



LONG TERM CARE COMMUNITY COALITION
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Working to improve long term care through research, education & advocacy

LONG TERM CARE (LTC) E- NEWSLETTER – April 2011: Volume 9, Number 3

Welcome to the [LTC E-NEWSLETTER](#), a monthly electronic newsletter of the [Long Term Care Community Coalition](#). Note to Readers: To go directly to an article, click on its page number in the Table of Contents. Once you are at the article, click on any underlined text for a link to more information or to send a message in “Spotlight on Advocacy.”

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Federal Government Issues Final Rules on Levying & Use of Nursing Home Civil Money Penalties

Background:

On March 18, the Center for Medicare and Medicaid Services (CMS) released its final rules implementing the 2010 Affordable Care Act (federal healthcare reform law) provisions re. the levying and use of Civil Money Penalties (CMPs). These federal CMPs are levied against nursing homes that have been found to have failed to meet minimum standards. LTCCC and other stakeholders have long had an interest in CMPs for two reasons: (1) Federal CMPs tend to be much higher than state fines, meaning that they have a stronger punitive effect when there is nursing home abuse or neglect and (2) federal CMPs must be used to benefit residents, such as protecting a resident or her possessions when a facility closes or to support activities that directly improve resident care or quality of life.

In 2005, LTCCC conducted a study (in partnership with Charlene Harrington of the University of California, with funding from The Commonwealth Fund) that assessed the levying and use of CMPs across the U.S. Our subsequent report, [*Funding for Innovation: A Review of State Practices with Civil Monetary Penalties*](#), provides comprehensive information on states' practices (as of 2005) related to CMPs and state CMPs/fines as well information stakeholders can use to make changes in their state to encourage the appropriate levying and use of CMPs to improve nursing home care.

Substantive Changes:

The 2010 Affordable Care Act makes substantive changes to federal CMP policy, many of which reflect the recommendations that came out of our 2005 study and subsequent work on CMPs. The new rules implementing these changes are, according to CMS, premised on the idea that “Congress has expressed its intent to improve efficiency and effectiveness of the nursing home enforcement process, particularly as it relates to civil money penalties imposed by CMS.” Furthermore, according to CMS, the Affordable Care Act provisions “seek to reduce the delay which results between the identification of problems with noncompliance and the effect of certain penalties that are intended to motivate a nursing home to maintain continuous compliance with basic expectations regarding the provision of quality care.” The major changes now in effect include:

- Substantial increase in portion of funds allocated to benefit and protect nursing home residents. The Affordable Care Act created a new, “permissive authority” allowing CMS to use a portion of collected CMPs (allocated to Medicare) to benefit residents. Prior to the law, all fines related to Medicare residents were returned to Medicare; only fines related to Medicaid were able to be used to protect nursing home residents. In addition, in its original proposal, CMS had originally proposed using only 50% of the Medicare funds for this purpose. However, in response to “overwhelming” public comments in support of using a greater portion of the funds, CMS has decided to allocate 90% of the funds for these purposes. This means that there will be significantly more money available that must be used by the states to improve resident care and quality of life! [Note: This applies to “funds that CMS requires to be placed in escrow, and that remain after all administrative appeals have been exhausted and where the facility is unsuccessful in its appeals.”]
- Clarification of the types of activities that can be funded with CMPs:
 - Potential uses include: To support resident and family counsels; to support consumer advocacy, for facility improvement initiatives approved by CMS (including joint training of facility staff and nursing home surveyors, which LTCCC has concerns about due to the need to ensure that surveyors maintain independence from those who they are supposed to be holding accountable - - LTCCC is disappointed that CMS did not accept the recommendation of mandating that consumers and ombudsmen be included in such

