

MEMORANDUM

Texas Department of Human Services * Long Term Care/Policy

TO: LTC-R Regional Directors & Program Managers
State Office Section/Unit Managers
HCSSA Program Administrators

FROM: Jim Lehrman
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Long Term Care-Regulatory & HCSSA
State Office MC: E-340

SUBJECT: New Regulation on Per-Instance Civil Monetary Penalty for Nursing Facilities - S&CC #00-03

DATE: June 26, 2000

The purpose of this letter is to advise Texas Department of Human Services (TDHS), Long Term Care-Regulatory (LTC-R) staff of the Health Care Financing Administration's (HCFA) policy eliminating the maximum notice period for imposition of a remedy, and to present the option of imposing a per-instance civil money penalty (CMP) as an enforcement remedy.

Eliminating the Maximum Notice Period

Currently, regulation establishes a maximum time frame for HCFA or the State to notify a provider that remedies will be imposed and to actually impose the remedy(ies). This regulation requires that remedies must be imposed within 20 days of the notice to the provider, and when they are not, another notice must be issued. This time frame has proven to be problematic as well as restrictive. The purpose of the 20 day notice has been to assure that the provider has been reasonably informed, in advance, of the imposing of an adverse action. However, due process is already being served by the 2 day notice in cases of immediate jeopardy and 15 days notice in all other cases. The 20 day notice does not offer the providers any additional information from the previous notice, and the delay of the enforcement action(s) serves no purpose for either HCFA or the State. Based on this rationale, **'488.402 (f) (5)** of the Code of Federal Regulations was revised to read that "the 2 and 15 day notice periods begin when the facility receives the initial notice that a remedy is being imposed."

Per-Instance Civil Money Penalties

Per-instance refers to a single deficiency identified by tag number as entered on the statement of deficiencies. A CMP assigned to that single deficiency creates an immediate remedy for one specific finding of noncompliance. HCFA's reasons for the creation of a per-instance CMP option include:

- determining the ending date of noncompliance has been troublesome in that it usually requires a revisit to a facility to verify correction;
- survey teams are not always able to return to a facility as quickly as the facility requests in order to clear the deficiency;

- the per day CMP penalty is continued even when the original deficiency(ies) has(have) been corrected, but a new deficiency(ies) has(have) been written;
- per day CMP's have not been imposed because facilities have corrected the deficiencies and are back in compliance, but have not been able to maintain substantial compliance.

HCFA's guidelines for selecting a per-instance CMP include:

- when per-instance is selected, there is no opportunity to correct prior to imposition;
- per-instance is imposed when noncompliance is documented;
- focus on the individual instances of noncompliance rather than the amount of time that a facility remains out of compliance;
- determine which type of CMP (per instance or per day) is the most appropriate remedy to impose, as **regulation does not authorize the use of both** when citing a specific deficient practice;
- The per day and the per instance CMP **cannot** be used simultaneously during a specific survey, but both **may** be used during an enforcement cycle, if more than one survey takes place **and** the per day CMP **was not** the CMP initially imposed. If a per day CMP is the CMP sanction initially imposed, a per instance CMP **cannot** be imposed on a subsequent survey of the same enforcement cycle. Enforcement cycle is defined as the time period beginning with the visit where a remedy is initially imposed, includes follow-up and/or monitoring visits, and continues until substantial compliance is achieved, or until termination. It does not include an investigation conducted during the cycle.
- minimum dollar amount for each per instance CMP is **\$1,000**;
- **total facility liability** for imposing one or more CMPs **cannot exceed \$10,000 per visit**. For example, if an investigation and an annual survey are being conducted
- during the same facility visit, the total amount of per instance CMP's cannot exceed \$10,000.
- per instance penalty amounts are imposed for noncompliance that constitutes **actual harm**, or for noncompliance that has **the potential for more than minimal harm**. There can be more than one instance of noncompliance identified during a survey where the per instance CMP is used as an enforcement remedy. The **total** dollar amount of the CMP **for the instance or multiple instances** of noncompliance may not exceed \$10,000, and may not be less than \$1,000 per instance.
- Provisions for reducing the amount of a CMP (e.g. immediate jeopardy is removed but noncompliance continues) or increasing the amount of a CMP (e.g. after imposing a penalty amount, noncompliance escalates to the point of posing immediate jeopardy) **do not apply** when a per instance penalty has been selected.

The following parameters need to be assessed prior to establishing the actual amount of the per instance CMP:

- the relationship of one deficiency to other deficiencies;
- the seriousness and scope of the deficient practice(s);
- the facility's degree of culpability;
- the facility's history of noncompliance, including repeated deficiencies.
- the facility's financial condition, as it contributes to a reasonable expectation of the facility's ability to pay;
- any other remedies being imposed, in addition to the CMP.

Previously, States were limited to giving notice of adverse actions to facilities for cases of minimal noncompliance only. HCFA was responsible for notifying all others. As a means of responding more quickly to the enforcement process, HFCA has granted the States the authorization to give notice of remedies to be imposed. HCFA will continue to assess current remedy options and the contribution they make in enhancing the objective of seeing nursing homes achieve and maintain substantial compliance as a means of addressing resident well-being.

If you have any questions, contact Sue Brown, Professional Services, at (512) 438-2631.

{Original Signature on File}

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JL:mg