

List of Subjects

42 CFR Part 402

Assessments, Civil money penalties, Exclusions.

45 CFR Part 102

Administrative practice and procedure, Penalties.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

PART 402—CIVIL MONEY PENALTIES, ASSESSMENTS, AND EXCLUSIONS

■ 1. The authority citation for part 402 is revised to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 2. Section 402.1 is amended—

■ a. In paragraph (c) introductory text by removing the reference “(c)(34) of this section” and adding in its place the reference “(c)(35) of this section”;

■ b. By removing paragraph (c)(20);

■ c. By redesignating paragraph (c)(21) as paragraph (c)(20);

■ d. By redesignating paragraphs (c)(22) through (34) as paragraphs (c)(23) through (35); and

■ e. Adding new paragraphs (c)(21) and (22).

The additions read as follows:

§ 402.1 Basis and scope.

* * * * *

(c) * * *

(21) Section 1862(b)(7)(B)—Except for the situation described in paragraphs (c)(21)(ii)(A) and (B) of this section, any entity that has a reporting obligation under section 1862(b)(7) of the Act (“reporting entity”) that—

(i) Fails to report any beneficiary record within 1 year of the last acceptable reporting date, defined as 365 days from the GHP coverage effective date or the Medicare beneficiary’s entitlement date, whichever is later.

(ii) A civil money penalty (CMP) is not imposed if—

(A) The incident of noncompliance is associated with a specific reporting policy or procedural change on the part of CMS that has been effective for less than 6 months following the implementation of that policy or procedural change (or for 1 year, should CMS be unable to provide a minimum of 6 months’ notice prior to implementing such changes).

(B) The entity complies with any reporting thresholds or any other reporting exclusions.

(22) Section 1862(b)(8)(E)—Except for the situations described in paragraph (c)(22)(ii)(A), (B) and (C) of this section,

any applicable plan that has a reporting obligation under section 1862(b)(8) of the Act (“applicable plan”), that—

(i) Fails to report any beneficiary record within 1 year from the date of the settlement, judgment, award, or other payment, or the effective date where ongoing payment responsibility for medical care has been assumed by the entity.

(ii) A CMP is not imposed in the following situations:

(A) An NGHP applicable plan fails to report required information as a result of the applicable plan’s inability to obtain an individual’s last name, first name, date of birth, gender, Medicare Beneficiary Identifier (MBI), Social Security Number (SSN), or the last 5 digits of the SSN, and the applicable plan has made a good faith effort to obtain this information by meeting the following:

(1) Has communicated the need for this information to the individual and his or her attorney, or other representative, if applicable, or both.

(2) Has requested the information from the individual and his or her attorney, or other representative (if applicable), at least three times—

(i) Once in writing (including electronic mail);

(ii) Then at least once more by mail; and

(iii) At least once more by phone or other means of contact in the absence of a response to the mailings.

(3) Has not received a response or has received a written response clearly indicating that the individual refuses to provide the needed information. Should the applicable plan receive a written response from the individual or their attorney or representative that clearly and unambiguously declines or refuses to provide any portion of the information specified herein, no additional communications with the individual or their attorney or other representative are required.

(4) Has documented its efforts to obtain the MBI or SSN (or the last 5 digits of the SSN). This documentation, including any written rejection correspondence, must be retained for a minimum of 5 years.

(B) An NGHP applicable plan complies with any reporting thresholds or any other reporting exclusions.

(C) The incident of noncompliance is associated with a specific reporting policy or procedural change on the part of CMS that has been effective for less than 6 months following the implementation of that policy or procedural change (or for 12 months, should CMS be unable to provide a

minimum of 6 months’ notice prior to implementing such changes).

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■ 3. Section 402.105 is amended by revising paragraph (b)(2) and adding paragraph (b)(3) to read as follows:

§ 402.105 Amount of penalty.

* * * * *

(b) * * * * *

(2) For entities with reporting obligations under section 1862(b)(7) of the Act (“reporting entity”), if a reporting entity fails to report any beneficiary record within the specified period from the latter of the GHP coverage effective date or the Medicare beneficiary’s entitlement date. The penalty is—

(i) Calculated on a daily basis, based on the number of recently added beneficiary records reviewed where CMS identifies that the entity submitted the required information more than 1 year after the GHP coverage effective date for the individual; and

(ii) \$1,000 as adjusted annually under 45 CFR part 102 for each calendar day starting the day after 1 year (365 days) from the first instance of noncompliance, as defined in paragraph (b)(2)(i) of this section.

