusing state survey attention on the SFF nursing facilities and causes for their repeated cycles of non-compliance.

Selection as an SFF. The state survey agency selects the poor performing nursing facility from a list maintained by CMS. SFF selection is reportedly based on a facility's three-year pattern of poor quality of care defined as a history of deficiencies at a scope and severity of "actual harm" or higher in the last three standard surveys. When a nursing facility leaves SFF status or if it is terminated from participation, the state survey agency selects another SFF from the list. Designation as an SFF is not subject to appeal.

Additional Surveys. For each SFF, the state survey agency is supposed to conduct twice the number of standard surveys, with three surveys in eighteen months. The state will also apply "progressive" enforcement until the nursing facility either (a) graduates from the list if it has significantly improved, (b) is provided additional time as an SFF nursing facility due to promising developments and improvement, or (c) is terminated from Medicare and/or Medicaid due to lack of significant improvement.

CMS defines significant improvement as citation of deficiencies at a scope and severity level no greater than “E” with no intervening complaint-related deficiencies greater than “E” for two consecutive standard surveys.

Progressive enforcement by the state survey agency or regional officer includes immediate sanctions, civil monetary penalties, and/or denial of payment for new admissions. If, after 18 months and three surveys, there is no significant progress, the state survey agency and CMS have authority to issue a notice of termination from the Medicare/Medicaid program.

Notification of Accountable Parties. In its November 2, 2007 memorandum, CMS also expanded the list of recipients of notice of a nursing facility’s selection as an SFF. In addition to the nursing facility administrator, notice extends to all “accountable” parties, which includes the governing board (and/or chairperson), owners, and operators. Notice may go to an owner of the building and land if separate from the holder of the provider agreement and corporate owners(s) for chain-operated nursing homes in addition to clearly identifiable owners on the CMS 855A form or the annual facility license application.

The purpose of the notice is to inform the facility and all respective owners of the SFF designation, the reasons for its selection, the consequences to the facility, including possible termination of the provider agreement, and the means to graduate from the SFF program. The State Ombudsman Office and State Medicaid Director will also receive notice.

This information is provided as a public service to Mellette PC clients. Should you have further questions, please contact Peter Mellette at (877) MELLETTE – (877) 635-5388. This advisory is not intended to provide legal advice about a specific issue; please contact your attorney for more information.

About the Author

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