



Medicare Providers - Beware! CMPs are Increasing

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On September 6, 2016, the Department of Health and Human Services published an interim final rule which became effective immediately. The new regulation adjusts for inflation the maximum civil monetary penalty (CMP) amounts for all agencies within HHS. Accordingly, many healthcare providers, including post-acute and long-term care providers, can expect to see more severe monetary penalties when the Centers for Medicare and Medicaid (CMS) alleges that a regulatory violation has occurred. Notably, several providers recently reported that CMS imposed a CMP in excess of \$10,000 per day, which was the prior maximum per day CMP amount. This alert provides a brief overview of the basis for adjusting the CMPs, the method of calculations, and information regarding effective dates.

By way of background, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“2015 Act”) was signed into law on November 2, 2015. The 2015 Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (“1990 Act”) and was designed to specifically improve the effectiveness of CMPs and maintain their deterrent effect. Importantly, the 2015 Act mandates that HHS: (1) adjust the level of the CMP with an initial “catch up” adjustment; and (2) make subsequent annual adjustments for inflation. Pursuant to the 2015 Act and 5 U.S.C. § 553(b) (3)(B), HHS is permitted to immediately implement an adjustment without prior notice and comment when it determines that it would be impracticable to delay publication of the rule for notice and comments. With the immediate effective date of the new CMP rule on September 6, 2016, HHS determined delaying publication was impracticable because the 2015 Act: (a) requires the “catch up” adjustment be made no later than August 1, 2016, and (b) provides a clear formula for such adjustment of the CMP, thereby leaving little room for discretion.

In addition to mandating a “catch up” and requiring annual adjustments, the 2015 Act substantially changed the method of calculating inflation adjustments. Under the 1990 Act, adjustments under the CMP required significant rounding, which kept CMPs at large round numbers and in turn led to minimal increases because the inflation factor was not large enough. In addition, CMP increases were capped at 10 percent. The 2015 Rule removed the rounding rule, and CMPs are now rounded to the nearest dollar. This change ensures that CMPs will be increased each year to a figure commensurate with the actual calculated inflation. Agencies are also now required to identify and track, for each CMP, the year and corresponding CMP amount(s) level or maximum range.

The adjusted amounts are effective only for CMPs assessed *after* August 1, 2016, whose alleged violations occurred *after* November 2, 2015. Finally, the 2015 Act mandates that agencies publish annual adjustments in the future not later than January 15 of every year after the publication of the initial adjustment. Future revisions based on annual inflation rates will be published in the *Federal Register* and CMS has indicated it will provide additional guidance to specific providers (e.g., skilled nursing facilities, nursing facilities, home health agencies and clinical laboratories) in its State Operations Manual (SOM).

Below is an example of two adjusted CMPs for violation of regulations applicable to skilled nursing facilities:

Citation	Description	Old Amount	New/Adjusted Amount	Percentage Increase
1396r(b)(3)(B)(ii)(I)	Penalty for willfully and knowingly certifying a material and false statement in a SNF resident assessment	\$1,000	\$2,063	106%
42 CFR 488.438(a)(2)	Penalty for willfully and knowingly certifying a material and false statement in a SNF resident assessment	\$10,000	\$20,628	106%

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