

MEMORANDUM

Texas Department of Human Services * Long Term Care/Policy

TO: LTC-R Regional Directors
Section/Unit Managers

FROM: Marc Gold
Section Manager
Long Term Care-Policy
State Office MC: W-519

SUBJECT: Regional Survey & Certification Letter #00-12

DATE: June 8, 2000

The attached RS&C Letter is being provided to you for information purposes and should be shared with all professional staff.

- RS&C Letter No. 00-12 -- Questions and Answers Furnished for State Operations Revision Transmittal 13 (**EFFECTIVE IMMEDIATELY**); Call Sue Brown, Professional Services, at (512) 438-2631. If you have any questions, please direct inquiries to the individuals or sections listed above.

~Original Signature on File~

Marc Gold

Attachment

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration
Division of Medicaid and State Operations, Region VI

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April 24 , 2000

REGIONAL SURVEY AND CERTIFICATION LETTER NO: 00-12

To: All State Survey Agencies (Action)
All Title XIX Single State Agencies (Information)

Subject: Questions and Answers Furnished for State Operations Revision Transmittal 13

EFFECTIVE IMMEDIATELY

The purpose of this letter is to provide State Survey Agencies a list of responses to questions which have been forwarded to HCFA since publication of Transmittal 13, revision to the Long Term Care Enforcement manual instructions.

Please note the enclosure. HCFA has issued clarification to twenty-seven questions regarding Chapter 7. However Q&A #18 is being rescinded because of issues raised by the HCFA regional offices.

If you have any questions, please contact Theresa Bennett at (214) 767-4406 or Dan McElroy at (214) 767-2077.

Sincerely,

~Signature on File~

Molly Crawshaw, Branch Chief
Survey and Certification
Operations Branch

Enclosure

Chapter 7

Questions and Answers

Civil Money Penalties (CMPs)

Q1: The SOM indicates that the provider is given no opportunity to correct when the per instance CMP is used as an enforcement remedy. Does this mean that the provider is *not* given an opportunity to correct for *all* deficiencies resulting from the survey?

A1: No. The provider would not be given an opportunity to correct the noncompliance associated with the per instance CMP (each tag for which the per instance CMP is used). The survey agency would need to make a determination about whether to provide an opportunity to correct for the remaining noncompliance that is not associated with this CMP remedy.

Example: The survey results in several findings of noncompliance; however, a per instance CMP is used as an enforcement remedy for only one of the deficiencies. No opportunity to correct would apply to the one deficiency against which the per instance CMP was imposed. The survey agency would need to determine whether to grant an opportunity to correct for the remaining noncompliance.

Q2: When the per instance CMP is used, should the effective date of the sanction be the date when the noncompliance began or should it be the last day of the survey, which may be different?

A2: For purposes of recording the date of imposition of the per instance CMP, the date of occurrence of the noncompliance may be used. However, for purposes of recording the deficiency on the HCFA-2567, the last day of the survey must be used. This will permit the input of deficiencies into the OSCAR/ODIE system. Selection of a date prior to the date of the survey prevents entry of the information.

Q3: Can the amount of a CMP be decreased when a revisit establishes that significant corrections have been made by the facility, although the facility is still not in substantial compliance?

A3: Yes. This was not changed by the revisions to Chapter 7. Just as the range of a per day CMP amount, i.e., immediate jeopardy or non-immediate jeopardy, can be adjusted based on any subsequent change in facility noncompliance, so may the amount within a given range.

Informal Dispute Resolution (IDR)

Q4: May States use representatives of the provider industry or other outside groups to participate in the IDR process?

