

IX. Civil Money Penalties

Introduction:

This category of the guide discusses federal Civil Money Penalties (CMPs) and state CMPs/fines. CMPs and fines are imposed by the regulatory agencies that license nursing homes if a nursing home does not comply with regulatory standards. These fines can be used to fund innovative programs to improve the lives of nursing home residents, among other things.

What you'll learn:

- Basis for CMPs
- How CMPs are determined
- When CMPs are due and payable
- How CMPs are collected and used

Basis for Civil Money Penalties [SOM §7510]

CMS or the state may impose a civil money penalty (CMP) for the number of days that a facility is not in substantial compliance with one or more participation requirements, or for each instance that a facility is not in substantial compliance, regardless of whether the deficiencies constitute IJ. Additionally, the per day or per instance CMP may be imposed for past noncompliance.

CMP amounts (for more information see §7516.1):

- Between \$3,050 and \$10,000 per day of IJ;
- Between \$50 and \$3,000 per day of non-IJ; or
- A “per instance” CMP from \$1,000 to \$10,000 for each deficiency.

If imposed, a facility cannot avoid the remedy. The CMP may be imposed immediately or after a facility is given an opportunity to correct and a revisit finds that the facility remains out of compliance. States and regional offices are encouraged to develop methods to ensure that CMP amounts are applied consistently within the broad ranges identified in [42 CFR 488.408](#).

Determining Citations of Past Noncompliance [SOM §7510.1]

Past noncompliance may be identified during any survey. To cite past noncompliance with a specific survey data tag ([F-tag](#) or K-tag), all of the following three criteria **must be met**:

- The facility was not in compliance with the specific regulatory requirement at the time the situation occurred;

- The noncompliance occurred after the exit date of the last standard (recertification) survey and before the survey (standard, complaint, or revisit) currently being conducted; and
- There is sufficient evidence that the facility corrected the noncompliance and is in substantial compliance at the time of the current survey for the specific regulatory requirement.

Regulations provide that a CMP may be imposed for past noncompliance. **CMS strongly urges states to recommend the imposition of a CMP for past noncompliance cited at the level of II.** When a CMP is recommended, the state SA notifies the CMS RO and/or SMA within 20 days from the last day of the survey that determined past noncompliance of its recommendation to impose a CMP. The CMS RO and/or SMA responds to the recommendation within 10 days, and if accepted, sends out the formal notice.

Determining Amount of Civil Money Penalty [SOM §7516]

Note: On November 2, 2015, the president signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Sec. 701 of the Bipartisan Budget Act of 2015, Pub. L. 114-74). The Act requires agencies to adjust the level of applicable CMPs with an initial “catch-up” adjustment and make subsequent annual adjustments for inflation. For more information and details on the annual adjustments, see <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Civil-Monetary-Penalties-Annual-Adjustments>.

Penalty Amount [SOM §7516.2]

Once the decision is made to impose a CMP for facility noncompliance, the following factors are considered in determining the specific amount to impose:

- The facility’s history of noncompliance, including repeated deficiencies;
- The facility’s financial condition;
- Seriousness and scope of the deficiencies (see [Appendix P](#) and [Appendix Q](#));
- The relationship of one deficiency to other deficiencies;
- The facility’s degree of culpability; and
- Any other remedies being imposed in addition to the CMP.

Changes in Civil Money Penalty [SOM §7516.3]

Decreasing Per Day Civil Money Penalty Range: If a CMP is imposed for a situation of IJ and the IJ is removed but the noncompliance continues, CMS or the state will shift the penalty amount to the lower range of penalty amounts.

Increasing Per Day Civil Money Penalty Range: Before the hearing, and following a revisit showing continued noncompliance, CMS or the state may propose to increase the penalty amount for facility noncompliance, which after imposition of a lower penalty amount, becomes sufficiently serious to pose IJ.

Note: When the per instance CMP has been selected, the provision for changing the amount of the CMP does not apply and no opportunity to correct is provided.

- If a CMP is imposed, **CMS and the state must increase the penalty amount for any repeated deficiencies** for which a lower level penalty amount was previously imposed, **regardless of whether** the increased amount would exceed the range otherwise reserved for deficiencies when IJ does not exist.

CMP Reductions for Self-Reporting and Prompt Corrections [SOM §7516.4]

CMS will reduce a CMP by 50% when a facility self-reports and promptly corrects a deficiency for which a CMP is imposed by CMS provided all of the following conditions are met:

- The facility must have self-reported the noncompliance to CMS or the state before it was identified by CMS or the state and before it was reported to CMS or the state by means of a complaint lodged by a person other than an official representative of the nursing home;
- Correction of the noncompliance must have occurred on the earlier of either 15 calendar days from the date of the self-reported circumstance or incident that later resulted in a finding of noncompliance or 10 calendar days from the date a CMS was imposed;
- The facility waives its right to a hearing;
- The noncompliance that was self-reported and corrected did not constitute a pattern of harm, widespread harm, IJ, or result in the death of a resident;
- The CMP was not imposed for a repeated deficiency that was the basis of the CMP that previously received a 50% reduction; and
- The facility has met mandatory reporting requirements for the incident or circumstance upon which the CMP is based as required by federal and state law.

Effective Date of CMP [SOM §7518]

The per day CMP may start accruing as early as the date that the facility was first out of compliance, as determined by CMS or the state. The effective date of the per day CMP will

often be the date of the survey because it may be difficult to document precisely when noncompliance begins if before the date of survey.

A CMP cannot be collected until a facility has an opportunity for a hearing if it properly requests one.

