Whether the provider is entitled to its full SNF annual payment update for Fiscal Year 2022?

1. **Facts**

Sec. 1888. **[**42 U.S.C. 1395yy**]** (a) The Secretary, in determining the amount of the payments which may be made under this title with respect to routine service costs of extended care services shall not recognize as reasonable (in the efficient delivery of health services) per diem costs of such services to the extent that such per diem costs exceed the following per diem limits, except as otherwise provided in this section:

(1) With respect to freestanding skilled nursing facilities located in urban areas, the limit shall be equal to 112 percent of the mean per diem routine service costs for freestanding skilled nursing facilities located in urban areas.

(2) With respect to freestanding skilled nursing facilities located in rural areas, the limit shall be equal to 112 percent of the mean per diem routine service costs for freestanding skilled nursing facilities located in rural areas.

Per, Sec. 1888. (e)(6) Reporting of assessment and quality data. —

(A) Reduction in update for failure to report. —

(i) In general.— For fiscal years beginning with fiscal year 2018, in the case of a skilled nursing facility that does not submit data, as applicable, in accordance with subclauses (II)and (III) of subparagraph (B)(i) with respect to such a fiscal year, after determining the percentage described in paragraph (5)(B)(i), and after application of clauses (ii) and (iii) of paragraph (5)(B), the Secretary shall reduce such percentage for payment rates during such fiscal year by 2 percentage points.

(ii) Special rule. — The application of this subparagraph may result in the percentage described in paragraph (5)(B)(i), after application of clauses (ii) and (iii) of paragraph (5)(B), being less than 0.0 for a fiscal year, and may result in payment rates under this subsection for a fiscal year being less than such payment rates for the preceding fiscal year.

(iii) Noncumulative application. — Any reduction under clause (i) shall apply only with respect to the fiscal year involved and the Secretary shall not take into account such reduction in computing the payment amount under this subsection for a subsequent fiscal year.

(B) Assessment and measure data. —

(i) In general. — A skilled nursing facility, or a facility (other than a critical access hospital) described in paragraph (7)(B), shall submit to the Secretary, in a manner and within the timeframes prescribed by the Secretary—

(I) subject to clause (iii), the resident assessment data necessary to develop and implement the rates under this subsection.

(II) for fiscal years beginning on or after the specified application date (as defined in subsection (a)(2)(E) of section 1899B), as applicable with respect to skilled nursing facilities and quality measures under subsection (c)(1) of such section and measures under subsection (d)(1) of such section, data on such quality measures under such subsection (c)(1) and any necessary data specified by the Secretary under such subsection (d)(1); and

(III) for fiscal years beginning on or after October 1, 2018, standardized patient assessment [[Page 128 STAT. 1966]] data required under subsection (b)(1) of section1899B.

(ii) Use of standard instrument. — For purposes of meeting the requirement under clause (i), a skilled nursing facility, or a facility (other than a critical access hospital) described in paragraph (7)(B), may submit the resident assessment data required undersection 1819(b)(3), using the standard instrument designated by the State under section1819(e)(5).

(iii) Non-duplication. — To the extent data submitted under subclause (II) or (III) of clause (i) duplicates other data required to be submitted under clause (i)(I), the submission of such data under such a subclause shall be in lieu of the submission of such data under clause (i)(I). The previous sentence shall not apply insofar as the Secretary determines it is necessary to avoid a delay in the implementation of section 1899B, taking into account the different specified application dates under subsection (a)(2)(E) of such section.

Section 1899B of the Improving Medicare Post-Acute Care Transformation Act of 2014 (Impact Act) required the submission of standardized data by long-term care hospitals, skilled nursing facilities, home health agencies, and inpatient rehabilitation facilities. The Impact Act instructed that standardized data are to be collected by the commonly used assessment instruments, which were the Minimum Data Set (MDS) for SNFs. The Law required the Secretary to implement specified clinical assessment domains and categories using standardized data required for submission by SNFs (and those other types of providers). Further, the Law required CMS to develop, implement, and maintain standardized patient assessment data elements for clinical categories.