A4: We view IDR as a process in which State agency officials make determinations of noncompliance and believe, for that reason, that States ought not be enlisting the assistance of outside groups to participate in this decision making process. States should be aware that HCFA holds them accountable for the legitimacy of the process including the accuracy and reliability of conclusions that are drawn with respect to survey findings. This means that while States may have the option to involve outside persons they believe

to be qualified to participate in this process, it is the States, not outside individuals, that are responsible for IDR decisions. HCFA will look to the States to assure the viability of these decision making processes, and holds the States accountable for them. Since HCFA has ultimate oversight responsibility relative to a State's performance, it may be appropriate for HCFA to examine specific IDR decisions or the overall IDR process to determine whether a State is arriving at a correct result. For dually participating or Medicare-only facilities, IDR findings are in the manner of recommendations to HCFA and, if HCFA has reason to disagree with those findings, it may reject the conclusions from IDR and make its own binding determinations of noncompliance.

Q5: Please explain the new requirement that a State's IDR policy be available in writing.

A5: The requirement that the IDR process for any State be available in writing was not changed by the revisions to Chapter 7. The only change made to that specific provision in '7212 was a word change from "provider " to "facility ". States have been required since 1995 to have their process available in writing.

Q6: In '7318.A, please clarify the sentence, "The provider may dispute penalties all deficiencies from the revisit through the IDR process (see '7212). "

A6: The sentence should be corrected to read, "The provider may dispute the results of the revisit through IDR in accordance with '7212. "

Temporary Management

Q7: The imposition of temporary management is required when a facility's deficiencies constitute immediate jeopardy or widespread actual harm when there is a decision to impose remedies as an alternative to termination. May a temporary manager be imposed when a facility's deficiencies do not constitute immediate jeopardy or widespread actual harm?

A7: Yes. When a facility is not in substantial compliance, a State has the option of imposing a temporary manager for a Medicaid-only facility. When the facility is dually participating or Medicare-only, the State may recommend a temporary manager and must obtain regional office concurrence. Although the enforcement regulations have focused its use in situations involving immediate jeopardy or widespread actual harm, both the statute and the regulation permit imposition of temporary management anytime a facility is out of compliance with participation requirements. THE selection of remedies provision of the regulations at '488.408 only sets out circumstances in which temporary management **must** be considered, but it does not foreclose imposition in other cases of noncompliance. Additionally, you should be aware that the preamble to the final enforcement regulations specifically referred to the possibility that this remedy might be applied in a broad array of cases of facility noncompliance.

Q8: Section 7309 seems to say that a temporary manager could be imposed instead of termination in immediate jeopardy situations. The selection of a temporary manager would not alleviate the immediate jeopardy and so the facility would remain on a termination track. Please explain.

A8: This not a change to '7309. The statute and implementing regulations have always authorized the imposition of temporary management instead of, or in addition to, termination in cases of immediate jeopardy. However, if the facility fails to remove the jeopardy by the 23rd day, termination must occur.

Reasonable Assurance

Q9: What types of surveys satisfy the reasonable assurance survey provision?

A9: Section 2016.D of the State Operations Manual, dated March 1998, speaks to this across all provider types and provides that "Two surveys are required.... The first survey is a partial survey conducted at the beginning of the reasonable assurance period to document compliance with requirements for which there were previous deficiencies. The second is a full/standard survey at the end of the reasonable assurance period to document compliance with program requirements. " Section 7321 of HCFA's newly released revised Chapter 7 allows more flexibility in survey type and provides that "Two surveys are required.... While both visits need not be full surveys, the regional office may require, at its discretion, that two full surveys be done in any particular case. Typically, if both visits are not full surveys, the first one is partial and the second full. " In other words, for nursing homes, when the RO concludes that circumstances of a given case warrant performing two full surveys rather than one partial and one full, policy at '7321 would support the performance of two full surveys.

"Double G " Deficiencies

Q10: We know we are to begin using revised Chapter 7 for surveys ending January 14, 2000, or later, but wonder how that affects the count of the first and subsequent surveys citing "G " level deficiencies which will prevent a facility from having an opportunity to correct before remedies are imposed. For example, if a complaint survey is conducted on January 15, 2000, and reveals a "G " level deficiency, does that survey count as the first survey in the facility's "G " survey history, or should we look back to see if there has been a "G " level deficiency cited sometime between this survey and the facility's last standard survey?

