

LOG OF CMS RESPONSES MADE TO STATE SURVEY AGENCY QUESTIONS
Regarding the
FEDERAL GOVERNMENT SHUTDOWN FY2014 as of October 4, 2014

Below are responses to questions we have made to State survey agencies (SAs) that have contacted us seeking clarification or answers to details related to activities during the federal government shutdown.

1. Revisits to Avert Termination: Regarding requests for revisits that offer providers an opportunity to demonstrate compliance and avert prospectively-scheduled termination, what lead time does Dr. Farris prefer for submission of requests (i.e., should we submit requests for a termination set for 1 week from now, 3 weeks from now)?

At the present time, we are considering requests for terminations that are scheduled to occur up to 4 weeks from the date of the request. This should enable time for both the revisit and for potential notifications of continued termination action in the event that the revisit does not reveal substantial compliance.

Requests are best sent to Dr. Farris via email at James.Farris@cms.hhs.gov. Please include in the email the name of the facility, the scheduled termination date, and any other brief information you consider important to the determination.

We advise States to hold off on requests for revisits associated with terminations that are scheduled further into the future than in 4 weeks.

2. Enforcement for Nursing Home Surveys: Section B. 2. of S&C Memo 14-02 states that requests for federal approval necessary for federal Medicare enforcement action should be directed to the federal contact.

(a) Does this include federal enforcement action for nursing homes, such as recommended Civil Money Penalty (CMP) and or Denial of Payment for New Admissions (DPNA)? For example, if a complaint triaged as immediate jeopardy results in an immediate jeopardy citation, should the State agency contact CMS for approval prior to sending the letter to the facility recommending a CMP or DPNA?

In order to promote timely facility notification and prompt action by the facility to correct deficiencies during the period of a federal government shutdown, States should accomplish the following when nursing home complaint investigations or revisits find deficiencies that warrant enforcement action:

- *Send the letters conveying the survey findings and appeal rights directly to the facility, including notification that the State is recommending to CMS a CMP or DPNA or Medicare termination or other enforcement action under section 1819(h) of the Social Security Act, without waiting for CMS prior approval;*
- *Copy in both the appropriate Regional Office and James.Farris@cms.hhs.gov. If the State SA is in doubt about a particular case or wishes to discuss a particular case, the SA should contact Dr. Farris, preferably via email.*

(b) What facility, enforcement or access to care information is desired when such a request is submitted?

Electronically copy the appropriate Regional Office and Dr. Farris when sending a letter to a facility notifying the facility of the recommendation for a CMP or DPNA.

(c) What will be the expected turnaround time from Dr. Farris on approval or disapproval of the request?

Since we are advising States to proceed with notification to the facility without needing to obtain prior federal approval in the case of recommendations for CMPs or DPNAs, this question is moot.

However, in any other situation in which prior federal approval is required (such as for revisit surveys), we are striving for a 24-hour turnaround to respond to each request.

3. Enforcement for Non-LTC Providers and Suppliers: For non-LTC providers, should we continue to follow section B. 2. of S&C Memo 14-02 and direct those to the federal contact?

Yes, for hospitals, home health, ESRD, and other types of providers or suppliers, please send the survey findings to Dr. Farris. CMS will then take the enforcement action for Medicare.

Since Dr. Farris does not have access to ASPEN, please send the Form 2567 and any other information that is particularly relevant. Obviously, immediate jeopardy findings are of greatest urgency. It will be most helpful if you can include in the email a very brief summary of the findings (e.g. condition-level deficiency for xyz) and your recommendations.

4. Bundling of Investigations: If we are conducting a 2- or 10-day complaint for reasons outlined in the S&C Memo 14-02, is it ok to conduct a standard survey or a complaint revisit that is due at the same time we would be conducting the new 2 or 10 day complaint? This could be compared to the question that AL asked about a next onsite complaint conducted with a 2 or 10 day complaint.

Standard surveys are not included among the essential S&C activities for which CMS has been authorized to incur obligations at this time. It is therefore not appropriate to conduct a standard survey at the same time as a complaint investigation that has been determined as essential in accordance with section B of S&C Memo 14-02.

