DEPARTMENT OF HEALTH & HUMAN SERVICES Centers for Medicare & Medicaid Services

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DATE: **April 29, 2002**

FROM: Director
Survey and Certification Group
Center for Medicaid and State Operations

SUBJECT: Voluntary Termination of a Skilled Nursing Facility (SNF) or Nursing Facility (NF)

TO: Associate Regional Administrators, DMSO
State Survey Agency Directors

The purpose of this memorandum is to identify the responsibilities of The Centers for Medicare & Medicaid Services (CMS) under the Social Security Act (the Act) and the regulations when a SNF or NF voluntarily terminates from the Medicare/Medicaid Programs.

VOLUNTARY SNF TERMINATIONS

When a SNF voluntarily terminates from the Medicare program, the general provider regulations at 42 CFR §§489.52 and 489.55 as well as the SNF regulations at §483.12 (a)(5)(6) apply (see also section 1866(b)(1) of the Act. In addition, there are several State Operations Manual (SOM) sections that address voluntary terminations. These include SOM sections 3008-3008.3, 3036, 3038, 3042, and 3046-3048. There are also model letters for voluntary terminations at Exhibits 188 and 189 in the SOM.

A voluntary termination may be a business closure or cessation of services to the community, or simply a withdrawal from the Medicare program. The withdrawal may be the SNF's way of avoiding a proposed involuntary termination or it may be requested because of dissatisfaction with the Medicare reimbursement amount or for some other reason.

The provider is required to give CMS a 15-day notice prior to voluntarily terminating its agreement, but this does not always happen. If the provider's notice does state the intended date of termination, this date must be the first day of a month, as determined by the regional office.

If no date is specified in the notice or the date is not acceptable to CMS, CMS may set a termination date that will not be more than 6 months from the SNF's notice of intent. CMS may accept a date that is less than 6 months after the notification date if it determines that to do so would not unduly disrupt services to the community or otherwise interfere with the effective and efficient administration of the Medicare program.

In establishing a date of termination, CMS will consider the availability of other facilities in the area. If a retroactive termination date is requested, CMS may honor such a date if there were no Medicare beneficiaries who received services from the SNF on or after the requested termination date. If there is a facility closure, the closure date is the termination effective date.

The withdrawing SNF is required to give notice to the public at least 15 days before the effective date of Medicare termination. The notice must be published in one or more local newspapers and must specify the termination date and specify what services it will continue after that date. There may be circumstances where the SNF is unable or unwilling to give public notice, such as a retroactive termination. In such a case CMS will provide the public notice. In a voluntary termination, CMS is not required to provide notice of an Administrative Law Judge hearing. However, if the SNF protests the voluntary termination of its agreement you may rescind the termination since it obviously would not be "voluntary" at that point. Then, if you want to convert it to an involuntary termination, hearing rights would accrue. In accordance with 42 CFR §489.55, payment may be made to a SNF for services furnished to a Medicare beneficiary for up to 30 days after the effective date of the termination if he/she was admitted before the effective date of the termination. Medicare will not pay for services to beneficiaries admitted on or after the effective date of termination.

If the facility continues to remain open, in accordance with 1866 of the Act, it cannot legally charge an individual or any other person for services the person is entitled to have Medicare pay for under the Act.

Although Section 1819(c)(2)(A) (C) of the Act and its regulatory counterpart at 42 CFR §483.12(a) which concern a resident's admission, transfer and discharge rights, may not have been intended to address voluntary withdrawal situations, they nevertheless apply when a SNF voluntarily withdraws from the Medicare program. This is so because the Medicare withdrawal or closure resulted from an action by the facility, and residents may choose to be transferred (moved to another legally responsible institutional setting) or discharged (moved to a non-institutional setting) from the facility since they are no longer protected by the terminated Medicare agreement or because the SNF is no longer serving the community. The regulations require that a SNF resident and, if known, a family member or legal representative of the resident be notified in writing at least 30 days prior to the discharge that the facility is transferring or discharging him/her because it is closing or it is voluntarily withdrawing from the Medicare program (ceasing to operate as a SNF).

In an imminent closure situation the notice should be provided as soon as possible because the resident will lose protection derived from the facility's Medicare participation. Medicare does not make payment to a resident located in a Medicaid only nursing facility (NF). Additional information is provided concerning the notice at section 1819(c)(2)(A) - (C) of the Act, 42 CFR §483.12(a) and the Medicare Interpretive Guidelines. In a situation where a facility closes its doors to the community there is no way that we can enforce these transfer and discharge protections following the effective date of its termination. If patients are abandoned you may, however, notify the Office of the Inspector General. Facilities are required as a part of the resident's notice to inform him/her of the name, address and telephone number of the long-term care ombudsman.

Regardless of what role the state survey agencies are allowed to play in voluntary SNF terminations, CMS remains ultimately responsible for responding to matters arising from these terminations. The state, however, is responsible for patient transfers in these cases.