A10: The latter. As of January 14, 2000, all provisions of revised Chapter 7 are to be applied, including the ability to look back at the facility's history of "G " deficiencies in order to determine if it meets the mandatory criteria for no opportunity to correct. In other words, on January 14, 2000, facilities did not begin with a clean "G " slate.

Q11: When more than one survey is conducted during an existing survey cycle, are "G " level deficiencies resulting from either the first of subsequent surveys combined in determining "double G " status?

A11: No. In order for a "G " level survey citation to be considered with a previous survey's "G " level citation to make the determination of "double G ", the previous survey cycle must have been completed and a certification of compliance achieved, as evidenced by a determination of substantial compliance on a standard or revisit survey. For purposes of operationalizing the "double G " concept, we have developed time line examples and attached them, in Excel format, to this Q&A package.

Revisits

Q12: Relative to revisits, '7317A.1 says that surveyors should focus on what has occurred since correction dates and that a determination of noncompliance is not based on problems which took place during the period of correction. Does that mean that surveyors cannot look at the period of time prior to correction or cite other noncompliance that may have occurred during the period of correction, or, is it acceptable to determine noncompliance based on a deficient practice which occurred prior to the revisit but which has been addressed by the facility and is not present at the time of the revisit?

A12: The language of '7317A.1 is permissive in this regard. However, the purpose of a revisit is to focus on whether or not substantial compliance has been achieved and that does not typically necessitate examination of a facility's correction period relative to those areas already identified as problematic and in the resolution process, especially when the facility is in compliance at the time of the revisit and there is no compelling reason to look behind that point. However, when there is compelling reason to believe that the noncompliance worsened or deteriorated during the correction period, further investigation of that period would be appropriate. (See also #13 below.)

Q13: What should be done with information about noncompliance which is collected prior to the date of alleged compliance, if the facility acted appropriately and corrected the problem prior to the revisit?

A13: The concept of "past compliance, " acknowledges the expectation that a facility should correct its problems prior to the survey. HCFA and the States have stressed that facilities must not wait for the survey process to identify and correct problems and that each facility is expected to have an effective quality assurance system. In fact, the 4th element of an acceptable plan of correction requires that this be done by the facility. However, when the level of noncompliance becomes more serious before it is successfully corrected, it represents a failure on the part of the facility and should be documented and addressed through enforcement. (See also #12 above.)

Removal of Immediate Jeopardy (IJ) and Survey Agency Documentation

Q14: When IJ is identified, '7308 of the State Operations Manual indicates that a plan of correction may be deferred until the IJ has been removed. What type of documentation must be prepared by the survey agency when a revisit is conducted to verify abatement of IJ before the HCFA-2567 has been transmitted?

A14: The finding of IJ must be documented on a HCFA-2567 and an acceptable plan of correction obtained. In addition, documentation resulting from the revisit must be completed indicating whether the IJ was removed and the deficiency had been corrected, or the IJ was abated but compliance had not been achieved.

State's Notice of Denial of Payment for New Admissions

Q15: For a State to provide notice for denial of payment for new admissions for HCFA, is the State required to obtain specific delegated authority from the HCFA regional office?

A15: No. The process is handled in the same way as it is for notice of category 1 remedies. The State recommends to the regional office that a denial of payment can be imposed, and the regional office approves or disapproves the recommendation. In accordance with '7314, if the regional office does not disapprove the recommendation within 2 calendar days, then the recommendation is deemed to be approved and the State then sends the notice to the facility since it has been authorized to do so by the regional office. The regional office retains the authority to actually impose the remedy.

State's Establishment of Correction Date

Q16: Has the concept of "date certain " been eliminated?

A16: No. While the terminology of "date certain " has been removed from the State Operations Manual, the concept has been retained in the provisions governing the initial notice by the surveying entity. Section 7305.A.1.d stipulates that the notice "provides the date by which correction must be made which is reflected by the completion dates on the plan of correction. " Survey agencies should continue to establish the "outside " date by which all corrections must be made.

