



Center for Medicaid, CHIP, and Survey & Certification/Survey & Certification Group

Ref: S&C-10-32-NH

**DATE:** September 17, 2010  
**TO:** State Survey Agency Directors  
**FROM:** Director  
Survey and Certification Group  
**SUBJECT:** Special Focus Facilities (SFF) Procedures

Memorandum Summary

- **Adjustment to Number of Slots:** The number of SFF slots for each State are adjusted to reflect the current population of nursing homes in each State and a ten percent increase in SFF slots nationally.
- **New Computation of the Candidate List** effective in the Fall 2010, the candidate list will be adjusted so that each SFF slot will have 5 candidates from which States may recommend selection.
- **Initial Selection Notice** effective Spring 2010 there were new procedures for notifying nursing facilities of their enrollment into the SFF Program.
- **Enhanced Survey and Progressive Enforcement**—Description of progressive enforcement procedures for SFF.
- **Triage and Termination without Significant Improvement**—Introduction of the Review Process as a new procedure for SFF.

**Background** – The Special Focus Facility program (SFF) focuses on nursing homes that have a track record of substandard quality of care. Although such facilities have sometimes incorporated enough improvement in the presenting problems to pass one survey, they have frequently manifested many problems on the next survey, often for many of the same problems as before. Such facilities with a “yo-yo” compliance history rarely addressed the underlying systemic problems that were giving rise to repeated cycles of serious deficiencies.

States recommend new SFFs from a candidate list that is provided by CMS Central Office (CO) on a monthly basis. Once selected as an SFF, the State conducts twice the number of standard surveys and applies progressive enforcement until the nursing home either (a) graduates from the SFF program or (b) is terminated from the Medicare and/or Medicaid program(s). Details of progressive enforcement process are presented in Section III of this memo.

The purpose of the SFF program is to focus on quality of life and quality of care issues. To this end, life safety code (LSC) surveys are not used in determining the list of facilities that are candidates for the SFF program. However, LSC surveys will be conducted at the same frequency as the health surveys (i.e., twice the number of standard surveys per year), and any

LSC finding of actual harm, or greater, on the most recent survey will prevent a facility from graduating from the SFF program during that survey cycle.

**SECTION I: SFF CANDIDATE LIST**

**SFF Candidate List**

The names of SFF candidates are issued monthly with the *Five-Star Quality Rating* updates. The methodology for selecting replacement facilities for the SFF program has been harmonized with the methodology of the health inspection domain of the *Five-Star Quality Rating System*.<sup>1</sup> The number of nursing homes on the candidate list is based on 5 candidates for each SFF slot, with a minimum of a candidate pool of 5 nursing homes and a maximum of 60. Each State selects new SFFs from a list of eligible nursing homes based on the candidate list. If the candidate list includes facilities already enrolled in the SFF program then the candidate list may be augmented by the State to include the full complement of candidates from which a replacement can be chosen.

Effective October 1, 2010, the number of SFF slots will be adjusted to reflect the current population of nursing homes in each State and a ten percent increase in SFF slots nationally. The table below presents the SFF slots and the adjusted size of the candidate list by State.

State	Required SFF Slots	Size of Candidate List	State	Required SFF Slots	Size of Candidate List
Alabama	2	10	Montana	1	5
Alaska	-	-	Nebraska	2	10
Arizona	1	5	Nevada	1	5
Arkansas	2	10	New Hampshire	1	5
California	12	60	New Jersey	3	15
Colorado	2	10	New Mexico	1	5
Connecticut	2	10	New York	6	30
Delaware	1	5	North Carolina	4	20
District of Columbia	-	-	North Dakota	1	5
Florida	6	30	Ohio	9	45
Georgia	3	15	Oklahoma	3	15
Hawaii	1	5	Oregon	1	5
Idaho	1	5	Pennsylvania	7	35
Illinois	7	35	Rhode Island	1	5
Indiana	5	25	South Carolina	2	10
Iowa	4	20	South Dakota	1	5
Kansas	3	15	Tennessee	3	15
Kentucky	3	15	Texas	11	55
Louisiana	3	15	Utah	1	5
Maine	1	5	Vermont	1	5
Maryland	2	10	Virginia	3	15
Massachusetts	4	20	Washington	2	15
Michigan	4	20	West Virginia	1	5