With regard to revisits bundled with an authorized complaint investigation, or other activity: If the purpose of the onsite visit is a complaint investigation or revisit determined as essential in accordance with section B of S&C Memo 14-02, States may not bundle the essential Medicare activity with other activities unless those other activities are:

- *Comprised of a revisit that is necessary to confirm a credible allegation of compliance that would avert a prospectively-scheduled termination of participation (even if the termination is scheduled for more than 4 weeks hence); or*
- *Necessary for the protection of life or property; or*
- *Necessarily implied in order to conduct the essential complaint investigation or revisit for which the original onsite visit has been authorized under section B of S&C Memo 14-02; or*
- *The obligation of another payment source not subject to the limitations of the federal government shutdown, such a CLIA survey or State licensure survey.*

5. Nurse Aide Registry: The CNA Registry is partially funded with Title XVIII dollars (50%). Is CNA Registry activity affected – or not – by the federal government shutdown? In other words, is CNA Registry activity included – or not – in allocation for Medicare Authorized Obligations identified in the Appendix to S&C 14-02-ALL?

Maintenance of the Nurse Aide Registry is part of the infrastructure necessary to perform essential State functions, which includes complaint investigations that allege immediate jeopardy or harm to a resident.

Section B of S&C Memo 14-02 makes clear that “States should maintain the infrastructure capability to support the complaint investigations, enforcement, and survey information system entries for Medicare activities authorized in this communication.” Section 1819(2)(2) obliges States to maintain the nurse aide registry, while section 1819(g)(1)(c) requires that States provide for timely investigation of allegations of neglect and abuse and misappropriations of resident property by a nurse aide. The Registry is a critical source for such investigations. Section 1819(b)(5) of the Social Security Act prohibits nursing homes from using individuals as nurse aides unless they have inquired of the Registry to see if the individual has a history that would disqualify him or her. Compliance with this statutory provision for protection of life and property of nursing home residents is part of both the nursing home responsibility and the state survey agency responsibility for any complaint investigation to which such compliance pertains.

6. Database for Registry: With regard to the essential functions of maintaining the nurse aide registry – would this include any other administrative function (e.g. database maintenance) that would be part of the nurse aide training program such as changes to nurse aide training program instructors for facility based programs?

The database is part of the infrastructure.

7. Vendor Contracts: What vendor contracts are affected by the federal work stoppage? Can a list be provided?

No S&C vendor contracts are affected by the federal government shutdown at this time. All such contracts were executed in FY2013 through FY2013 appropriations. The processing of some work products for some vendors in FY2014 will be slowed, however. For example, some contractors that perform onsite surveys for CMS (such as organ transplant center surveys) will not have their survey results immediately processed by CMS. If the federal government shutdown persists for more than 3 weeks, some contractors may also begin to be affected in other ways due to the absence of federal staff necessary to provide direction and/or approvals of work products.

8. Shutdown Activities: Section B.5. of S&C Memo 14-02 indicates that states could complete tasks begun prior to 10-1-13 within 4 hours of the federal shutdown. Please confirm this means that surveys that were completed prior to 10-1-13 but not uploaded to ASPEN yet should not be uploaded at this time.

If the surveys did not result in a deficiency citation, or in the case of a nursing home survey did not reveal a deficiency above the level of isolated potential for more than minimal harm (“D” level), the surveys should generally wait until after the end of the federal government shutdown to be processed, including the upload to ASPEN.

9. Complaint Investigations-with No Deficiency Findings: If an onsite complaint investigation determines that there is no deficiency, should State surveyors write up the survey results during the period of a federal government shutdown?

When there is no deficiency finding from an onsite complaint investigation, surveyors should document the findings at the point that preserves the findings, and hold off on any further administrative follow-through that can reasonably wait until after the federal government shutdown ends.

10. Complaint Investigations-with Potential Harm Findings: If an onsite complaint investigation determines that there is a deficiency finding that is limited to a potential for more than minimal harm, should State surveyors write up the survey results, issue the CMS Form 2567, and implement enforcement actions during the period of a federal government shutdown?

Complaint investigation activities described as essential in S&C memorandum 14-02 are those for which there is a credible allegation of immediate jeopardy or actual harm. If the completed investigation finds that there has not been actual harm, but there remains the potential for more than minimal harm - at a minimum - the survey results should be documented and communicated to the responsible party to ensure that party is taking action to protect life or property. Such communication could occur at the exit interview.

