



# Client Alert



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## OIG Urges CMS to Implement Intermediate Sanctions for Noncompliant Home Health Agencies

The Omnibus Budget Reconciliation Act of 1987 (P.L., 100-203; OBRA 1987) provides for intermediate sanctions for home health agencies that are out of compliance with Medicare conditions of participation. On March 2, 2012, the Office of Inspector General of the U.S. Department of Health and Human Services (OIG) issued a report that calls attention to the fact that these sanctions have yet to be implemented by the Centers for Medicare & Medicaid Services (CMS) and that urges CMS to make this a high priority.<sup>1</sup> CMS has yet to respond to this report, but it has indicated earlier that it anticipates issuing a proposed rule for alternative sanctions later this year.

### Background

To participate in Medicare, home health agencies must satisfy conditions of participation set forth at 42 C.F.R. Part 484.<sup>2</sup> As the OIG reviewed in its report on March 2, 2012, CMS uses a survey and certification process to monitor and enforce compliance by home health agencies with these conditions of participation. When a surveyor determines that a home health agency is out of compliance, the home health agency can be cited with one or more deficiencies, depending on the nature of the noncompliance. The home health agency will then be required to correct the deficiencies or face termination from Medicare participation. This correction process may involve the home health agency having to submit a plan of correction and undergo additional surveys to determine if the deficiencies have in fact been corrected.<sup>3</sup> To incentivize completion of the plan of correction, CMS can place noncompliant home health agencies on a track for termination from Medicare.

Pursuant to Section 1891(f) of the Social Security Act, as amended by OBRA 1987, intermediate sanctions for noncompliant home health agencies should have been implemented by no later than April 1, 1989. These are supposed to include civil monetary penalties, payment suspension and appointment

1 HHS, OIG, *Intermediate Sanctions for Noncompliant Home Health Agencies*, OEI-06-11-00401, March 2008.

2 These include conditions concerning patients' rights; release of patient-identifiable OASIS information; compliance with federal, state and local laws, disclosure and ownership information, and accepted professional standards and principles; organization, services and administration; group of professional personnel; acceptance of patients, plan of care and medical supervision; reporting OASIS information; skilled nursing services; therapy services; medical social services; home health aide services; qualifying for outpatient physical therapy or speech pathology services; clinical records; evaluation of the agency's program; and comprehensive assessment of patients—all as elaborated under the governing regulations.

3 See CMS, *State Operations Manual* Pub. No. 100-7, ch. 2, §§ 2728-2734.

of temporary management.<sup>4</sup> In response to OBRA 1987, a Notice of Proposed Rulemaking (NPRM) to implement intermediate sanctions was published in 1991. But CMS has never issued a final rule and withdrew the NPRM in August 2000. In 2008, the OIG issued a report citing that 15 percent of home health agencies had the same deficiencies during three consecutive surveys.<sup>5</sup> This same report noted that CMS' sanctioning options were limited to Medicare termination, to which CMS seldom resorted. Thus, the OIG encouraged CMS to implement intermediate sanctions as an additional means of incentivizing home health agencies to achieve and maintain compliance.

## 2012 Report

After reviewing the issue and meeting with CMS officials in December 2011, the OIG in its March 2, 2012 report concluded that "[m]ore than 20 years after Congress directed CMS to implement intermediate sanctions for [home health agencies] found to be out of compliance with the Medicare conditions of participation," CMS has yet to do so. In discussing CMS' progress, the OIG noted the following:

Each year since the 2008 OIG report, CMS provided written updates on its progress toward developing a proposed rule for [home health agency] intermediate sanctions in its written responses to OIG's upcoming Compendium [of Unimplemented Recommendations]. In the 2010 Compendium, CMS stated that it had "drafted an alternative sanction that was under review." In the 2011 Compendium, CMS stated that it was developing a new proposed rule for intermediate sanctions that it anticipated publishing in 2011. In its written response to OIG for the forthcoming 2012 Compendium, CMS stated that a draft proposed rule containing alternative sanctions would be sent for clearance within CMS and that it anticipated publishing a new NPRM by September 2012.<sup>6</sup>

The OIG concluded its report by again urging CMS to make intermediate sanctions for home health agencies a high priority and to complete this implementation process as soon as possible.

## Conclusion

The OIG is clearly pressuring CMS to implement intermediate sanctions for use against home health agencies found out of compliance with Medicare conditions of participation. Whether CMS accomplishes this task in 2012 remains to be seen. But home health agencies should anticipate that intermediate sanctions may, in the near future, be added to CMS' arsenal for use against home health agencies with cited deficiencies. Please click [here](#)<sup>7</sup> to view the OIG's March 2, 2012 report.

<sup>4</sup> Social Security Act 1891(f)(2)(A).

<sup>5</sup> HHS, OIG, *Deficiency History and Recertification of Medicare Home Health Agencies*, OEI-09-06-00040, August 2008.

<sup>6</sup> Citations omitted.

<sup>7</sup> <http://oig.hhs.gov/oei/reports/oei-06-11-00401.asp>

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