



## **Analysis and Summary of Additional Provisions in the CMS Interim Final Rule**

### ***Medicare and Medicaid Programs, Clinical Laboratory Improvement Amendments (CLIA), and Patient Protection and Affordable Care Act; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency***

*NOTE: This analysis serves as a detailed supplement to the high-level [summary](#) of the testing components of the rule shared on August 25, 2020.*

#### **New Enforcement Requirement for LTC Facilities**

With this interim final rule, CMS is revising a section of its enforcement regulations for nursing homes. This change pertains specifically to **enforcement of requirements for reporting facility data on COVID-19 to the CDC's National Healthcare Safety Network (NHSN)**, as outlined at [§483.80\(g\)\(1\) and \(2\)](#) and that became effective on May 8, 2020. Through this regulation, CMS is codifying its current approach to enforcement of NHSN reporting requirements, as outlined in [QSO 20-29-NH](#). See below for a more detailed summary of this revised regulation.

CMS has not specified in this rule any new or additional enforcement or specific civil monetary penalty (CMP) amounts for noncompliance with the new testing requirements outlined in our [summary](#). Unless CMS announces otherwise, enforcement with new testing requirements will be based on the scope and severity of noncompliance determined by the survey process, in accordance with existing guidance and regulations. CMS is issuing further sub-regulatory guidance on the new testing requirements, including criteria and recommendations for testing frequency as well as survey information.

CMS states in the rule that based on data provided to CMS by the CDC, compliance with the NHSN reporting requirements have been greater than 98 percent since the reporting week ending June 28, 2020. CMS has issued 2,507 citations for noncompliance as of August 10, 2020, with corresponding CMPs imposed.

The enforcement policies for NHSN reporting will continue to be in effect for up to one year beyond the Public Health Emergency (PHE) for COVID-19.

#### **Addressing the Impact of COVID-19 on Part C and Part D Quality Rating Systems**

CMS will modify the calculation of the 2022 Part C and Part D Star Ratings to address the application of the extreme and uncontrollable circumstances policy for the PHE for COVID-19.

## **Quality Reporting: Updates to the Extraordinary Circumstances Exceptions (ECE) Granted for Four Value-Based Purchasing Programs in Response to the PHE for COVID-19, and Update to the Performance Period for the FY 2022 SNF VBP Program**

On March 22, 2020, CMS granted ECEs to ESRD facilities, hospitals, and SNFs to reduce the data collection and reporting burden so providers could direct their full resources to patient care during the early months of the pandemic. Each of these ECEs applied to data for the fourth quarter calendar year (CY) 2019, first quarter CY 2020 and second quarter CY 2020.

In this IFC, CMS is updating the performance period for the FY 2022 SNF VBP Program because it is concerned that using qualifying claims from the two quarters that are not excepted under the ECE for COVID-19 (October 1, 2019 through December 31, 2019 (Q4 2019), and July 1, 2020 through September 30, 2020 (Q3 2020)) for all SNFs nationwide to calculate the SNF Readmission Measure (SNFRM) for the FY 2022 Program will not yield measure scores that reliably reflect SNF quality of care as determined by hospital readmission rates. The new performance period will be April 1, 2019 through December 31, 2019 and July 1, 2020 through September 30, 2020.

Should CMS make further adjustments due to ongoing COVID-19 issues, it may provide further information and advance notice through subregulatory guidance.

### **Merit-Based Incentive Payment System (MIPS) Updates**

These proposed provisions are related to physician quality reporting program performance measure assignment and do not impact SNF providers.