- trainings, though they specify that they “expect that joint trainings are designed so the line between provider and regulator would not be blurred”);
- Prohibited uses include: a state’s survey and certification activities, ongoing Long Term Care Ombudsman activities, to benefit long term care consumers outside of nursing homes.
 - Codification of the right of CMS to approve or disapprove the states’ uses of the monies. This includes the right of CMS to monitor not only states’ uses of the funds, but also if a state is not using the funds at all. This is a major change that will at least begin to address the longstanding problem of states collecting these monies and then not spending them for beneficial purposes. The new rules state: “If there is reason to believe that a State is not spending collected civil money penalties in accordance with the law or not at all, this matter should be referred to the appropriate CMS Regional Office account representative so that he or she may review this matter with the State.”
 - Clarification that funding at the facility level must “be used to implement programs and services that **go beyond meeting minimum statutory requirements**... [emphasis added].” Furthermore, “[i]t is not appropriate for States to return civil money penalty funds directly to a deficient facility.” This addresses a major concern for LTCCC and other consumers: facilities should not receive additional monies to meet the minimum standards of care and quality of life for which they are already being paid.
 - CMS also promulgated significant changes to how CMPs will be collected, including:
 - New requirements around depositing proposed fines in escrow when a nursing home contests a fine (so as to avoid historically long delays in collecting fines against nursing homes that fail to meet minimum standards);
 - Reduction of a CMP by 50% when a facility self-reports a deficiency and promptly corrects it;
 - A new informal dispute resolution process in which facilities can contest CMPs. Though LTCCC has concerns about this provision in the law (especially given that facilities already have a right to informal review and to formally appeal a citation, whereas residents have no rights to appeal when their abuse or neglect has gone undetected by surveyors) we were pleased that CMS included the provision that residents, their representatives and long term care ombudsman cannot be excluded from the process.

[Link to the new CMP rules: <http://j.mp/eGMVOT>. Link to LTCCC’s CMP page: [http://www.nursinghome411.org/articles/?category=civilpenalties.](http://www.nursinghome411.org/articles/?category=civilpenalties)]

[U.S. Senate Special Committee on Aging Hosts Roundtable on Assisted Living](#)

Assisted living is frequently cited as the fastest growing form of senior housing. These residences provide care and other services to people who need or desire a residential care setting but who want to avoid the institutional environment of the traditional nursing home. However, despite its increasing importance in caring for the frail elderly and disabled, including people with dementia, assisted living has largely evaded accountability. There are no federal regulations or oversight pertaining to assisted living whatsoever, and state laws are highly inconsistent.

In order to begin to address the burgeoning issues around consumer rights and protections, government funding mechanisms and the overall place of assisted living in the continuum of long term care, the U.S. Senate Special Committee on Aging held a roundtable discussion on assisted living on March 15, 2011. Participants included representatives from several state governments, the assisted living industry, and

other stakeholders. There was one individual representing the interests of consumers and the public: Eric Carlson, of the [National Senior Citizens' Law Center](#) and [Assisted Living Consumer Alliance](#).

The roundtable touched on a number of important issues such as: current state oversight models, the role of the federal government (including how the federal government could make resources available for affordable assisted living for lower and middle income individuals) and the rights of consumers vs. the industry in terms of disclosure requirements, eviction criteria, and “negotiated risk” agreements (in which a facility mandates that a resident agree to absolve the facility of any responsibility for any injury that might happen when the resident participates in certain activities).

[For more information on the roundtable, and the Aging Committee’s work (including a videotape of the roundtable): <http://aging.senate.gov/>. For LTCCC’s website dedicated to assisted living quality and oversight: <http://www.assisted-living411.org/>.]

We’re on the Web!

www.ltccc.org: Our main website, with access to all of our issues, policy briefs and research.

www.assisted-living411.org: For information on assisted living, including consumer issues and policies.

www.nursinghome411.org: For information on developments in nursing home care, regulation and policy issues.

Watch LTCCC’s executive director, Richard Mollot, discuss nursing homes, assisted living & Alzheimer’s care on [Getting Your Money’s Worth](#).

LTCCC Links of Interest

- View the latest enforcement actions against nursing homes in New York State.
- Read the latest edition of LTCCC’s quarterly newsletter, *The Monitor*.
- Long term care information booklet in [Chinese](#) and [English](#) for Chinese consumers: *What You Need to Know about Long Term Care*.
- [Tools for Stakeholders & National Report](#) on Increasing Transparency and Consumer Involvement in States’ Uses of Nursing Home Civil Money Penalties to Improve Care and Quality of Life.
- LTCCC study: *Government Monitoring & Oversight of Nursing Home Care* in [Word 2007](#) or [PDF](#).

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