VOLUNTARY NF TERMINATIONS

The regulation at 42 CFR §431.107(b) requires a NF, among other Medicaid providers, to have an agreement between the NF and the Medicaid agency in which the provider agrees to comply with specific requirements identified in the regulation. See also section 1902(a)(27)(28) of the Act. However, the Medicaid regulations at 42 CFR §442 ff. that address agreements do not address termination of those agreements, but refer to subpart E of Part 488 for NFs (42 CFR §442.12(c)). Subpart C of Part 488 does not discuss voluntary terminations either, although there is a discussion of the termination of provider agreements at subpart F of Part 488 at 42 CFR §488.456. However, this regulation discusses, among other things, involuntary rather than voluntary terminations of the provider by the state. Also, the regulation at 42 CFR §441.11 allows for Federal financial participation to continue for a resident for up to 30 days following the effective date of a facility's voluntary termination of its Medicaid agreement as a NF.

42 CFR §483.12(a) requires a nursing facility to provide at least 30 days notice to a resident, and if known, a family member or legal representative of the resident before transferring or discharging him/her. The regulations and interpretive guidelines specify other documentation and requirements that must be met prior to transferring or discharging a patient. The terms transfer and discharge have the same meaning for NFs as they do for SNFs. Among the reasons a NF might legitimately transfer or discharge a patient is it ceases to operate (as a NF) (42 CFR §483.12 (a) (2) (vi)).

Section 1919(c)(2) (A) - (F) of the Act specifies what happens to NF residents when there is a transfer or discharge of a resident. Some of these statutory requirements could come into play when the facility closes or voluntarily terminates from the Medicaid program.

In particular, section 1919(c)(2)(F)(i)(I) of the Act states that in the case of a NF that voluntarily withdraws from participation in a state plan but continues to provide NF type services, the voluntary withdrawal is not an acceptable basis for discharging or transferring residents of the facility on the day before the effective date of the withdrawal (including those residents who were not entitled to medical assistance as of such day). These provisions continue to apply to the residents until the date of their discharge from the facility. In the case of each individual who begins residence in the facility after the effective date of its withdrawal, the facility must provide notice orally, and in a prominent manner in writing, (on a separate page from other documents signed by the individual) at the time he/she begins residence.

The written notice must include: (1) a statement that the facility is not participating in the Medicaid program; and (2) a statement that the facility may transfer or discharge the resident from the facility when he/she is unable to pay the charges of the facility, even though the resident may have become eligible for medical assistance for nursing facility services under Medicaid.

At the time the individual begins residence at the nursing facility the aforementioned information must be provided by the facility, and the facility must obtain a signed acknowledgment from the individual in writing that he/she was given notice of the non-participation and discharge information previously discussed. The signed acknowledgement must be separate from other documents signed by the resident.

With respect to individuals who were residing in the facility on the day before its voluntary withdrawal (including those who were not entitled to medical assistance of that date), the facility is deemed to continue under the state plan after the effective date of the facility’s voluntary withdrawal from the state plan for the purposes of: (1) receiving payments under the state plan for nursing facility services provided to such residents; (2) maintaining compliance with all applicable requirements of Title XIX; and (3) continuing to apply the survey, certification and enforcement authority provided under 1919(g)(h) of the Act including involuntary termination of a participation agreement deemed continued after its voluntary termination. This deemed continuance does not apply to individuals who become residents after the facility’s effective date of voluntary withdrawal from the Medicaid program. The voluntary withdrawal provisions apply to those withdrawals occurring on or after March 25,1999.

Section 1919 (c)(2)(F) of the Act is self-implementing. There are no implementing regulations. A facility's decision to voluntarily withdraw from the program does not in any way alter the resident protections offered at section 1919(c)(2)(A) - (D) of the Act and 42 CFR §483.10(o), and 42 CFR §483.12 of the regulations. Of course if a facility ceases to provide services to the community we cannot force it to remain open to provide services to its residents. These residents must be discharged or transferred.

Section 1919 (c)(2)(F) of the Act also neither addresses distinct parts nor changes the distinct part policies discussed at Section 3202 of the SOM. These instructions remain intact and apply to Medicaid NFs. The policies are to be followed by the state when a voluntarily terminated NF attempts to change its number of beds (See also 42 CFR §440.40).

The State Medicaid Agency is responsible for the welfare of residents affected by a voluntary closure of a NF. SOM section 3008.3 provides guidance concerning relocating patients displaced by termination (including voluntary termination) or closure. It explains that each state is expected to have a plan that describes the relocation of patients, and informs as to what CMS believes the plan should provide for. Additionally, in accordance with section 1819(c)(2)(B)(iii)(II) of the Act, the notice to residents is to include information as to how to contact the ombudsman who is established under the Older Americans Act.

Effective date: This guidance is effective immediately.

Training: This memorandum should be shared with all survey and certification staff, surveyors, their managers, the state/regional training coordinator and the Medicaid state agency.

/s/
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