

HCFA IMPOSES STRICTER CIVIL PENALTY REQUIREMENTS ON NURSING HOMES

By L. Jane Charlton and W. James Rogers

If you think the federal government has increased its scrutiny of long term care facilities, you are absolutely correct. Since 1995, the federal government has been enforcing the most stringent nursing home regulations in the history of the Medicaid and Medicare Programs. Every month seems to bring a new round of scrutiny and regulation of nursing home operations. Now, the Health Care Financing Administration (HCFA) has issued new regulations that will undoubtedly result in more frequent issuance of civil money penalties (CMPs) for even minor instances of non-compliance.

New Rule Effective On May 17, 1999.

On March 18, 1999, HCFA published in the Federal Register a final rule that expands HCFA's and the States' ability to impose CMPs on nursing homes that are not in compliance with federal program requirements. The new regulations, which became effective on May 17, 1999, apply to all nursing homes that participate in Medicare and Medicaid programs, which includes most of the nearly 17,000 nursing homes across the United States.

HCFA asserted that it "waived" the traditional notice and public comment period on the basis of a compelling public interest. In another equally dubious explanation, HCFA stated that the solicitation of public comments regarding the notification procedures was unnecessary since HCFA merely changed its interpretation of existing regulations.

Prior Rule: "Per Day" Penalties Only.

Previously, the regulations authorizing the imposition of civil money penalties required the amount of the penalty to be tied to the length of noncompliance. HCFA, or the State, as appropriate, determined a specific amount for each day of non-compliance based on the type of violation: \$3,050 per day up to \$10,000 per day in cases involving immediate jeopardy to patient health and safety, down to \$50 to \$3,000 per day for ordinary noncompliance. The total amount of the penalty depended on when the facility achieved substantial compliance as determined by a return survey.

According to HCFA, the existing rule was deficient in that CMPs were not imposed until the violation had ceased and the number of days of noncompliance could be determined. Secondly, HCFA was disturbed by the fact that investigators frequently set a compliance deadline and, if the deadline was met, no CMP was levied against the facility; although it not clear why HCFA needed a new set of regulations to correct its own internal practices.

New Rule: "Per Instance" Option.

Under the new rule, HCFA and the States (as appropriate) may impose CMPs on a "per instance" basis. This means that CMPs may be imposed on the first day an "instance" of non-



compliance is discovered. Calculation of the penalty amount will not be based on the beginning and the end date of the identified violation. According to HCFA's comments in the Federal Register, the timely correction of the violation will not reduce or eliminate the penalty. (Of course the failure to correct the problem could result in additional CMPs or sanctions.) HCFA states that every singular "instance" of non-compliance may be the basis for imposition of CMPs. The type and severity of non-compliance will determine the amount of the per instance penalty calculation.

The only limitation is that the CMP for an instance of non-compliance may not total more than \$10,000. If there are multiple civil penalties, the total facility liability may not exceed \$10,000 per day even where the calculation is made on a "per instance" basis. The minimum amount of the penalty is \$1,000.

Although HCFA and States still have the authority to impose CMPs on a "per day" basis, the new rule does not authorize the imposition of both a "per day" and "per instance" CMP for the same violation. The enforcement authority must elect the CMP option at the outset. Nursing homes and their attorneys are well advised to ensure that there has not been a prohibited overlap in the calculation of penalties. The regulation does not modify the nursing homes' ability to file a prompt appeal from the assessment of a CMP.

Modified Notification Requirements.

Existing regulations, 42 CFR §488.402(f)(5), established a maximum time frame of 20 calendar days for the surveying agency to notify a provider that penalties would be imposed and to actually impose the penalties. Where the 20 day period was not met, HCFA and/or the State had to issue another notice. Basically, the enforcement agencies found that the 20 day requirement created a process that restricted their ability to issue CMPs on their own timetable. In addition, the maximum notification requirement delayed the imposition of CMPs where an additional notice was necessary.

Under the new final rule, the maximum notice period is eliminated. Once the notice of intent to impose remedies has been issued, HCFA and the State have virtually unlimited time in which to impose CMPs. HCFA asserts that due process concerns are satisfied insofar as nursing homes will still receive at least two days notice in immediate jeopardy cases and 15 days notice in all other cases pursuant to the ordinary notice of noncompliance provisions.

Compliance Education is Vital.

It is safe to assume that HCFA changed its regulations with the expectation that its increased enforcement arsenal will be used. The obvious intent of the new regulations is to make it easier for surveyors to impose CMPs as a means of enforcing compliance. Long term care facilities can no longer (if they ever could) expect to avoid CMPs by correcting violations after they happen. Now more than ever, facilities must develop effective compliance programs to reduce the possibility of violations in the first instance.

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