Minnesota	4	20	Wisconsin	4	20
Mississippi	2	10	Wyoming	1	5
Missouri	5	25			

CMS informs States and nursing homes of a facility’s inclusion on the SFF candidate list in the monthly preview of the *Five-Star Quality Rating System*. CMS will continue to provide the monthly *Five-Star* rating system preview to nursing home providers via their electronic connection to their State servers for submission of Minimum Data Set (MDS) data. Providers must log into the State server to retrieve the previews, as described in S&C 09-17 available on the CMS website at <https://www.cms.gov/OpenDoorForums/Downloads/SCLetter0917.pdf>.

## SECTION II: NOTICE OF INITIAL SELECTION OF SFF AND EDUCATION

### A. Selection

Once the candidate lists are received, States may recommend to CMS Regional Office (RO) SFF coordinators any nursing home on the candidate list, regardless of the rank order of candidates. Once the State identifies a candidate, it should check to see if there are any pending independent dispute resolution (IDR) settlements, or appeals. If so, the State should check to see if the results of these actions will occur before the selection notice is issued. If an IDR, settlement, or results of an appeal is likely to occur after the selection and notice of SFF selection, there is no need additional checking and the facility is properly included in the SFF program. The State Agency (SA) is to notify each facility of its selection as an SFF, after notice to the appropriate CMS regional office. The process for selecting a facility from the SFF candidate list is not to exceed 21 days from the date of termination or graduation of the SFF facility in need of replacement.

### B. Notification

**Initial Selection Notice** The State notifies the facility and all accountable parties (see section C) by letter (and any additional means chosen by the SA) that:

- The facility has been selected as a SFF facility;
- The selection in the program is due to persistent pattern<sup>a</sup> of poor quality on its last three standard surveys and complaints (i.e., three years of compliance history);
- An early termination of the provider agreement may result if significant improvements<sup>b</sup> are not evident within the next four standard surveys (or 24 months, whichever is shorter).
- The Social Security Act requires termination of the Medicare provider agreement no later than six months unless substantial compliance is achieved (as defined by the statute); and that

<sup>a</sup>Persistent pattern of poor quality refers to 3 years of compliance history with deficiencies at a scope and severity of “Harm” or higher or history of Substandard Quality of Care.

<sup>b</sup>In S&C 08-02 significant improvement is defined as the ability of an SFF to demonstrate that its practices have resulted in no deficiencies with a S/S rating above an ‘E.’. Other synonyms from previous correspondence include significant progress (S&C 08-02) and substantial improvement from (S&C 08-02 model letter).

- Termination may occur more quickly than the six-month statutory date if serious deficiencies that evidence harm continue.

A model letter is included in Attachment A. States may tailor the communication to accommodate any special features for facilities in the State. The official date of enrollment of a SFF is the date on the Initial Selection Notice. This date should be listed on the monthly SFF worksheets under the column “Date Selected as an SFF”.

**Removal from SFF Designation** The State should notify the SFF and all accountable parties that the facility is no longer designated as an SFF once it has successfully met the criteria for removal (See Section F). A copy is to be sent to the additional parties listed in section C below. Once a facility is graduated its status is changed on the monthly SFF posting<sup>2</sup> on the internet. All graduated and terminated facilities will be posted for six months after their removal from the SFF program. Updates in status of the SFFs are posted on the Internet on the fourth Thursday of every month. The SFF Designation on Nursing Home Compare<sup>3</sup> will be removed in the month following the graduation of the facility. The official graduation date is the date the facility and accountable parties are notified of the nursing home’s removal from the SFF program.

### **C. Accountable Parties**

Address or copy the communications to all of the following parties, since they are all accountable and in a position to effect necessary improvements:

- Administrator;
- Chairperson of the Governing Body or full Governing Body (as identified on Survey and Certification documents); and
- Owners and operators: This must include the holder of the provider agreement. The State should make reasonable effort to notify any other clearly identified owners (such as the owner of the building and land if separate from the holder of the provider agreement, and corporate owner(s) for chain-operated nursing homes).