Example: As a result of a standard survey, the provider is notified that a per day CMP will be imposed to include the period of noncompliance if substantial compliance is not achieved by a date specified by the survey agency. (The survey agency establishes the "outside " date by which all corrections must be made.) At the time of the revisit the survey agency determines that substantial compliance has not been achieved. The effective date for imposition of the per day CMP would be retroactive to the date of the standard survey.

"Double Gs "

Q17: The Online Survey, Certification and Reporting system (OSCAR) records the scope/severity level of deficiencies cited at standard surveys and at complaint surveys, but does not record the scope/severity level of deficiencies at revisits when the facility is not in substantial compliance. If a revisit reveals that the scope/severity of a previously cited tag has risen to a G level or above, should the State replace the original scope/severity with the most recent scope/severity resulting from the revisit?

A17: Yes. The original scope/severity rating of a deficiency will only be changed in OSCAR by a revisit if that same deficiency remains at revisit and has worsened to a "G " level or above. This instruction is contrary to previous guidance which provided that in no case should be original scope/severity rating of a deficiency be changed, but it is now necessary to officially record "G " level (or above) noncompliance history in OSCAR since recurring "G " findings are now especially significant for enforcement purposes. And, as before and not changed by this Q&A, the scope/severity of any new deficiency identified at the revisit should be entered into OSCAR.

Q18: Does past noncompliance at the "G " level recorded at Tag 698 fit into the mandatory "double G " computation?

A18: No. Past noncompliance is not recorded as a current deficiency on the HCFA-2567 nor is a scope/severity rating for it entered into OSCAR. A scope/severity rating should be assigned to the deficiency, however, and included in the narrative under Tag 698. While past noncompliance is not included in the mandatory criteria for "no opportunity to correct ", if a State believes that the "G " level or above past noncompliance should be a factor in its decision to impose sanctions immediately for noncompliance identified at the current survey, States have the statutory authority to impose sanctions immediately anytime.

Q19: In the previous set of Qs and As, charts were included to illustrate what does and does not constitute "double G ". Please explain why the last example on the chart titled "Examples Not Constituting Double G " isn't a "double G ", since 2 findings of "G " level noncompliance were identified and separated by a period of compliance.

A19: In order for two "G " level findings to constitute the mandatory "double G " determination, there must have been a determination of compliance following the first G (see previous set of Qs and As, #11). Therefore, regardless of how many Gs are identified by individual surveys within any given survey cycle, unless and until there has been an intervening determination of substantial compliance, all of the Gs found during that cycle can only count as one "G " finding.

Civil Money Penalties (CMPs)

Q20: Why would the State not cite past noncompliance as part of the current annual survey since the facility is supposed to maintain substantial compliance at all times?

A20: Past noncompliance is noncompliance which occurred between 2 certifications of compliance and which is corrected at the time of the current survey. In accordance with '7510.B of the State Operations Manual, past noncompliance is entered on the HCFA-2567 under the heading "Past Noncompliance " at Tag 698. Noncompliance that began in the past but still exists at the current survey is not past noncompliance, but rather is current noncompliance and would be documented along with other current findings of noncompliance.

Q21: Could "egregious " past noncompliance be further defined?

A21: We are in the process of revising '7510.A to remove the word "egregious ".

Q22: Section 7313.A establishes a 10-day time frame for the regional office (or the survey agency, if it is authorized by the regional office) to provide notice about imposition of immediate remedies in non-immediate jeopardy cases. However, when a per instance CMP is imposed for non-immediate jeopardy cases, HCFA's current Memorandum of Understanding (MOU) with the Department of Justice (DoJ) allows up to 14 days. Was it your intention to reduce the DoJ time frame from 14 to 10 days.

