Civil Monetary Penalties Misuse

CONGRESS: We ask you to advise CMS to revise sub-regulatory guidance from July 2016 (S&C memo #16-31-NH) and ensure civil monetary penalties (CMPs) are used to create an incentive to quickly fix deficiencies instead of penalizing SNFs. Specifically:

- CMPs be initiated on the day the SNF is informed of the deficiency, not retrospectively,
- CMPs be lifted when the facility is back in compliance,
- CMS should allow SNFs with CNA training programs to fix problems and retain CNA training programs.

The skilled nursing profession is one of the most regulated industries in the country. Even within the healthcare space, the survey and certification process for the SNF setting is much more extensive than for hospitals, home health, and other Medicare providers. The survey process is an important component to ensure quality of care, but recent developments at the Centers for Medicare and Medicaid Services (CMS) have burdened even some of the best providers with immense financial hardships.

When a deficiency is found in a SNF, no matter how small, it is treated as a violation of the requirements of participation in Medicare and Medicaid, puts the SNF on a termination track from these programs, and can result in large Civil Monetary Penalties (CMPs).

CMPs are out of control. In July 2016, CMS issued subregulatory guidance to Regional survey teams that encouraged and, in fact, required an increase in deficiencies and CMPs. These changes imposed mandatory CMPs for any deficiency rated as an immediate jeopardy and lowered the scope and severity of deficiencies that would trigger their imposition. They also took away all control and decision making authority from State Survey Agencies, shifting the decision making to the regional offices, and allowed the regional offices to issue CMPs retroactively, even after situations had been resolved.

### Trend in Total CMP Due When Issued as Per Diem

This, coupled with the lack of oversight by the CMS program staff, has resulted in serious misuse of CMPs. The purpose of issuing a CMP is to create a financial incentive to immediately resolve a jeopardy situation that may cause further adverse events to residents. We have seen a dramatic increase in CMPs being retroactively issued and used as a punishment. This practice is counter to the original cause for using CMPs and is generating immense financial strain for even some of the highest-quality care providers.
These changes have also had a serious impact on workforces in SNFs. Certified Nursing Assistants (CNAs), who provide a majority of care in SNFs, are trained in special programs in SNFs. These training programs are revoked for two years when CMPs of a certain amount are issued. The increase in the use of CMPs retrospectively and for citations unrelated to resident harm has resulted in many CNA training programs being revoked. These programs are essential to help meet the staffing shortages in SNFs. Revocation of these programs is the death knell to a SNF, where staffing shortages are already endemic in our profession.

What is particularly maddening about these changes is they come at a time when skilled nursing care quality is improving. Staffing levels are increasing, rehospitalizations are decreasing, and SNFs are doing better on 16 of 18 metrics measured by CMS. We feel providers should be rewarded for this, not punished.
CMS actions will have the opposite impact as intended. Quality of care will decline for patients for two reasons. First, these fines are financially crippling. SNF margins are already a razor-thin 1.6% and CMPs take important funds away from bedside care. Second, operators now have to focus on avoiding meaningless regulatory issues that do not put patients at risk, taking limited staff time away from patient care.

CMPs should be used as an incentive to quickly fix underlying deficiencies, not to penalize SNFs for behavior that has already been corrected. AHCA recommends that CMS issue revised guidance stipulating that CMPs must be issued when a SNF is notified of a deficiency, not retrospectively; CMPs should be lifted once a SNF is back in compliance; and CNA training programs not be tied to CMP amounts. We ask that lawmakers contact CMS about these serious problems within the survey and certification process and ask that new regulations be issued.

AHCA is happy to work with both Members of Congress and CMS to create new regulations that will preserve care and not unfairly punish SNFs. The current system does little to incentivize providers to improve care and the lack of central oversight means that some of the best providers are unfairly targeted and punished. Central oversight and a return to using CMPs as an incentive rather than a retroactive punishment will protect patients and ease the financial hardship on an already strained profession.