

# PUBLICATION

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## Self-Reporting Violations May Lower Civil Money Penalties under Final Rule

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The Final Rule “Civil Money Penalties for Nursing Homes” was published in the Federal Register (76 Fed. Reg. 15106) on March 18, 2011. Section 6111 of the Affordable Care Act amended the Social Security Act to incorporate new provisions governing the imposition and collection of civil money penalties when nursing homes are not in compliance with federal participation requirements. By this Final Rule, the Centers for Medicare and Medicaid Services (CMS) revised and expanded Medicare and Medicaid regulations as required in accordance with Section 6111 of the Affordable Care Act of 2010. According to CMS, Congress enacted Section 6111 to improve efficiency and effectiveness of the nursing home enforcement process by reducing delays between the identification of problems with noncompliance and the effect of penalties that are intended to motivate a nursing home to maintain continuous compliance with basic expectations regarding the provision of quality of care. Section 6111 sought to eliminate a facility's ability to defer the financial effect of a civil money penalty until after a formal appeal and litigation.

### Provisions of the Rule include:

*Opportunity for Independent Informal Dispute Resolution.* Although CMS retains ultimate authority for survey findings and imposition of civil money penalties, a facility has the opportunity for independent informal dispute resolution within 30 days' notice that a civil money penalty has been imposed. CMS clarified that a facility can elect either the current informal dispute resolution process conducted by the state or a new Independent Informal Dispute Resolution (IIDR) process to be conducted by an independent entity approved by CMS. The facility must request the IIDR within 10 days of receipt of CMS's offer of IIDR and the IIDR must be completed within 60 days of the facility's timely request.

*Escrow Account for Civil Monetary Penalties (CMPs).* CMS is authorized to collect and place CMPs imposed by CMS into an escrow account pending the resolution of any formal appeal by the facility. A CMP can be collected by CMS upon the earlier of (i) completion of an IIDR, or (ii) 90 days after notice of the imposition of the CMP. Per day, CMPs would be effective and continue to accrue but would not be collected during the time that a CMP is subject to the IIDR process. When a facility is successful on appeal, the applicable portion of any CMP amount held in escrow would be returned to the facility with interest.

*Authority to Reduce CMP if Facility Self-Reports.* The Secretary of Health and Human Services can reduce CMPs by as much as 50 percent in situations where the facility self-reports a compliance violation and quickly corrects it. For a facility to receive this 50 percent reduction, CMS must determine that the facility self-reported and corrected the noncompliance within 10 days of identifying it and before it was identified by CMS or the state. Noncompliance constituting immediate jeopardy, a pattern of harm, widespread harm or resulting in a resident's death is not eligible for CMP reduction. A facility that receives the 50 percent reduction may not also receive the 35 percent reduction currently available to a facility for waiving its right to a hearing.

*Use of Escrowed CMP.* Ninety percent of the escrowed CMP attributable to Medicare may be used for the protection or benefit of nursing home residents, with the remaining 10 percent being conveyed to the U.S. Treasury.

*Effective Date.* In order for CMS to phase in the provision implementing the availability of an IIDR process, the effective date for the Final Rule is January 1, 2012. CMS intends to issue additional guidance on the use of CMP funds and the new IIDR process through survey and certification memoranda.

The Final Rule made several changes to the proposed rule based on the comments that CMS received, including:

- The Rule clarified that a facility may choose to elect either the current IIDR process or the new independent IIDR process.
- The requirement for a user fee was removed.
- CMS may adjust the timing of CMP payments to account for a facility's financial hardship.
- When a facility does not pay the applicable CMPs into an escrow account within 30 calendar days from the notice of collection, the collection process will be the same process for state-imposed CMPs under 42 C.F.R. §488.432.
- Finally, the self-reporting and correction time frame was changed and the eligibility for a 50 percent reduction was clarified.

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