Send a copy of any communication to the CMS RO SFF coordinator.

### **D. Additional Parties**

Provide a copy to the State Ombudsman Office and the State Medicaid Director. All survey outcomes should be reported to the CMS RO SFF coordinators. If the results of any standard survey reveal that the facility continues to practice a level of care that has resulted in harm to residents, then the State should notify the CMS RO SFF coordinator as soon as possible.

### **E. Other Considerations**

CMS encourages face-to-face communications between the State Survey Agency (SA) and the nursing home’s accountable parties to the extent that the resources of SA permit, in addition to written communication, so as to ensure that the seriousness of SFF designation is adequately understood.

Please maintain up-to-date communication with your CMS RO coordinator after surveys of SFF nursing homes.

## **F. Removal from the SFF Program**

A nursing home is eligible to graduate from the SFF Program once the facility has completed two consecutive standard surveys with no deficiencies cited at a scope and severity of “F” or greater (including life safety code deficiencies), and has no intervening complaints with a scope and severity of “F” or greater. Any standard surveys counting towards the graduation of a facility from the SFF Program must have occurred after the facility has been selected to be an SFF. Facilities with LSC deficiencies of a scope and severity of actual harm or greater are not eligible to graduate.

### **SECTION III: PROGRESSIVE ENFORCEMENT**

While a nursing home is enrolled in the SFF Program, the SA will survey the facility with twice the frequency required by the Social Security Act, and apply progressively stronger enforcement actions in the event of continued failure to meet Medicare and/or Medicaid participation requirements.

An active SFF must have two standard surveys per year from the date of Initial Notification of Selection. Once a facility has been selected for the SFF program, the SA must conduct a standard survey within six months of the selection date. The timing of the six-month standard surveys must be as *unpredictable* as possible.

Each enforcement authority (SA or RO), must impose an immediate remedy on each SFF that fails to achieve and maintain significant improvements<sup>c</sup> in correcting deficiencies on the first and each subsequent standard survey after a facility becomes a SFF.

The SFF program does not supplant the six-month mandatory termination required in §1819(h)(2)(C) or §1919(h)(3)(D) of the Social Security Act, nor the mandatory Denial of Payment for New Admissions (DPNA) at §1819(h)(2)(D) or §1919(h)(2)(C) where it applies. In other words, a facility cannot continue to participate in Medicare or Medicaid if they are not in substantial compliance within six months of the date of the findings of noncompliance, nor may they avoid a mandatory DPNA remedy at the third month. The three-month statutory DPNA must be built into the progressive enforcement action of the SFF program, and the six-month statutory termination requirement will supersede any other provisions of this SFF policy if it applies to the nursing home.

Consistent with CMS’ policy of progressive enforcement, the SA will recommend enforcement remedies of increasing severity as described in the table below. Enforcement actions may include a Civil Money Penalty (CMP), DPNA, Directed Plan of Correction, or Directed In-Service Training. As an example, the SA could recommend a 2-month discretionary DPNA and a 4-month discretionary termination for any SFF not in substantial compliance. CMS RO, or the State on behalf of CMS, should impose remedies with a 15-day formal notice of remedies, with the exception of a CMP that requires no advanced notice or an Immediate Jeopardy that requires 2-day notice. Enforcement action on a SFF should not delay the enforcement required as a result of the “double G” policy.

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<sup>c</sup> For a definition of significant improvement see S&C 08-02.