The Impact Act details the requirements for reporting assessment data at 1899B(b)(1)(A):

(A) IN GENERAL.—Beginning not later than October 1, 2018, for PAC providers described in clauses (ii), (iii), and (iv) of subsection (a)(2)(A) and January 1, 2019, for PAC providers described in clause (i) of such subsection, the Secretary shall require PAC providers to submit to the Secretary, under the applicable reporting provisions and through the use of PAC assessment instruments, the standardized patient assessment data described in subparagraph (B). The Secretary shall require such data be submitted with respect to admission and discharge of an individual (and may be submitted more frequently as the Secretary deems appropriate).

The regulation at 42 C.F.R. §413.360 include the requirements under the SNF quality reporting program (QRP). Regarding data submission requirements, at paragraph (b) the regulation states,

**(1)** Except as provided in [paragraph (c)](https://www.law.cornell.edu/cfr/text/42/413.360#c) of this section, and for a program year, [SNFs](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) must submit to [CMS](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=bf357408153b566fe5915e650bfb5a49&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) data on measures specified under sections 1899B(c)(1) and 1899B(d)(1) of the [Social Security Act](https://www.law.cornell.edu/topn/old_age_pension_act) and standardized [resident](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=ec556483e7a555c4cfe608c2f508a1e6&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) assessment data in accordance with section 1899B(b)(1) of the [Social Security Act](https://www.law.cornell.edu/topn/old_age_pension_act), in the form and manner, and at a time, specified by [CMS](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=bf357408153b566fe5915e650bfb5a49&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360).

**(2)** [CMS](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=bf357408153b566fe5915e650bfb5a49&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) may remove a quality measure from the [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) QRP based on one or more of the following factors:

**(i)** Measure performance among [SNFs](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) is so high and unvarying that meaningful distinctions in improvements in performance can no longer be made.

**(ii)** Performance or improvement on a measure does not result in better [resident](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=ec556483e7a555c4cfe608c2f508a1e6&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) outcomes.

**(iii)** A measure does not align with current clinical guidelines or practice.

**(iv)** The availability of a more broadly applicable (across settings, populations, or conditions) measure for the particular topic.

**(v)** The availability of a measure that is more proximal in time to desired [resident](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=ec556483e7a555c4cfe608c2f508a1e6&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) outcomes for the particular topic.

**(vi)** The availability of a measure that is more strongly associated with desired [resident](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=ec556483e7a555c4cfe608c2f508a1e6&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) outcomes for the particular topic.

**(vii)** Collection or public reporting of a measure leads to negative unintended consequences other than [resident](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=ec556483e7a555c4cfe608c2f508a1e6&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) harm.

**(viii)** The costs associated with a measure outweigh the benefit of its continued use in the program.

The regulation goes on to discuss exceptions and extensions at paragraph (c), which states,

**(1)** A [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) may request and [CMS](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=bf357408153b566fe5915e650bfb5a49&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) may grant [exceptions](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=b382e30e03ae0d8ab3a9ce54906e836e&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) or extensions to the reporting [requirements](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=9bfc710926d1e1814edab2a1d582548c&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) under [paragraph (b)](https://www.law.cornell.edu/cfr/text/42/413.360#b) of this section for one or more quarters, when there are certain extraordinary circumstances beyond the control of the [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360).

**(2)** A [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) may request an exception or extension within 90 days of the date that the extraordinary circumstances occurred by sending an email to *SNFQRPReconsiderations@cms.hhs.gov* that contains all of the following information:

**(i)** [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) [CMS](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=bf357408153b566fe5915e650bfb5a49&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) Certification Number (CCN).

**(ii)** [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) Business Name.

**(iii)** [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) Business Address.

**(iv)** CEO or CEO-designated personnel contact information including name, telephone number, title, email address, and mailing address. (The address must be a physical address, not a post office box.)

**(v)** [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360)'s reason for requesting the exception or extension.

**(vi)** Evidence of the impact of extraordinary circumstances, including, but not limited to, photographs, newspaper, and other media articles.

**(vii)** Date when the [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) believes it will be able to again submit [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) QRP data and a justification for the proposed date.

