January 2, 2019

Dr. Kate Goodrich
Director and CMS Chief Medical Officer
Centers for Medicare & Medicaid Services (CMS)
Center for Clinical Standards and Quality (CCSQ)
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC  20201

Dear Dr. Goodrich:

AARP has long sought to ensure the quality of care and quality of life for older adults residing in nursing homes, and we are therefore concerned by a recent change made to the enforcement structure for nursing facilities that could negatively impact the quality and care received in these facilities. Specifically, the Centers for Medicare & Medicaid Services (CMS) limited the type of civil money penalty (CMP) available for past noncompliance, thus undercutting the enforcement structure for nursing facilities.

AARP, with its nearly 38 million members in all 50 States, the District of Columbia, and the U.S. territories, is a nonpartisan, nonprofit, nationwide organization that helps empower people to choose how they live as they age, strengthens communities, and fights for the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities and protection from financial abuse.

In July 2017, CMS issued a directive entitled “Revision of Civil Money Penalty (CMP) Policies and CMP Analytic Tool”(S&C 17-37-NH) in which CMS instructed State Survey Agency Directors and CMS Regional Offices that “Per-Instance” CMPs will be imposed for past noncompliance. Past noncompliance is defined as something that occurred before the current survey but which has been corrected before the survey started without regard to the seriousness of the violation or the actual harm that resulted.

At a minimum, given the plain language of the Social Security Act, AARP believes CMS should have engaged in notice-and-comment rulemaking, giving the public the opportunity to weigh in on the dangers of such a move. Had it done so, however, AARP is doubtful that CMS could have made this regulatory change because such a change
conflicts with the enforcement provisions in the Social Security Act that provide for the imposition of civil monetary penalties for “each day of noncompliance.” Those provisions grant states the authority to recommend and CMS the authority to impose CMPs for each day of noncompliance. Consequently, AARP asks that CMS withdraw S&C 17-37-NH.

Oversight of nursing facilities is a shared federal-state responsibility, wherein CMS regional offices oversee state survey agencies. State survey agencies, pursuant to a contract with CMS (42 U.S.C. § 1395aa), evaluate whether nursing facilities meet CMS standards by conducting regular surveys and investigations of complaints regarding resident care or safety. 42 U.S.C. §§ 1395i-3(g)(1)(A) and 3(g)(2)(A)(iii). The statute governing remedies for past noncompliance observed by state surveyors grants states the discretion to “recommend a civil money penalty under paragraph (2)(B)(ii) for the days in which it finds that the facility was not in compliance with such requirements.” 42 U.S.C. § 1395i-3(h)(1). Paragraph (2)(B)(ii) concerns “Authority with respect to civil money penalties” and says “…the Secretary may impose a civil money penalty in an amount not to exceed $10,000 for each day of noncompliance.” 42 U.S.C. § 1395i-3(h)(2)(B)(ii). Thus, the applicable sections of the Nursing Home Reform Act, as amended, provide that states may recommend per-day CMPs for past noncompliance, and CMS may impose the same.

The relevant regulations provide further explanation about the remedies available for a facility’s past noncompliance, making clear that both per-day and per-instance CMPs are remedies available for recommendation by the state surveyor and imposition by CMS. Specifically, 42 C.F.R. § 488.430 instructs:

(a) CMS or the State may impose a civil money penalty for either the number of days a facility is not in substantial compliance with one or more participation requirements or for each instance that a facility is not in substantial compliance, regardless of whether or not the deficiencies constitute immediate jeopardy.

(b) CMS or the State may impose a civil money penalty for the number of days of past noncompliance since the last standard survey, including the number of days of immediate jeopardy.

The CMS memo at issue says regional offices “will impose a per-instance CMP for past noncompliance – something occurred before the current survey, but has been fully addressed and the facility is back in compliance with that area.” S&C: 17-37-NH at 2 (emphasis added). The memo instructs, “[t]his guidance should be communicated to all RO and State Survey Agency survey, certification, and enforcement staff, their managers and the State/RO training coordinators.” Id. at 3; see also CMP Analytic Tool § 3.6 (similar language, adding “within 30 days of this memorandum.”). The analytic tool itself provides instructions to “[s]elect ‘Per Instance CMP (PI) for Past Noncompliance’ for all past noncompliance in which a CMP would be recommended. Past noncompliance occurs when a facility was out of substantial compliance before the
current survey began, but took specific action to fully address the issue and come back into compliance with a specific regulatory tag.” CMP Analytic Tool § 2.4.2.1 (emphasis added).

The language in the CMS memo prohibits CMS Regional Offices from imposing, and states from recommending,¹ per-day CMPs for past noncompliance. This undermines the entire structure for enforcement of the Nursing Home Reform Act. Per-day penalties are intended to incentivize nursing facilities to identify and self-correct violations at the earliest point in time, before residents are placed at risk of harm. Under CMS’ new directive, states can only effectively recommend, and CMS will only impose, per-day CMPs if ongoing non-compliance is discovered during the survey. Because facilities generally know when an annual survey is due to begin, the elimination of per-day penalties for past noncompliance permits facilities to scramble to address even dangerous non-compliance only around the time the survey team is due. The survey and certification process, including the enforcement and remedy provisions, were designed to protect nursing facility residents from violations of the Nursing Home Reform Act. CMS has disregarded these critical statutory protections in issuing S&C 17-37-NH.

For these reasons, AARP asks that CMS immediately withdraw the July 2017 “Revision of Civil Money Penalty (CMP) Policies and CMP Analytic Tool” (S&C 17-37-NH) and notify its Regional Offices as well as State Survey Agency Directors that they again have discretion to impose per-day CMPs for past noncompliance as the Nursing Home Reform Act and its implementing regulations provide. If you have any questions, please feel free to contact me or Rhonda Richards (rrichards@aarp.org) on our Government Affairs staff at 202-434-3770.

Sincerely,

David Certner
Legislative Counsel & Legislative Policy Director

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¹ Although the policy memo and CMP Analytic tool do not directly instruct state surveyors on how to recommend penalties to CMS regional offices, if CMS will never impose a per-day CMP for past noncompliance, then the state’s ability to recommend per-day penalties is rendered meaningless.