

# NEW SURVEY PROCESS EXPANDS SANCTIONS

## *HCEFA Proposes More Enforcement Remedies and Broader Disclosure Requirements for Nursing Facilities*

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After lengthy study, the Health Care Financing Administration (HCFA) has proposed regulations specifying a new process for surveying and certifying nursing facilities for participation in Medicare and Medicaid. The process would include periodic surveys of varying depth, expanded enforcement remedies, and broader disclosure requirements. A formal severity and scope scale would be introduced to evaluate a deficiency's seriousness and select an appropriate corrective remedy. Resident outcomes would continue to be the primary vehicle for gauging whether a facility complies with federal requirements.

The new survey process would apply equally to hospital-based and freestanding nursing facilities. Its objectives would be twofold: to motivate facilities to render more consistent quality care, and to maintain ongoing compliance with federal participation requirements. Apart from termination as a Medicare or Medicaid provider, deficiencies

could result in one or more intermediate sanctions for noncompliant facilities. The state could, for example, assume temporary administrative control of the facility and levy civil money penalties reaching \$10,000 a day.

The proposed regulations would impose two new notification requirements on nursing facilities. One concerns nursing staff waivers; the other involves substandard facilities. Furthermore, in the preamble, HCEFA indicates its intention to apply the proposed rules governing the imposition of sanctions to hospitals and all other providers, as well as to nursing facilities.

### THE PROPOSED PROCESS

Every nursing facility participating in Medicare or Medicaid is periodically inspected for compliance with federal requirements (see **Box**). The state conducts standard, special, and extended surveys; HCFA performs validation surveys. Standard surveys are the most common; they must be unan-

**Summary** The Health Care Financing Administration (HCFA) has proposed a new process for surveying and certifying nursing facilities for participation in Medicare and Medicaid. The process would be grounded in the principle that all federal requirements must be met and enforced.

Surveyors would use a severity and scope scale to evaluate a deficiency's seriousness and determine the appropriate corrective remedy. The more severe or pervasive the facility's shortcomings, the harsher the sanction.

HCFA and the states have been reluctant to use the traditional remedy for noncompliant facilities—terminating their participation in Medicare or Medicaid. The available remedies would be expanded to include intermediate sanctions such as temporary management, denial of payment, directed

plan of correction, and civil money penalties.

The critical factors for determining the remedy would be the severity and scope of the deficiencies and whether they pose an immediate and serious threat to resident well-being. A facility could appeal the specific remedy, but not the conclusion that violations have occurred. Importantly, except for civil money penalties, the states would have to impose enforcement remedies at the time violations are uncovered, regardless of any other provision of state law, such as a policy precluding penalties while a hearing is pending.

The proposed regulations also would impose two new notification requirements on nursing facilities—one for any facility that receives a nursing staff waiver, and the other for a facility rendering substandard care.



nounced. An individual who notifies the facility in advance could be fined up to \$2,000. Surveyor findings and conclusions are based on direct observations, record reviews, and interviews with residents, staff, and members.

The new survey process would implement provisions of the Omnibus Budget Reconciliation Act of 1987 and amendments enacted in each of the next three years. The process would be grounded in the principle that *all* federal requirements must be met and enforced. Therefore certain (usually minor) deficiencies would no longer be tolerated just because the facility is in "substantial compliance" with the requirements. Instead, each requirement's importance would depend on the circumstances and its implications for resident outcomes at the time a facility is inspected.

Under the new process, the designated state agency would survey all nursing facilities and would certify whether a non-state-operated skilled or intermediate care facility complies with federal Medicaid requirements. The state agency, subject to HCFA approval, also would determine whether a skilled nursing facility satisfies Medicare requirements. HCFA's approval also would be necessary for the state to certify a state-operated nursing facility for participation in Medicare, Medicaid, or both programs. (NOTE: The designation "state operated" excludes nurs-

ing facilities operated by counties or other local public entities.)

### SEVERITY AND SCOPE

Surveyors would use a 4-by-4 severity and scope scale to evaluate a deficiency's seriousness and determine the appropriate corrective remedy (or remedies). Although each facility would be expected to meet every federal requirement, the severity and scope scale would recognize that deficiencies vary in terms of their threat to resident health and safety. In other words, the more severe or pervasive the facility's shortcomings, the harsher the sanction.

A deficiency's severity would mirror its actual or potential impact on:

- Residents' physical well-being
- Rights violations
- The facility's ability to help residents attain their highest practicable physical, mental, or psychosocial well-being

The **Box** on p. 54 indicates that the severity scale would range from least severe (level 1) to most severe (level 4), with the highest two levels differing only in terms of whether serious harm has already occurred or is likely to occur.

A deficiency's scope would indicate its prevalence throughout the facility, varying from an isolated event affecting only a few residents (level 1) to a systemic practice of the facility (level 4).