If the potential is limited to isolated harm that is more than minimal, we rely upon the judgment of the State survey agency as to what further actions are immediately necessary to protect life or property. This is because the State SA will then have unique survey-derived knowledge of the specific circumstances involved, will have information about the facility's immediate verbal or written remedial actions being made in response to the communicated findings of the complaint investigation, and the fact that the potential for harm is isolated. If the State SA judges that no further actions are immediately necessary, then the SA should hold off on further actions until the federal government shutdown is ended, including the process of writing up the Form 2567. If the SA determines that additional action is immediately necessary, it should proceed to take those actions. We appreciate that this may require some retrospective policy action on the part of CMS to ensure that our State Operations Manual accommodates the exigencies of this federal government shutdown.

However, if the potential is for a pattern of more than minimal harm or for widespread harm, the Form 2567 should be written and issued, and enforcement implemented.

11. Write-Up Instructions: Do you anticipate the “special instructions” for completing write-up to be issued during the shutdown period?

After the federal government shutdown ends, we will issue special instructions. At the present time, there are too many unknowns. In addition, before issuing the instructions we would benefit from some consultation with States.

12. Medicaid Funding Availability: State Medicaid agencies have not been able to provide a definitive answer on the availability of Medicaid Administration funding. States have little to no information regarding the availability of Medicaid funding for survey and certification allowable activities. Should states assume Medicaid funds are available as normal?

Medicaid funding continues to be available to States for S&C activities, unaffected by the federal government shutdown in the first quarter of FY2014. Medicaid funds are also available now for draw-down from the payment management system. State business operations staff may contact their CMS Regional Office payment management system contacts for any special instructions with regard to methods of making the draws for Medicaid. Medicaid funds for the first quarter of FY2014 are not affected by the federal government shutdown, but there may be some special

instructions with regard to the manner of structuring the draw-down requests from the payment management system. States may also contact Kristin Fan (Kristin.Fan@cms.hhs.gov) or Tim Hill (Timothy.Hill@cms.hhs.gov) if there are questions.

13. Non-Essential Work: If the SA continues to do non-essential federal work (e.g. standard surveys), will federal enforcement remedies be available when warranted and will these surveys be recognized as federal surveys of record?

CMS is not authorized to incur fiscal obligations for more than the essential functions articulated in S&C memo 14-02. Whether States might be paid for any other activities that are not part of the authorized obligation depends entirely upon the final action of Congress, whether appropriations are made retroactive, and the precise wording of the legislation. In certain past federal government shutdowns, Congress eventually passed a budget bill that was retroactive and that provided for a variety of payments (even including payment for federal employees who were on furlough). Past precedent does not predict the provisions that may apply in this case.

14. LSC Portion of Standard Surveys: We completed the health portion of three nursing home recertification surveys at the end of September 2013. They now require a life safety code survey (LSC) survey. Our LSC survey section needs to know if there will be retrospective payment for the LSC survey activity associated with these three health surveys if the LSC surveys are done after the October 1 federal shutdown date.

During the federal government shutdown, we recommend that States delay performance of the LSC portion of the recertification survey. During this period States may de-link the LSC portion from the health portion of the recertification surveys in ASPEN.

15. Dispute Resolutions: We note that dispute resolutions for non-essential survey activities should not be done (S&C memo 14-02 section C). But an IDR must occur (if requested) for a complaint investigation that found harm or immediate jeopardy. When the completed IDR in such a case suggests a change in the deficiency citation, should the State SA proceed to revise the Form 2567 or wait until the federal government shutdown ends?

At the present time, the State SA should document the IDR findings, convey those to the RO, and hold off on further action until the federal government shutdown ends.

16. Recovery Plan: When the federal government shutdown ends, will CMS issue a recovery plan?

Yes, we will be in close communication with State SAs and then issue a recovery plan. We appreciate that we will need to make certain FY2014 adjustments to performance expectations in the State Operations Manual (SOM) and State Performance Standards System (SPSS), at a minimum. We will solicit State suggestions for the issues that the Recovery Plan should address and seek an understanding of the particular recovery challenges that need to be managed.