A22: No, nor was it our intention to do that in the previous version of Chapter 7 which also failed to recognize the time frames established in the MOU with the DoJ. Section 7313.A was changed in the latest release of Chapter 7 to increase the previous 3-day time frame to 10 working days in order to provide more realistic processing time. The MOU needs to be updated although changes to the MOU will not necessarily be for the purpose of decreasing the time allowed for review by the DoJ. The MOU currently uses the terminology "poor performing facility " which is no longer correct. Additionally, it was executed prior to promulgation of the "per instance " CMP regulation which does not allow an opportunity to correct prior to imposition.

Q23: What became of the proposal to permit a "cc " of the State's notice to a facility to satisfy the requirements for notice to the DoJ in CMP cases?

A23: Upon reflection, we decided not to change the procedure in this regard since relying on the State's notice could be confusing to the DoJ in determining which party to deal with, i.e., HCFA, the State, or the facility.

State Notice of Denial of Payment for New Admissions (DoPNA)

Q24: What was the rationale for permitting States to give notice about imposition of DoPNA in cases when the facility isn't being given an opportunity to correct?

A24: Since releasing revised Chapter 7, we have concluded that there isn't anything gained by letting States notify facilities about the imposition of DoPNAs in cases of "no opportunity to correct " since the regional office must become involved immediately in these cases anyway. The real advantage of permitting States to notify facilities of DoPNA actions is in cases when facilities ***are being given an opportunity to correct*** since it allows HCFA to effectuate the action immediately following a revisit should it reveal that noncompliance still exists. Therefore, we are deleting the provision that States may provide notice of imposition of this sanction in cases when the facility is going to be sanctioned immediately.

Q25: There are still places in Chapter 7 that refer to the State "imposing " sanctions, as authorized by HCFA or the State Medicaid agency. Is this reference an error?

A25: Yes. We are in the process of changing any remaining references of the States' ability to "impose " sanctions to the ability to "provide notice of the imposition " of sanctions, as authorized by HCFA or the State Medicaid agency.

Life Safety Code (LSC)

Q26: Why are different remedies imposed when the health portion and LSC portion of the survey are performed more than 7 days apart?

A26: Different remedies aren't imposed when the two surveys are performed more than 7 days apart. The confusion may be about the timing of remedies when there are separate enforcement tracks for each portion (health and LSC) which is the case when the two surveys occur more than 7 days apart. When there are separate enforcement tracks for each portion of the survey, each respective track proceeds independently within its own set of enforcement time frames.

Q27: Can sanctions other than denial of payment for new admissions and termination be used for LSC violations?

A27: Yes. Section 7400.C does not distinguish between the sanctions available for LSC and health noncompliance. All remedies are available for both types of noncompliance.

Examples Constituting "Double G "

Key: NC = Noncompliance
C = Compliance
x = Period of noncompliance

Example 1:

Previous Std Survey (pre-1/14)	Revisit	Current Std Survey (1/14)	1st Revisit	2nd Revisit	Complaint Survey
x	x	x	x	x	x
NC No Gs	C certified	NC No Gs	G cited	C certified	G cited

Example 2:

Previous Std Survey (pre-1/4)	1st Revisit	2nd Revisit	Complaint Survey (1/14)
x	x	x	x
G cited	G cited	C certified	G cited

Example 3:

Last Std Survey (pre-1/14)	Revisit	Complaint Survey	Current Survey (1/14)
x	x	x	x
G cited	C certified	NC No G	G cited

Examples Not Constituting "Double G "

Key: NC = Noncompliance
 C = Compliance
 Shading = Period of noncompliance

Example 1:

Previous Std Survey (pre-1/14)	Revisit	Current Std Survey (1/14)	Revisit	Complaint Survey
x	x	x	x	x
G cited	C certified	NC No Gs	C certified	G cited

Example 2:

Last Std Survey (pre-1/4)	Complaint Survey (1/14)	Revisit	Complaint Survey
x	x	x	x
No NC C certified	G cited	NC	G cited

Example 3:

Previous Std Survey (pre-1/14)	Revisit	Current Std Survey (1/14)	Complaint Survey	Revisit
x	x	x	x	x
G cited	C certified	NC No G	G cited	G cited