**(3)** Except as provided in [paragraph (c)(4)](https://www.law.cornell.edu/cfr/text/42/413.360#c_4) of this section, [CMS](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=bf357408153b566fe5915e650bfb5a49&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) will not consider an exception or extension request unless the [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) requesting such exception or extension has complied fully with the [requirements](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=9bfc710926d1e1814edab2a1d582548c&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) in this paragraph (c).

**(4)** [CMS](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=bf357408153b566fe5915e650bfb5a49&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) may grant [exceptions](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=b382e30e03ae0d8ab3a9ce54906e836e&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) or extensions to [SNFs](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) without a request if it determines that one or more of the following has occurred:

**(i)** An extraordinary circumstance affects an entire region or locale.

**(ii)** A systemic problem with one of [CMS](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=bf357408153b566fe5915e650bfb5a49&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360)'s data collection systems directly affected the ability of a [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) to submit data in accordance with [paragraph (b)](https://www.law.cornell.edu/cfr/text/42/413.360#b) of this section.

The regulation goes on to discuss reconsideration, appeals, and data completion thresholds.

Critical to this issue and the instant case was an extraordinary circumstance. On January 31, 2020, Alex M. Azar II, Secretary of Health and Human Services, pursuant to the authority vested to him under Section 319 of the Public Health Service Act, determined the existence of a public health emergency related to the Novel Coronavirus[[1]](#footnote-1). In consideration of the public health emergency, CMS announced relief in Medicare quality reporting so that health care providers could direct their resources toward patient care, while ensuring health and safety of patients and staff in view of Covid-19. CMS notified the public via press release on March 22, 2020[[2]](#footnote-2). On March 27, 2020, CMS issues a memorandum to the provider community, supplementing the March 22 press release, notifying that CMS was granting exceptions for Medicare quality reporting for various service types, including SNFs[[3]](#footnote-3). The memorandum reiterated the need to grant exceptions in quality reporting so that health care providers could focus on safety in view of Covid-19. CMS also notified that data collected may be greatly impacted by the response to Covid-19 and therefore, should not be in the quality reporting program. Specifically, within the memorandum, pursuant to 42 C.F.R. §413.360(c), CMS granted exception to SNF quality reporting for Q4 2019 (10/1-12/31), Q1 2020 (1/1-3/31), and Q2 2020 (4/1-6/30).

The provider is challenging the CMS finding that the hospital failed to achieve an 80% threshold on the MDS reporting requirement for CY 2020 (July 1, 2020 – December 31, 2020). On September 21, 2021, CMS acknowledged the provider’s request for reconsideration and notified the provider it was upholding its decision to reduce the SNF’s APU due to the provider’s failure. On March 15, 2022, the provider filed the instant appeal.

The provider submits data through the National Healthcare Safety Network (HNSN)[[4]](#footnote-4). NHSN is the conduit for facilities to comply with Centers for Medicare and Medicaid Services quality reporting requirements. The NHSN allows providers, such as the provider in the instant appeal, to verify its data submissions in real time. This also allows hospitals to analyze its progress related to measures in real time.

The providers are challenging the CMS finding that they did not achieve an 80% threshold on the Minimum Data Set (MDS) reporting requirement for CY 2020 (July 1, 2020-December 31, 2020). Providers requested reconsideration of the CMS decision on July 19, 2021. CMS notified the providers on September 21, 2021 that they are upholding their decision that the providers will be subject to reduced FY 2022 APU.

## **Argument**

CMS provides a good deal of training related to SNF quality reporting. The CMS website includes a dashboard for SNF QRP training that includes:

* Training Materials and In-person Training
* Training Question and Answers (Q&As)
* SNF Open Door Forum (ODF) Presentations
* Special Open Door Forum (SODF) Presentations
* CMS Quality Partner/Vendor Workgroup Presentations

In addition, providers can submit technical questions to the PAC training mailbox or submit content-related questions to the SNF QRP mailbox. Further, CMS sends informational messages to SNFs that are not meeting annual payment update (APU) thresholds on a quarterly basis ahead of the submission deadline. However, to receive informational messages, CMS notifies providers that they must register with Swingtech (CMS subcontractor) by submitting a hospital email, facility name, and CMS certification number (CCN). For whatever reason, the Provider here chose to not register for the informational messages. Prior to the submission deadline for Q3 2020 and Q4 2020, the Provider could have been made aware of failures in quarterly data, allowing opportunity to review and correct data submissions.