### **Detailed Summary**

#### **New Enforcement Requirement for LTC Facilities**

- CMS is adding a regulation, §488.447 Civil Money Penalties imposed for failure to comply with 42 CFR 483.80(g)(1) and (2), to specify the civil money penalty (CMP) amounts that may be imposed for failure to electronically report COVID-19 data each week, which includes suspected and confirmed COVID-19 infections among residents and staff, personal protective equipment in the facility, and testing information such as a facility's access to testing supplies and timeframes to receive test results.
- These revisions codify enforcement policies outlined in QSO 20-29-NH for determining compliance and imposing CMPs for NHSN reporting. CMS will continue to assess compliance through a retrospective review each week to identify facilities that did not report to NHSN as required, based on information CMS receives weekly from CDC. Noncompliance with this requirement for each weekly reporting cycle will be cited as an "F" level deficiency, as stated in prior guidance. CMS will impose a \$1,000 CMP for the first instance of noncompliance with NHSN reporting, and each subsequent time the facility does not report as required, the CMP amount will be increased by \$500.
- After each CMP is imposed, CMS will place the facility back into compliance, without requiring a Plan of Correction (POC) in accordance with §488.408(f). A facility may still submit a POC if it chooses to do so but it is not required. Facilities may continue to request an Independent Informal Dispute Resolution under §488.431, including when they have technical difficulties that prevent timely submission. Providers may use and adapt AHCA's template for this purpose.
- CMS notes that in keeping with existing regulations at §488.408(d)(1)(iii) specifying per instance CMP amounts for an instance of noncompliance at Level "F", it will not continue incrementally increasing the CMP amount after 12 occurrences of noncompliance. The maximum CMP amount

imposed would not exceed \$6,500 for each subsequent occurrence of noncompliance after 12 occurrences. These CMP amounts are subject to annual adjustments for inflation at 45 CFR 102.3. CMPs imposed in accordance with this rule are subject to the same procedures as all other CMPs imposed under sections 1819(h) and 1919(h) of the Social Security Act, including notice, escrow, independent informal dispute resolution, and collections. Facilities may appeal the determination leading to a CMP imposed under this rule in accordance with 42 CFR part 498.

- CMS states that these enforcement policies will continue to be in effect for up to one year beyond the end of the PHE.

### **Quality Reporting: Updates to the Extraordinary Circumstances Exceptions (ECE) Granted for Four Value-Based Purchasing Programs in Response to the PHE for COVID-19, and Update to the Performance Period for the FY 2022 SNF VBP Program**

- As part of the CMS response to the COVID-19 pandemic, on March 22, 2020, the Agency granted ECEs to ESRD facilities, hospitals, and SNFs to reduce the data collection and reporting burden on these facilities and providers so they could direct their full resources to patient care during the early months of the pandemic. Each of these ECEs relieved these providers and facilities of their obligation to report data for the fourth quarter calendar year (CY) 2019, first quarter CY 2020 and second quarter CY 2020, but CMS stated that the Agency would score such data if optionally reported.
- In this IFC, CMS is updating the performance period for the FY 2022 SNF VBP Program because the Agency is concerned that using qualifying claims from the two quarters that are not excepted under the ECE for COVID-19 (October 1, 2019 through December 31, 2019 (Q4 2019), and July 1, 2020 through September 30, 2020 (Q3 2020)) for all SNFs nationwide to calculate the SNF Readmission Measure (SNFRM) for the FY 2022 Program will not yield measure scores that reliably reflect SNF quality of care as determined by hospital readmission rates. The new performance period will be April 1, 2019 through December 31, 2019 and July 1, 2020 through September 30, 2020.
- CMS also announced that they reserve the right to not score facilities or make associated payment adjustments for the FY 2022 Program if due to ongoing COVID-19 issues, there are additional ECEs or a significant number of individual facility ECEs submitted that the Agency does not have sufficient SNF VBP program data to reliability measure national performance. In the interest of time and transparency, CMS may provide subregulatory advance notice of an intent to suspend proactive application of SNF VBP program penalties or payment adjustments for FY 2022 if unable to do so under the SNF PPS proposed rulemaking process.
- The baseline period of the FY 2022 Program has not been impacted by the PHE for COVID-19 and will remain as FY 2018 (October 1, 2017 through September 30, 2018), and the FY 2022 Program performance standards included in the FY 2020 final rule (84 FR 38822 through 38823) will remain as finalized.
- CMS welcomes public comments regarding the policy to revise the FY 2022 SNF VBP Program performance period to April 1, 2019 through December 31, 2019 and July 1, 2020 through September 30, 2020.