CMP Notification [SOM §7520]

The state notifies the facility of the possibility of a CMP being imposed for noncompliance in its initial letter to the facility after the survey. The state may:

- Recommend that the RO and/or the SMA impose a CMP promptly as a result of noncompliance found during a standard, complaint, or revisit survey;
- Recommend that a CMP accrue from the date of the noncompliance as a result of a revisit substantiating the facility's failure to correct the noncompliance;
- Recommend that the RO and/or SMA impose a CMP for each instance that results in a deficiency during a survey; and
- Recommend a CMP upon identification of past noncompliance. (See [SOM §7306](#).)

CMP Settlement [SOM §7524]

The RO has the authority to settle cases at any time prior to a final administrative decision when it imposed the CMP. The state has the authority to settle cases at any time, prior to the evidentiary hearing decision when the SMA imposed the CMP. **If a decision is made to settle, the settlement should not be for a better term than had the facility opted for a 35% reduction.**

CMP Collection [SOM §7528]

When a CMP Subject to Being Collected and Placed in an Escrow Account is Imposed [SOM §7528.1]

When the RO imposes a CMP that is subject to being collected and placed in an escrow account, payment is due on whichever the following occurs first if the facility files an appeal of the enforcement action:

- The date on which the independent informal dispute resolution process is completed; or
- The date which is 90 calendar days after the date of the notice of imposition of the penalty.

CMP Disposition [SOM §7534]

Within certain federally mandated parameters, **federal CMP funds can be used for a variety of activities and projects to benefit nursing home residents.** Funds may be granted to any entity permitted under state law and approved by CMS. **Funds cannot be provided to nursing homes to meet existing Medicare/Medicaid requirements** or other statutory and regulatory requirements.

Medicare or Dually-Participating Facility [SOM §7534.1]

The specific use of CMP funds collected from long-term care facilities as a result of federally imposed CMPs must be approved by CMS on behalf of the Secretary. Collected CMP funds may be used for:

- To support activities that benefit residents, including assistance to support and protect residents of a facility that closes (voluntarily or involuntarily) or is decertified (including offsetting costs of relocating residents to home and community-based settings or another facility);
- Projects that support resident and family councils and other consumer involvement in assuring quality care in facilities; and
- Facility improvement initiatives approved by the Secretary (including joint training of facility staff and surveyors, technical assistance for facilities implementing quality assurance programs, the appointment of temporary management firms, and other activities approved by the Secretary).

The vast majority of U.S. nursing homes are Medicare or Dually-Participating, meaning that a portion of the CMPs derived from substandard care in these facilities can be used for activities or projects that benefit residents.

Medicaid-Only Facility [SOM §7534.2]

A CMP collected by a state from a Medicaid facility that the state or CMS finds deficient must be applied to the protection of the health or property of residents of nursing facilities that the state or CMS finds deficient. Statutory examples of appropriate uses include:

- State costs related to the operation of a facility pending correction of the deficiencies or closure;
- Reimbursement of residents for personal funds or property lost at a facility as a result of actions by the facility or by individuals used by the facility to provide services to residents. Established procedures for the reimbursement of residents are followed; and/or
- Payment for the cost of relocating residents to other facilities.

CMS does not have the authority to endorse, approve, disapprove, or otherwise make determinations about suggested uses for CMPs. States have the authority to determine which activities constitute acceptable and beneficial uses of the funds.

Dually Participating Facility [SOM §7534.3]

A CMP collected from a dually participating facility is apportioned commensurate with the relative proportions of Medicare and Medicaid beds at the facility actually in use by residents covered by the respective programs on the date the CMP begins to accrue, per resident census data the time of the survey.

- The Medicare portion of the collected CMP is deposited as miscellaneous receipts of the US Treasury in the Fines, Penalties, and Forfeitures Account.
- The Medicaid portion of the collected CMP is returned to the state.

Dually Participating Facility or Medicare Facility and Held in Escrow [SOM §7534.4]

A CMP collected from a dually participating facility is apportioned between Medicare and Medicaid commensurate with the relative proportions of Medicare and Medicaid beds at the facility actually in use by residents covered by the respective programs on the date the CMP begins to accrue, per resident census data at the time of the survey.

Ten percent of the collected CMP funds that are subject to be held in escrow and that remain after a final administrative decision will be deposited with the Department of the Treasury. **The remaining 90% may not be used for survey and certification operations but must be used entirely for activities that protect or improve the quality of care for residents.**

Use of Civil Money Penalties [SOM §7535]

The Act provides that CMP funds may be used to support **activities that benefit residents**. These include, but are not limited to:

- Assistance to support and protect residents of a facility that closes (voluntarily or involuntarily) or is decertified (including offsetting costs of relocating residents to home and community-based settings or another facility);
- Projects that support resident and family councils and other consumer involvement in assuring quality care in facilities; and
- Facility improvement initiatives approved by the Secretary (including joint training of facility staff and surveyors, technical assistance for facilities implementing quality assurance programs, the appointment of temporary management firms, and other activities approved by the Secretary).

CMS, states, and others are in general agreement about the types of expenditures that should be considered **inappropriate for CMP funds**. These include, but are not limited to:

- Making capital improvements to a facility;

- Paying for items or services that are already the responsibility of the nursing home;
- Funding projects, items or services that are not related to improving the quality of life and care of nursing home residents;
- Projects for which a conflict of interest or the appearance of a conflict of interest exists;
- Long-term projects (greater than three years);
- Temporary manager salaries; and
- Supplementary funding of federally required services.

Editor's Note: For more information on the use of CMPs, please see [LTCCC's National Study on Use of Civil Money Penalties to Protect Nursing Home Residents](#).