



CMS Accelerates Collection of Civil Money Penalties

Alan C. Horowitz

On August 30, 2013, the Centers for Medicare & Medicaid Services (CMS) published a Survey and Certification Memo for State survey agency directors in which it outlined additional collection measures for civil money penalties (CMP).¹ The directive from CMS notes that effective October 1, 2013, CMS may collect a CMP based on any survey deficiencies within 90 days or less from the date the CMP was imposed.

Section 6111 of the Affordable Care Act (ACA) authorized CMS to collect and escrow CMPs prior to an administrative hearing. As required, CMS promulgated regulations on March 18, 2011, explaining that it would begin collecting and escrowing CMPs effective January 1, 2012. In its *Interim Advance Guidelines*, CMS noted that it would “phase in the new civil money collection and escrow provisions.”² Initially, CMS only collected and escrowed CMPs based on a deficiency that allegedly caused actual harm or immediate jeopardy to resident health or safety (“G-level” deficiency or higher). CMPs imposed on alleged deficiencies at a scope and severity level of “D,” “E” and “F,” the potential for more than minimal harm, were not subject to collection and escrow during the phasing in process.

The August 30, 2013 memo further alters the CMP landscape. It provides that CMS may collect and escrow CMPs triggered by any deficiency cited during a standard or complaint survey conducted on or after October 1, 2013. Regardless of whether the CMP is a per day or a per instance CMP, and regardless of the amount, CMS may collect and escrow the CMP. The regulation that authorizes the collection of CMP funds before a hearing is found at 42 C.F.R. § 488.431. It also requires that CMS must provide the facility with the opportunity for an Independent Informal Dispute Resolution (IIDR) process in such cases.

CMS may place CMPs in an escrow account at the earliest of the date the IIDR is completed or 90 calendar days from the date of the notice of the CMP. (Note that the IIDR must be requested within 10 calendar days of notice of the CMP and completed within 60 days from the date it was requested.) If a provider appeals the basis for the CMP and prevails, CMS must return the escrowed CMP amount with interest. If a provider fails to pay the CMP, CMS is authorized to deduct the amount from any sum then or later owed to the facility by CMS.

The ACA and the regulations also provide CMS with the discretion to continue its long-standing practice of waiting until a final agency determination by an Administrative Law Judge (ALJ) or the Departmental Appeals Board (Board) before initiating collection. However, based on empirical evidence, since CMS began escrowing CMP funds in early 2012, it has not been overly willing to use its discretion to wait until after a hearing to determine whether deficiencies serving as the basis for a CMP are legally supportable.

Some commenters to the Final Rule observe that imposing and collecting a CMP before a hearing is a deprivation of a facility’s due process rights. CMS addressed that concern in the preamble to the Final Rule by noting that providers have the option of an IIDR when CMP funds are escrowed,

¹ *Escrow and Independent Informal Dispute Resolution (Independent IDR) Process for Nursing Homes – Applicable to All Civil Money Penalties*, S & C: 13-57-NH (Aug. 20, 2013).

² *Federal Requirements for the Independent Informal Dispute Resolution (Independent IDR) Process for Nursing Homes – Interim Advance Guidance*, S & C: 12-08-NH (Dec. 2, 2011).

which “should reduce the chance of erroneous deprivation.”³ However, CMS has the ultimate authority to determine whether a provider is in compliance with Medicare’s requirements. Thus, even if a provider prevailed at an IDR (or traditional IDR), CMS could reject those findings. In such a case, the escrowed CMP funds would only be returned if a provider prevailed at a subsequent agency determination. So, an independent IDR does not necessarily eliminate the possibility of an erroneous deprivation.

CMS explained the purpose of its accelerated collection of CMPs by noting that “Congress intended to enhance and strengthen the motivational and deterrent effects of civil money penalties” and that delaying collection of those CMPs “would undermine such motivational effects.”⁴ The early collection and escrowing of CMPs, especially in regions that typically impose six-figure CMPs, has the potential to disrupt cash flow necessary to operate smaller facilities and afford the costs associated with an appeal. Even when a facility appeals the deficiencies and prevails, it may take several years before a decision by an ALJ, the Board and ultimately, the U.S. Court of Appeals. One wonders what purpose is served by depriving a provider of its funds for that extended period, especially where a tribunal ultimately determines that the deficiencies were not legally supportable. There is a reason Congress left CMS with the discretion to wait until after a hearing before collecting a CMP. Hopefully, CMS will use its discretion accordingly.

³ 76 Fed. Reg. 15,108 (Mar. 11, 2011).

⁴ *Id.*

Authors and Contributors

Alan C. Horowitz

Of Counsel, Atlanta Office
404.873.8138
alan.horowitz@agg.com

not *if*, but *how*.[®]

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a “business sensibility” approach, developing a deep understanding of each client’s industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal’s prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief “not if, but how.” Visit www.agg.com.

Atlanta Office

171 17th Street NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Ave., NW,
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: <http://www.agg.com/subscribe/>

©2013. Arnall Golden Gregory LLP. This legal insight provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice. Under professional rules, this communication may be considered advertising material.