



CMP Funds Are Available for Skilled Nursing Facilities

Alan C. Horowitz

An article in last week's edition of AGG's Healthcare Authority noted that skilled nursing facilities (SNF) may obtain funds from the Centers for Medicare & Medicaid Services (CMS) for certain projects aimed at promoting resident care.¹ This article describes some of the permitted uses and the process for applying for those Civil Money Penalties (CMP) funds. Section 6111 of the Patient Protection and Affordable Care Act (the Affordable Care Act) specified that a portion of federally collected CMPs "must be applied directly to promote quality care and the well-being of residents in nursing facilities."² Access to collected CMPs may provide a modicum of relief, especially to providers who have paid staggering six-figure CMPs imposed by CMS. Note that any provider, not just a provider subject to a CMP may apply for the funds.

According to regulations promulgated by CMS, "ninety percent of the collected civil money penalty funds [placed in escrow and remaining after a final administrative determination]... must be used entirely for activities that protect or improve the quality of care for residents."³ One of the ten CMS Regional Offices imposed more than \$18 million in CMPs in 2012. Thus, the amount of money that "must" be applied to promote quality care is substantial. (Although it is not required to do so, CMS has generally demanded that providers place the entire amount of a CMP in an escrow account with CMS even when the underlying basis for the CMP is appealed.⁴)

Permitted Uses

CMS must approve all activities supported by the CMP funds. Examples of activities permitted by the regulation are:

- Activities that provide support and protection for residents of a facility that is closing (voluntarily or involuntarily);
- Expenses related to relocating residents to home and community-based settings or other facilities when a facility closes;
- Programs that support resident and family councils and other consumer activities that foster quality care for residents;
- Joint training initiatives, such as training of staff and surveyors or technical assistance for facilities implementing quality assurance and performance improvement (QAPI) programs, when those facilities have been cited by CMS with a deficiency in that area;
- The development and maintenance of temporary management or receivership capability, including recruitment, training, retention or other system infrastructure expenses (this does not include a temporary manager's salary).

¹ *Senators Pressure CMS to Improve SNF Survey Process*, April 14, 2014, available at: <http://www.agg.com/files/Publication/7b9fb346-489f-4c9a-973f-e6508dec61bd/Presentation/PublicationAttachment/bde34104-ccb7-42f0-9724-3c1b5f1394c3/Horowitz-Senators-Pressure-CMS-to-Improve-SNF-Survey-Process.pdf>.

² 76 Fed. Reg. 15,120 (Mar. 18, 2011).

³ 42 C.F.R. § 488.433.

⁴ Since 2011, CMS has been authorized to escrow the full CMP before an appeal can be decided by an Administrative Law Judge or a further appeal. 42 C.F.R. § 488.431.

Prohibited Uses

- CMS will not approve funds where a conflict of interest either exists or appears to exist;
- Long-term projects (*i.e.*, more than three years) will generally be denied although CMS will consider each request on a case-by-case basis;
- CMP funds may not be used for a facility's capital improvement, such as replacing a roof or repairing structural damages (CMS considers these items the responsibility of the nursing facility);
- CMP funds may not be used to pay the salary of a temporary manager since that is the responsibility of the facility. However, as noted above, the recruitment, training and retention of temporary managers may be funded;
- CMP funds will not be used to supplement a State's Long Term Care Ombudsman program's consumer education materials. Nor can CMP funds be used to pay for the recruitment and/or training of an Ombudsman's staff or volunteers (the Older Americans Act provides funding for such activities);
- CMP funds will not be provided for basic nursing home services or supplies. For example, items such as laundry, food, heating, and staffing will not be funded by CMS. However, this prohibition does not apply to the salary of someone who is approved to work in the facility as part of a demonstration project, such as new uses of a wound specialist.

How to Apply for CMP Funds

CMP Applying for CMP funds is a bifurcated process. First, a facility must apply to its respective State survey agency. After the State survey agency completes its review, it will forward the request to CMS for a determination. CMS will either approve or deny the request, or request additional information. CMS provides feedback to the State survey agency within 45 days of receipt of the request. There are no appeal provisions for a denial by CMS.

For those facilities located in CMS Region IV, more specific guidance has been made available along with the form that is required to be submitted with a request for CMP funds.⁵ The CMP application is available at: <https://www.gmcf.org/AlliantWeb/Files/QIOFiles/Nursing%20Homes/CMPGrantApplic508.pdf>.

Providers are encouraged to consider submitting a clear, concise request for CMP funds for one of the approved activities. Requests for CMP funds should comply with the requirements noted in the publication referred to above or the specific requirements from the respective State survey agencies.⁶ A request should include the following: the project title and a brief summary; the requestor's background and qualifications; the need for the project; expected outcomes; a description of how the project results will be assessed (including specific measurements); a description of how the project will benefit nursing home residents; a statement that the proposed project will not supplant existing responsibilities or other statutory and regulatory requirements; a description of the involvement by residents and/or family councils and staff in the development and implementation of the project; the amount of funds anticipated for the project and duration of the project (note: CMS Region IV requires an Excel spreadsheet with budgeted expenses for the project and an explanation of the costs); and a list of all organizations that will receive funds committed to the project (if known).

Requiring CMS to return CMP funds to nursing facilities, as well as other eligible entities, may be one of the more enlightened and productive measures authorized by Congress. After all, the stated purpose of CMPs is remedial, not punitive.⁷

⁵ Region IV includes: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.

⁶ Note that individual States also provide funds from collected CMPs to eligible nursing facilities. The CMP funds made available by individual states are not federal funds. Section 1919(h)(2)(A)(ii) of the Social Security Act provides that CMP funds collected by a state as a result of nursing home actions must be applied for the benefit and protection of residents in nursing homes with a history of noncompliance.

⁷ See *e.g.*, 59 Fed. Reg. 217 (Nov. 10, 1994) (The purpose of a CMP is to motivate providers to achieve and maintain substantial compliance.); see *also*, 42 C.F.R. § 488.402(a) ("The purpose of remedies is to ensure prompt compliance with program requirements.").

Authors and Contributors

Alan C. Horowitz

Partner, Atlanta Office
404.873.8138
alan.horowitz@agg.com

not *if*, but *how*.[®]

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a “business sensibility” approach, developing a deep understanding of each client’s industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal’s prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief “not if, but how.” Visit www.agg.com.

Atlanta Office

171 17th Street NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Ave., NW,
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: <http://www.agg.com/subscribe/>

©2014. Arnall Golden Gregory LLP. This legal insight provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice. Under professional rules, this communication may be considered advertising material.