

## Long-Term Care Survey Alert

### Survey Trends: Beware: CMS Increasing the Number of Special Focus Facilities, Escalating Oversight

**The agency's tougher stance on SFFs may portend a rougher survey road ahead for all facilities.**

"Dear Nursing Home Administrator," a new CMS form letter reads: "Because of your facility's poor compliance history for the past three years, you have been selected as a Special Focus Facility (SFF) ..."

The bad news is that many facilities will be the recipients of these announcements. CMS is increasing the number of facilities eligible for participation in the SFF program, an initiative in which facilities either improve -- or get the boot from Medicare and/or Medicaid.

According to a September survey and certification memo, CMS is adjusting the number of "SFF slots" for each state "to reflect the current population of nursing homes in each State and a ten percent increase in SFF slots nationally." The memo goes on to state that effective this fall, "the candidate list will be adjusted so that each SFF slot will have five candidates from which States may recommend selection."

#### Know the Consequences

SFFs are subject to twice the number of standard surveys as other nursing homes, CMS reminds providers in the memo. "A nursing home may be removed from the SFF program when it demonstrates at two standard surveys that it has no deficiencies cited at a scope and severity level of 'F' or greater and no intervening complaint-related cited at 'F' or greater," states the "model letter" that the memo includes for states to use to notify facilities that they are on the SFF list.

"A nursing home may also be removed through a termination action if it fails to make significant improvements in the 24 months (3 standard surveys) following its selection as a SFF," the model letter explains.

In addition, the survey and certification memo notes that the state agency will use progressive enforcement until the facility either graduates or gets terminated from Medicare and/or Medicaid. The memo spells out how the state will escalate enforcement, including a chart that explains the process (see the chart on page 6 of the memo

at [www.cms.gov/Surveycertificationgeninfo/downloads/SCLetter10\\_32.pdf](http://www.cms.gov/Surveycertificationgeninfo/downloads/SCLetter10_32.pdf)).

#### 5 Strikes (or Maybe 4) and You're Out

"The guidance does put facilities at greater risk for termination and other sanctions," warns attorney **Howard Sollins** with Ober/Kaler in Baltimore. "CMS describes a process for providing five standard surveys as opportunities to demonstrate compliance, but the fifth survey is not automatic."

The memo notes that a fifth survey won't be in the offing unless the state determines that:

- "Progressive improvement (just short of being able to graduate) and clear prospects for further improvement, with notice to the facility that it is the last standard survey that will be authorized before proceeding to a termination of the provider agreement;
- Change of ownership or other major change, provided that the change signals a much greater likelihood of quality improvement in the near future.

"In the event that a fifth standard survey continues to find deficiencies at 'F' or above, then termination will be

implemented," CMS says in the memo.

Watch out: Sollins cautions that some F-level deficiencies aren't Substandard Quality of Care and therefore permit a survey cycle to end without a revisit. But that "successful end to a survey cycle might not 'count' toward" getting the facility off the SFF list, he says.

**Example:** An F-level kitchen deficiency that doesn't represent Substandard Quality of Care may not require surveyors to do a revisit based on the plan of correction, Sollins says. "But that deficiency could cause the facility to remain on the SFF list." (For tips on how to avoid or get off the SFF list, see page 84 of this issue.) Handwriting for More Oversight on the Survey Wall If you think the CMS memo on the SFF program just affects a limited number of facilities nationwide, you may be missing a bigger take-home message.

Attorney **Paula Sanders** sees the survey and certification memo as part of a larger trend. For one, she points out that the Office of Inspector General (OIG) 2011 work plan says the OIG plans to look at oversight of poorly performing nursing homes.

In the plan, the OIG says it "will review CMS's and States' use of enforcement measures to determine their impact on improving the quality of care that beneficiaries received in poorly performing nursing homes and evaluate the performance of these nursing homes."

(The work plan is available online at [http://oig.hhs.gov/publications/workplan/2011/FY11\\_WorkPlan-All.pdf](http://oig.hhs.gov/publications/workplan/2011/FY11_WorkPlan-All.pdf).)

In addition, OIG and U.S. Government Accountability Office reports issued earlier this year also "state how poorly CMS and states are monitoring the survey process," Sanders notes. So we're now seeing changes, such as the survey and certification memo expanding the SFF list, she adds. The OIG's push will lead to "even stricter enforcement and a higher number of terminations of poorly performing facilities," predicts Sanders, with Post & Schell in Harrisburg, Pa. And she predicts a "trickle down effect" will occur "where the whole survey process will be affected by the OIG's continuing increased scrutiny [in this area]."