SNFs are afforded an opportunity to preview, review, and correct their data before the applicable quarterly data submission deadlines. The correction of any errors must be submitted by the submission deadlines. A Review and Correct Report is available for providers to access in the CMS reporting system, which will assist them in identifying whether there are any issues with the data already collected and submitted before the applicable quarterly data submission deadlines. SNFs are also afforded the opportunity to request CMS’ review of report data where they believe failures within the report are erroneous. Such requests must be made within certain timeframes. Again, there is no evidence that the Provider previewed, reviewed, or asked for corrections to its data submission. Further, there is no evidence the Provider asked CMS to review its data to dispute errors.

The Provider wishes only to point to calendar-year 2020 data, while the applicable measure was undoubtedly Q3 and Q4 2020. The Provider was made aware of the measure period via public notices in March 2020. The law informs that the measuring periods are as the Secretary deems appropriate. The regulation very clearly informs the assessment data are to be submitted in the form and manner, and at a time, specified by [CMS](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=bf357408153b566fe5915e650bfb5a49&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360). The regulation also very clearly allows the Secretary to grant exceptions to the reporting requirements for one or more quarters where an extraordinary circumstance affects an entire region or locale. The Secretary is able to grant such exception without a request by a provider. Undoubtedly, the Covid-19 pandemic was (and remains) an extraordinary circumstance affecting the entire country. Secretary Azar’s emergency declaration confirms this fact. CMS acted in accordance with the law and regulation when determining the SNF QRP measure period for 2020.

The CMS in their upholding the con-compliance decision letter dated July 15, 2021, notified the providers that they did not meet one or more of the Skilled Nursing Facility (SNF) Quality Reporting Program (QRP) requirements for the Calendar Year (CY) 2020 data submission that impacts Federal Fiscal Year (FY) 2020 Annual Payment Update (APU). Failure to meet the requirements of the SNF QRP will result in a two (2) percentage point reduction in the FY 2022 APU. CMS noted that due to impacts of COVID-19 during Q1 and Q2, the APU payment impact for FY 2022 is based upon data collected in Q3 and Q4 of calendar year 2020 only.

CMS determined the providers did not meet the program requirements because they did not achieve 80% thresholds on the Minimum Data Set (MDS) reporting requirement for CY 2020 (July 1, 2020, to December 21, 2020).

The Providers’ reconsideration request dated July 19, 2021, was denied by CMS on September 21, 2021. CMS indicated that under 42 CFR Part 405, the providers may appeal this decision through the Provider Reimbursement Review Board (PRRB) within 180 days of the date of this letter.

The Providers raised two arguments in their position paper. Each will be addressed below:

1. “The SNFs Met the Threshold for QRP Reporting to Avoid a Two Percent

Reduction to their APU for FY 2022.”

The Provider believes it had the right to submit data for the full 2020 calendar-year, and to have complied with the regulation if its full calendar-year data met certain requirements. The Provider argues that there are no exceptions to 42 C.F.R. §413.360(b)(2), which was amended and removed from the regulation after the period in question. The Provider believes there is no authority in the regulation that allows CMS to create an exception to paragraphs (b)(1) and (b)(2), with regard to full year data.