## TYPES OF COMPLIANCE SURVEYS

Participating nursing facilities are surveyed periodically for compliance with federal requirements. All surveys must be unannounced, subject to a penalty that could reach \$2,000 for standard surveys. Regulations specify the survey's content, procedures, frequency, consistency, and team composition.

A standard survey is conducted no later than 15 months from the last standard survey. The survey includes:

- Interviews and observations of a case-mix-stratified sample of residents
- A survey of the quality of care furnished, as measured by indicators of medical, nursing, and rehabilitative care; dietary and nutrition services; activities and social participation; and sanitation, infection, control, and the physical environment
- An audit of written plans of care and residents' assessments to deter-

mine the accuracy of the assessments and the adequacy of plans of care

- A review of compliance with residents' rights requirements

The state may conduct a standard or an abbreviated standard survey to determine whether the facility's quality of care has declined due to a change in ownership, administrator or director of nursing, or management firm. Furthermore, the state must conduct a standard or an abbreviated standard survey to investigate complaints of violations of federal requirements.

An extended (or partial extended) survey's objective is to identify the policies and procedures resulting in substandard care. The state must conduct an extended survey no later than 2 weeks after a standard survey finds that the facility has furnished substandard care.

An extended survey reviews:

- A larger sample of resident assessments than is used in a standard survey
- Staffing and in-service training
- Contracts with consultants, if appropriate
- Policies and procedures related to deficiencies
- Any participation requirement that the survey agency deems warranted

Each year HCFA surveys a sample of nursing facilities to assess the adequacy of state surveys. It conducts unannounced validation ("look-behind") surveys for at least 5 percent of the facilities. HCFA may also inspect any facility suspected of not complying with any federal requirement. In addition, HCFA requires the state to conduct ongoing studies to measure and reduce any inconsistencies in conducting surveys and applying the findings.



However, scope levels would not be distinguished by sharp lines, such as a fixed number of residents.

**ENFORCEMENT REMEDIES**

The traditional remedy for a noncompliant facility has been the nonrenewal or termination of its participation agreement or denial of its application to be a Medicare or Medicaid provider. HCFA and the states, however, have been reluctant to impose such a harsh penalty for several reasons. Termination is disruptive to residents and forces them to receive care elsewhere, perhaps at a greater distance from relatives and friends. Termination magnifies the difficulty many Medicaid-eligible persons encounter in gaining admission to facilities in areas with tight bed supplies. And termination can be financially devastating for a facility with predominantly Medicare and Medicaid residents.

The proposed process would broaden the enforcement remedies to include the following intermediate sanctions.

**Temporary Management** HCFA or the state would appoint a substitute administrator to operate the facility, hire or terminate staff, and obligate facility funds to correcting deficiencies.

**Denial of Payment** Reimbursement would be denied for all Medicare and Medicaid residents, for all new Medicare and Medicaid admissions, or

for all new Medicare and Medicaid admissions in certain diagnostic categories or in need of specialized care.

**Directed Plan of Correction** HCFA or the state, directly or through temporary management either approves, would formulate a plan of correction that the facility is required to implement within prescribed time frames.

**State Monitoring** An employee or contractor of the state survey agency would oversee the correction of deficiencies through frequent site visits. State monitoring would be mandated when a facility is cited as substandard on the last three consecutive standard surveys.

**Civil Money Penalties** HCFA or the state could impose a per diem monetary penalty on any facility not complying with one or more requirements based on:

- The facility's compliance history
- The facility's financial condition
- The scope, severity, and duration of noncompliance
- Whether the deficiency affects health and safety or administrative requirements.

For a deficiency constituting an immediate and serious threat to residents, the penalty could be \$3,050 to \$10,000 for each day the threat lasts. For other deficiencies, except those with a severity and scope level of 1, the fine could equal \$50 to \$3,000 a day.

Money penalties would apply from the penalty's effective date until the deficiency is remedied or the participation agreement is terminated. In immediate and seriously threatening situations, the effective date would be the 10th day after the last day of the survey; otherwise, the effective date would be 20 days.

**Closure** In emergencies the state could close a Medicaid facility and transfer the residents.

**Alternative Remedies** With HCFA approval, the state could impose alternative remedies on substandard Medicaid facilities. The alternatives would have to be identified in the state Medicaid plan and would have to include denial of payment for new admissions and state monitoring. At a minimum, these two remedies would be mandated for a facility providing substandard care on its last three consecutive surveys.

**REMEDY SELECTION**

The severity and scope scale would play a critical role in helping surveyors determine whether a facility renders substandard care. A facility that renders substandard care would be one that has at least one deficiency with a severity level of 3 or 4, irrespective of its scope; alternatively, it would have a level 2 severity coupled with a level 3 or level 4 scope for the quality of care requirements.