**Progressive Enforcement Table**

<b>Surveys After SFF Selection</b>	<b>No Deficiencies cited at a Scope &amp; Severity of “F” or Greater</b>	<b>Deficiencies at “F” or above (no improvement)</b>	<b>Immediate Jeopardy</b>
1st Standard Survey	Complete 2nd Standard Survey	Immediately recommend remedy (CMP or DPNA at a minimum)	Recommend remedy and proceed to termination if not corrected.
2nd Standard Survey	Graduate (if 2 surveys with no deficiencies above “E”)	Recommend more stringent remedy. Must be in substantial compliance at 6 months or face termination.	Recommend remedy and proceed to termination if not corrected.
3rd Standard Survey	If a facility has deficiencies at E or below on the 3rd Standard Survey after selection (but is not able to graduate due to findings at F or above on 2nd Standard Survey or LSC deficiencies greater than F), Schedule 4th Standard Survey.	If a facility has deficiencies at G or above at the 3rd Standard Survey, Triage- (1) Schedule a 4 <sup>th</sup> standard survey or (2) Issue a termination notice	Recommend remedy and proceed to termination if not corrected.
4th Standard Survey	Graduate (if 2 consecutive surveys with no deficiencies above “E”)	Triage - either (1) schedule 5th standard survey, or (2) issue a termination notice	Recommend remedy and proceed to termination if not corrected.
5th Standard Survey	Graduate (if 2 consecutive surveys with no deficiencies above “E”)	Issue termination notice (timing may be extended but not beyond statutory timeframes).	Recommend remedy and proceed to termination if not corrected.

Complaint surveys may not be used to determine that a facility's performance has improved. A complaint survey with serious deficiencies such as a “G” level between the 2nd and 3rd standard surveys should prompt the State to review the compliance history either (1) begin termination without a revisit or (2) give the facility an opportunity to attain compliance, thus permitting the fourth standard survey. Option (2) does not prevent the SA or RO from imposing an immediate remedy if the remedy is required under CMS State Operations Manual (SOM) or policy.

**SECTION IV: TRIAGE AND TERMINATION AFTER FOUR SURVEYS WITHOUT SIGNIFICANT IMPROVEMENT**

These policies apply to facilities designated as SFFs that were able to achieve substantial compliance within the mandatory six-month timeframe, but are found out of compliance at their next standard survey. If the facility has not achieved substantial compliance within six months, the statute requires termination of the provider agreement.

If a nursing home fails to make significant improvement after four standard surveys or 24 months after being selected as an SFF (whichever comes first), then the situation will be reviewed by the State and RO.

### ***The Review Process***

The review process includes the consideration of the situation and pertinent facts, such as the number and severity of current deficiencies, the facility history, and facility improvement efforts. Within 30 days of the fourth survey or the 24<sup>th</sup> month (whichever is earlier), make a recommendation to the CMS RO detailing which of the following outcomes should be implemented:

- Fifth Standard Survey Recommended or,
- Termination of Provider Agreement.

#### **A. Fifth Standard Survey Recommended**

CMS will not approve a fifth standard survey unless, in the State’s judgment, there has been:

- 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; or
- 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 (see below).

#### **B. Termination of the Provider Agreement**

Upon CMS RO approval, a termination notice will be issued to the facility. In unusual circumstances, CMS may approve an extended time period before the Medicare termination takes effect, unless the six-month mandatory termination required in §1819(h)(2)(C) or §1919(h)(3)(D) of the Social Security Act applies.

State receivership can result in CMS extending a Discretionary Termination date to the Mandatory Termination date. The imposition of receivership does not absolve the facility from the mandatory DPNA or termination of the provider agreement as provided by law. If the State communicates its intent to undertake receivership, then CMS will suspend its discretionary termination to permit the receivership to be implemented so long as federal law permits.<sup>d</sup>

The SA will:

- Recommend to CMS an effective date for termination of the provider agreement that is no more than 120 days from the date that the review was completed. The timing of the termination may be affected by several considerations, the most important of which is the

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<sup>d</sup> An example of a Federal law that would oblige termination anyway would be the statutory requirement for termination if a facility has not been in substantial compliance for an entire, uninterrupted six-month period. If immediate jeopardy is found and uncorrected, the timeframe must meet the Federal regulations of 23 days with a 2-day notice to the facility.

well-being of the residents and efforts to meet resident preferences in selection of another nursing home or alternative living arrangements. The timing may also be affected by the statutory six-month requirement for substantial compliance.