(3) For entities with reporting obligations under section 1862(b)(8) of the Act (“applicable plan”) as follows:

(i) If an applicable plan fails to report any NGHP beneficiary record within the specified period from the date of the settlement, judgment, award, or other payment (including the effective date of the assumption of ongoing payment responsibility for medical care). The penalty is—

(A) Calculated on a daily basis, based on the number of recently added beneficiary records reviewed where CMS identifies that the entity submitted the required information more than 1 year after the date of settlement, judgment, award, or other payment (including the effective date of the assumption of ongoing payment responsibility for medical care);

(B) \$250 (as adjusted annually under 45 CFR part 102) for each calendar day of noncompliance as defined in paragraph (b)(3)(i)(A) of this section for each individual for which the required information should have been submitted, but was reported more than 1 year but less than 2 years after the required reporting date;

(C) \$500 (as adjusted annually under 45 CFR part 102) for each calendar day of noncompliance as defined in paragraph (b)(3)(i)(A) of this section for each individual for which the required information should have been

submitted, but was reported 2 years or more, but less than 3 years, after the required reporting date; and

(D) \$1,000 (as adjusted annually under 45 CFR part 102), for each calendar day of noncompliance as defined in paragraph (b)(3)(i)(A) of this section for each individual for which the required information should have been submitted, but was reported 3 years or more after the required reporting date.

(ii) The maximum penalty that may be imposed for noncompliance associated with any one individual for which the

required information should have been submitted is \$365,000 (as adjusted annually under 45 CFR part 102).

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For the reasons specified in the preamble, the Department of Health and Human Services amends 45 CFR part 102 as specified below:

PART 102—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 4. The authority for part 102 continues to read as follows:

Authority: Pub. L. 101–410, Sec. 701 of Pub. L. 114–74, 31 U.S.C. 3801–3812.

■ 5. Section 102.3 is amended in table 1 by adding references for U.S.C. 1395y(b)(6)(B), 1395y(b)(7)(B)(i), and 1395y(b)(8)(E)(i) in numerical order to read as follows:

§ 102.3 Penalty adjustment and table.

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TABLE 1 TO § 102.3—CIVIL MONETARY PENALTY AUTHORITIES ADMINISTERED BY HHS AGENCIES AND PENALTY AMOUNTS

U.S.C. sections	CFR ¹	HHS agency	Description ²	Date of last statutorily established penalty figure ³	2021 maximum adjusted penalty (\$)	2022 maximum adjusted penalty ⁴ (\$)
42 U.S.C.:	*	*	*	*	*	*
1395y(b)(6)(B)	42 CFR 402.1(c)(20), 402.105(a).	CMS	Penalty for any entity that knowingly, willfully, and repeatedly fails to complete a claim form relating to the availability of other health benefits in accordance with statute or provides inaccurate information relating to such on the claim form.	2021	3,484	3,701
1395y(b)(7)(B)(i)	42 CFR 402.1(c)(21), 402.105(a).	CMS	Penalty for any entity serving as insurer, third party administrator, or fiduciary for a group health plan that fails to provide information that identifies situations where the group health plan is or was a primary plan to Medicare to the HHS Secretary.	2021	1,247	1,325
1395y(b)(8)(E)(i)	42 CFR 402.1(c)(22), 402.105(a)(E).	CMS	Penalty for any entity serving as insurer, third party administrator, or fiduciary for a non-group health plan that fails to provide information that identifies situations where the group health plan is or was a primary plan to Medicare to the HHS Secretary.	2021	1,247	1,325
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¹ Some HHS components have not promulgated regulations regarding their civil monetary penalty-specific statutory authorities.
² The description is not intended to be a comprehensive explanation of the underlying violation; the statute and corresponding regulation, if applicable, should be consulted.
³ Statutory or Inflation Act Adjustment.
⁴ The cost of living multiplier for 2018, based on the CPI-U for the month of October 2017, not seasonally adjusted, is 1.02041, as indicated in OMB Memorandum M-18-03, "Implementation of Penalty Inflation Adjustments for 2018, Pursuant to the Federal Civil Penalties Adjustment Act Improvements Act of 2015" (December 15, 2017).
⁵ The cost of living multiplier for 2020, based on the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October 2019, not seasonally adjusted, is 1.01764, as indicated in OMB Memorandum M-20-05, "Implementation of Penalty Inflation Adjustments for 2019, Pursuant to the Federal Civil Penalties Adjustment Act Improvements Act of 2015" (December 16, 2019).

Dated: October 3, 2023.
Xavier Becerra,
 Secretary, Department of Health and Human Services.
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