



August 11, 2010

Dr. Donald Berwick  
 Administrator  
 Centers for Medicare and Medicaid Services  
 Department of Health and Human Services  
 Attention: CMS-2435-P  
 P.O. Box 8012  
 Baltimore, MD 21244-8012

**[Submitted Electronically]**

**RE: File Code CMS-2435-P**

Dear Dr. Berwick:

**President**  
 Irene B. Collins  
 Alabama

On behalf of the National Association of States United for Aging and Disabilities (NASUAD), I am pleased to provide comments on the Notice of Proposed Rule Making (NPRM), "Medicare and Medicaid Programs; Civil Money Penalties for Nursing Homes," published by the Centers for Medicare & Medicaid Services (CMS) in the *Federal Register* on July 12, 2010 [CMS-2435-P].

**Vice President**  
 James Toews  
 Oregon

NASUAD represents the 56 officially designated state and territorial agencies on aging. Our members oversee the implementation of the Older Americans Act (OAA), including the state long-term care ombudsman program. Many of our members implement their state's survey and certification program, a joint effort of the federal and state governments to ensure safety and improve the quality of care in facilities.

**Treasurer**  
 Charles D. Johnson  
 Illinois

**A. Proposed Establishment of an Escrow Account for Civil Money Penalties**

**Secretary**  
 Carol Sala  
 Nevada

NASUAD supports CMS' interpretation and application of Congress' intent in this section. By establishing an escrow account into which civil money penalties (CMP) would be deposited and continue to accrue from the date that noncompliance is determined until the completion of the Independent Informal Dispute Resolution (IIDR), CMS has moved towards addressing the current delays and inefficiencies in the collection system.

**Immediate Past President**

Patricia A. Polansky  
 New Jersey

**B. Proposed Reduction of a Civil Money Penalty by 50 Percent for Self-Reporting and Prompt Correction of Noncompliance**

**Past President**  
 Kathy Leitch  
 Washington

While NASUAD applauds CMS' attempts to promote quality assurance and improvement by providing financial incentives to encourage internal improvements in facility management and federal compliance, we are concerned about the potential administrative and financial burden these self-reporting incentives may have on states.

State resources, both personnel and budgetary, have been greatly impacted by the continuing economic downturn. If this regulation were to create additional state employee responsibilities without providing necessary funding to carry out these new requirements, an extra burden would be placed on the state.

Under the proposed rule, states would be required to inspect a self-reporting facility twice within a 10 calendar-day period in order to document and certify that the facility has corrected the reported deficiency, and is therefore eligible to receive the 50 percent reduction in CMP. Asking states to absorb the additional costs of this new self-reporting process is overly burdensome, and the increased pressure on state time and resources will significantly affect the state's survey and certification operations.

For these reasons, NASUAD does not support the imposition of an unfunded mandate that states finance additional survey and certification activities for noncompliant facilities. To address these concerns, we recommend that CMS define the corrective action a facility must take to receive a 50 percent reduction in CMP, and that CMS clarify the state role in determining if a facility has done so. Additionally, if a state's role and duties are to increase, this expansion should be funded at no additional cost to the state.

### ***C. Proposed Opportunity for an Independent Informal Dispute Resolution Process***

NASUAD supports CMS' efforts to establish an efficient, effective balanced Independent Informal Dispute Resolution Process (IIDR) for resolving the imposition of CMPs. To improve the process, NASUAD recommends that further clarification be provided for the new enhanced requirement that nursing facility residents and ombudsman be notified with respect to the opportunity to provide written comments as part of the IIDR.

NASUAD supports CMS' proposal to require facilities to pay for IIDR and to implement a user fee structure that is based on the complexity of the violation and the type of personnel and review time required to resolve the appeal. Also, in response to CMS' solicitation, we are currently unable to support refunding IIDR user fees to facilities without further clarification regarding what entity would absorb this cost in lieu of the facility, as we do not support facilities charging the cost of IIDR, including consultant and attorneys' fees, to Medicare and Medicaid, nor the state survey and certification agency.

### ***D. Proposed Acceptable Uses of Civil Money Penalties Collected by CMS***

NASUAD commends CMS in using its discretionary authority to retain 50 percent of the Medicare portion of collected CMP amounts to be used to protect the health or property of nursing home residents. Moreover, we support greater flexibility in the use of CMPs collected by CMS.

NASUAD supports CMS providing greater guidance around the specific categories of CMP that may be used for pre-request approval. In keeping with both legislative intent of The Patient Protection and Affordable Care Act (Pub. L. 111-148) and CMS' stated goals of improving and promoting the well-being and health of facility residents, NASUAD recommends the inclusion of "state long-term care

ombudsman program activities” as a specific category of CMP that may be allocated without requiring case-by-case advance approval by CMS. Acknowledging that further clarity is needed in defining appropriate “ombudsman program activities,” we urge CMS to develop guidelines that allow state ombudsman the opportunity to meet the needs of its citizens in the most efficient and effective manner possible. By allowing CMP funds to be used towards ombudsman activities, the quality of life of facility residents will be improved and protected through the ombudsman’s role in identifying, investigating, and resolving resident’s complaints; protecting the legal rights of residents; advocating for systemic change; providing information and consultation to residents and their families; and publicizing issues of importance to residents.

Thank you for the opportunity to comment on the Civil Money Penalties for Nursing Homes NPRM. Should you have any questions, please contact Martha Roherty, NASUAD Executive Director, at 202-898-2578.

Sincerely,

A handwritten signature in blue ink that reads "Martha Roherty". The signature is written in a cursive style.

Martha Roherty  
Executive Director

cc: NASUAD Members