- Work with the State Medicaid Agency that has responsibility for resident relocations, the State ombudsman program, families, and other appropriate individuals during the termination process.
- Coordinate with the State's home and community-based alternatives system to offer residents more choice in the way of living arrangements and support services, including any State efforts under the President's *New Freedom Initiative* and *Money Follows the Person* program.

CMS RO will:

- Respond to the State's recommendation within a timely fashion.
- Issue the termination notice to the facility.
- Consider a facility's status in setting the termination date, and consider the facility's progress as an SFF in setting a reasonable assurance period<sup>c</sup> before a nursing home can reapply to participate in Medicare.
- Work closely with the State when the State works to fulfill its obligations for transitioning nursing home residents in the event of facility closure, or when placing the nursing home in receivership.

**Effective Dates:**

The changes included in this S&C memo regarding SFF procedures augment current guidance. With the exception of the changes in the SFF slots and candidate lists, the policy for current SFFs can be implemented as soon as the SA is ready but no later than 60 days from the date of this memo. The changes to the SFF slots and increases in the candidate lists will be effective October 1, 2010.

/s/

Thomas E. Hamilton

Attachments

cc: Survey and Certification Regional Office Management

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<sup>c</sup> See State Operations Manual Pub 107, 7321B & 7321C.



**Notes:**

1. The methodology for creating the SFF candidate list is based on the Five-Star Quality Rating System. The Design for Nursing Home Compare Five-Star Quality Rating System (<http://www.cms.hhs.gov/CertificationandCompliance/Downloads/usersguide.pdf>)
2. Monthly SFF posting on the internet can be found at the following url: (<http://www.cms.hhs.gov/certificationandcompliance/downloads/sfflist.pdf>)
3. Nursing Home Compare Website (<http://www.medicare.gov/nhcompare>)

## **Appendix A**

### **MODEL LETTER TO PROVIDER SELECTED AS A “SPECIAL FOCUS FACILITY”**

#### **IMPORTANT NOTICE – PLEASE READ CAREFULLY**

(Date)

Nursing Home Administrator Name

Facility Name

Address

City, State, ZIP Code

Dear (Nursing Home Administrator)

Because of your facility’s poor compliance history for the past three years, you have been selected as a Special Focus Facility (SFF) program. The purpose of this letter is to notify you of this designation and to explain what this designation means for your nursing home.

#### **What Does This Mean?**

You will be subject to two standard surveys per year instead of the one required by law. You can expect that we will be closely monitoring your facility with the desire that your facility can attain and maintain compliance.

#### **How Does A Facility Get Removed From the SFF?**

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. 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.

**Robust Enforcement for Lack of Significant Progress:** CMS will impose an immediate sanction on a SFF that fails to achieve and maintain significant progress in correcting deficiencies on the first and each subsequent standard survey after a facility becomes a SFF. Enforcement sanctions will be of increasing severity. These will include a Civil Money Penalty and/or a Denial of Payment for New Admissions.

If, after 24 months and four surveys subsequent to being selected as a SFF, you fail to have made significant progress, a notice of termination from participation in Medicare and Medicaid will be issued. CMS will consider a facility’s status and progress as a SFF in setting a reasonable assurance period before a home can reapply to participate in Medicare.

#### **Can This Be Appealed?**

Your selection as a SFF cannot be appealed. However, you still have the right to informal dispute resolution (see 42 Code of Federal Regulations §488.331) and to appeal the

noncompliance that led to a remedy through an Administrative Law Judge of the Department of Health and Human Services. Specific requirements for requesting a formal hearing are contained in the notice of the imposition of the remedy.

It is our intent that you take the designation of a special focus facility seriously. We can help. We can refer you to helpful resources, including help from the (Name of State Quality Improvement Organization).

We are also sending a copy of this notice to (name of nursing home owner) and (name of mortgagee) to give them notice of the designation of SFF for your facility.

If you have any questions, please contact (name, title, address, phone number, fax number and e-mail address of appropriate survey agency official.)

Sincerely yours,

(Name and Title)

Cc: CMS Regional Office  
(Name of Quality Improvement Organization)  
(Name of Owner)  
(Name of Mortgagee, if applicable)