As previously discussed, the regulation is quite clear that CMS may grant exception to the requirements at (b)(1) for one or more quarters where an extraordinary circumstance occurs. The Provider’s suggestion that the exception cannot apply to paragraph (b)(2) is incorrect. Paragraph (b)(2) follows (b)(1) as an alternative set of criteria providers could meet to comply with the requirements under (b)(1). In other words, providers still must comply with paragraph (b)(1). The alternative at (b)(2) is only a means of doing so. The requirements at (b)(1) were excepted for Q1 and Q2, therefore, compliance with (b)(1) or (b)(2) was not relevant for QRP purposes for Q1 or Q2. All requirements under (b)(1) were excepted at paragraph (c) by the public health emergency, including the criteria at paragraph (b)(2). The Provider implies that program year is synonymous with a calendar or fiscal year reporting period to further its argument. Quite clearly, the regulation informs what a program year is,

For purposes of this section, a program year is the fiscal year in which the market basket percentage described in § 413.337(d) is reduced by two percentage points if the [SNF](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=1343f4820bcbb131d0d1e1cbde09dcce&term_occur=999&term_src=Title:42:Chapter:IV:Subchapter:B:Part:413:Subpart:J:413.360) does not report data in accordance with [paragraph (b)](https://www.law.cornell.edu/cfr/text/42/413.360#b) of this section.[[5]](#footnote-5)

The providers meeting or exceeding the threshold of 80% for QRP reporting for CY 2020 is not at question. The CMS’s decision was based on the providers’ failure to achieve the 80% threshold on the Minimum Data Set (MDS) reporting requirement for CY 2020 (July1, 2020 through December 31, 2020) which the providers fail to address in their preliminary position paper.

1. “CMS cannot Change a Substantive Legal Standard Governing Payment for Services Without Following the Procedures of the Medicare ACT.”

The Provider’s argument is baseless. CMS very clearly informed that the review period would include only Q3 and Q4 2020. CMS was plainly within its authority to do so, under 42 C.F.R. §413.360(c). There was no new rule, but rather a rule with an exception being applied in an extraordinary circumstance, just as the regulation allows. Quite clearly, the statutes/regulations grant CMS and the Secretary substantial deference to develop, implement, and maintain standardized patient assessment data elements for clinical categories through the SNF’s submission of required quality data in the form, manner and time specified.

1. **Conclusion**

In view of the foregoing, the provider has failed to persuade the MAC that it met the MDS 3.0 compliance percentage. Accordingly, the burden of proof, which was upon the provider, has not been met. Therefore, the Board must find that the CMS decision to grant the reduced annual update in light of the provider’s failure was not arbitrary or capricious and did in fact adhere to Medicare Law and Regulations. Thus, the Board must conclude that the provider is not entitled to the full annual update.

IV. LAW, REGULATIONS AND PROGRAM INSTRUCTIONS

Law: Social Security Act

Section 1886(b)(3)(B)(viii)

Sec. 1888. **[**42 U.S.C. 1395yy**]** (a)

Sec. 1888. (e)(6)

Regulations: 42 C.F.R., Part 412, Subpart H

Section 412.140

42 C.F.R., Part 412, Subpart D

Section 412.64

42 CFR 413.360

Other Sources: Federal Registers

V. EXHIBITS

C-1. CMS notifications

C-2. Provider’s Appeal Request Including the Schedule of Providers

C-3. Public Health Emergency Declaration dated 01/31/2020

C-4. CMS Press Release dated 03/22/2020

C-5. CMS Memorandum dated 03/27/2020

1. Public Health Emergency Declaration dated 01/31/2020. See Exhibit C-3 [↑](#footnote-ref-1)
2. CMS Press Release dated 03/22/2020. See Exhibit C-4 [↑](#footnote-ref-2)
3. CMS Memorandum dated 03/27/2020. See Exhibit C-5 [↑](#footnote-ref-3)
4. See <http://www.cdc.gov/nhsn/> - The NHSN is a secure, Internet-based surveillance system maintained and managed by the CDC, and can be utilized by all types of healthcare facilities in the United States, including acute care hospitals, long term acute care hospitals, psychiatric hospitals, rehabilitation hospitals, outpatient dialysis centers, ambulatory surgery centers, and long term care facilities. The NHSN enables healthcare facilities to collect and use data about HAIs, adherence to clinical practices known to prevent HAIs, the incidence or prevalence of multidrug-resistant organisms within their organizations, and other adverse events. [↑](#footnote-ref-4)
5. 42 C.F.R. § 413.360(a) [↑](#footnote-ref-5)