**PROPOSED SEVERITY AND SCOPE SCALE**

**SEVERITY**

**Level 1** Any deficiency with respect to requirements not meeting the criteria for levels 2, 3, or 4.

**Level 2** A negative outcome or resident rights violation has occurred; the ability of the individual to attain the highest practicable physical, mental, or psychosocial well-being has been compromised; or both.

**Level 3** There is the potential for physical harm that could cause serious impairment or death.

**Level 4** Life-threatening harm, serious impairment, or death has occurred.

**SCOPE**

**Level 1-Isolated** The deficiency exists only in a very limited number of cases.

**Level 2-Occasional** The deficiency is identified in a number of cases, but does not appear to reflect a pattern of facility behavior.

**Level 3-Pattern** The deficiency is identified in a number of cases such that it appears likely that it also exists for cases not reviewed by the surveyors.

**Level 4-Widespread** The deficiency exists in a sufficient number of cases to represent a systemic or pervasive practice of the facility.



In selecting the enforcement remedy or remedies, surveyors would rely largely on their judgment and knowledge of the facility rather than on hard and fast empirical standards. A separate remedy could be imposed for each deficiency or a single remedy for interrelated deficiencies. The critical factors for determining the remedy would be the severity and scope of the deficiencies and whether they pose an immediate and serious threat to resident well-being. For example:

- Regardless of scope, severity level 3 or 4 would always reflect an immediate and serious threat, but severity level 1 never would.

- No remedy would be imposed for deficiencies at the 1-by-1 severity and scope level because of their inconsequential nature. The facility nonetheless would be required to correct them, or face penalties during the next standard survey.

- For deficiencies at severity level 2, one or more of the remedies described above would have to be imposed. Similarly, remedies could be imposed for deficiencies with severity level 1 and scope level 2 or more.

Secondary factors that may help decide the remedy are any identified relationships between deficiencies and the facility's compliance history, particularly related to its current deficiencies.

### **CORRECTION DEADLINES**

If the deficiency is an immediate and serious threat to residents, the facility would have 23 days from the last day of the survey to rectify the situation or have its participation agreement terminated (or accept temporary management). If the deficiency is not serious, the facility would have 90 days to correct it as stipulated in its approved plan of correction.

Failure to act in a timely manner would result in denial of payment for new admissions for as long as the problem persists or until 90 days have elapsed, at which time the facility's participation agreement would be terminated. Furthermore, the facility (for Medicare) or the state (for Medicaid) would have to repay HCFA all federal money received during the correction period.

### **HEARINGS**

A facility would have 60 days from the mailing of a notice of termination or noncompliance to request a hearing. The facility would be permitted to appeal the specific remedy but not the severity and scope ratings, the manner in which surveyors reached their conclusions, and the conclusion that violations have occurred.

Importantly, except for civil money penalties, the states would have to impose enforcement remedies at the time violations are uncovered, regardless of any other provision of state law, such

as a policy precluding penalties while a hearing is pending. For a facility that waives its right to a hearing within 60 days, HCFA and the state could reduce the civil money penalty by 35 percent.

HCFA has indicated that the proposed principles of due process and rules governing the imposition of sanctions would also apply to hospitals and all other providers. Thus they too would no longer receive presanction hearing relief.

### **TWO NOTICES**

The proposed regulations would impose two new notification requirements on nursing facilities. First, any facility that receives a nursing staff waiver would have 10 working days to notify the residents or their guardians. (HCFA or the state would notify the state long-term care ombudsman and the state mentally ill and mentally retarded protection and advocacy system.)

Second, a facility rendering substandard care would have 10 working days to furnish HCFA or the state with the names of Medicare and Medicaid residents, as well as the names and addresses of their attending physicians. In addition, the state would have 30 days to inform the residents' attending physicians and the state licensing board for nursing facility administrators about the substandard conditions.

The state ombudsman would also have to be notified about other adverse actions against the facility; that is, the state and HCFA would have to make available survey and certification information, Medicare and Medicaid cost reports, statements of ownership, and the names of all individuals with a direct or indirect ownership interest in the facility. Furthermore, information concerning all surveys and certification, including statements of deficiencies, would be available to the public.

### **MORE UNREIMBURSED COSTS?**

The fact that facilities must meet all participation requirements, coupled with the expansion of the enforceable sanctions, may result in an increase in the number of appeals, at least initially. This could result in more facilities incurring unreimbursable legal and other professional fees, even if appeals are successful.

On a positive note, the state may decide to take advantage of a provision for incentive payments to nursing facilities that render the highest quality care to Medicaid residents. The payments would qualify for federal financial participation.

Finally, the proposed rule aims to make the survey and certification process more consistent and objective both among and within states. This would address a frequent complaint about the current process. □