



DEPARTMENT OF HEALTH AND HUMAN SERVICES  
**OFFICE OF INSPECTOR GENERAL**

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**FROM:**   
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**SUBJECT:** Early Alert Memorandum Report: *Intermediate Sanctions for Noncompliant Home Health Agencies*, OEI-06-11-00401

This early alert memorandum report provides information related to our ongoing study *Survey and Certification of Home Health Agencies* (OEI-06-11-00400)<sup>1</sup> and alerts the Centers for Medicaid & Medicare Services (CMS) regarding Federal statutory requirements to implement intermediate sanctions for noncompliant home health agencies (HHAs).

#### SUMMARY

CMS has not implemented intermediate sanctions for noncompliant HHAs as directed by the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987) and as recommended in a 2008 Office of Inspector General (OIG) report.<sup>2, 3</sup> Intermediate sanctions would allow CMS to penalize HHAs found to be out of compliance with the Medicare conditions of participation, and give noncompliant HHAs an incentive to improve their practices. Without intermediate sanctions, the only option available to CMS to penalize noncompliant HHAs is to terminate their Medicare participation, an option that the 2008 OIG study found CMS rarely exercised. Each year since the 2008 report, CMS indicated activities toward promulgating regulations to implement HHA intermediate sanctions, but it has not yet issued a proposed rule. Given the length of time since the passage of OBRA 1987 and since the 2008 OIG recommendation, CMS should make

<sup>1</sup> Department of Health and Human Services (HHS), OIG, *Work Plan*, Fiscal Year 2012. Available online at <http://oig.hhs.gov/reports-and-publications/archives/workplan/2012/Work-Plan-2012.pdf>. This study will examine recertification surveys, complaints, and CMS enforcement actions taken in recent years to address HHAs found to be out of compliance with the Medicare conditions of participation.

<sup>2</sup> OBRA 1987, P.L. 100-203, § 4023 (adding Social Security Act 1891(e) and (f)).

<sup>3</sup> HHS, OIG, *Deficiency History and Recertification of Medicare Home Health Agencies*, OEI-09-06-00040, August 2008.

HHA intermediate sanctions a high priority and complete their implementation as soon as possible.

## **BACKGROUND**

HHAs provide home health services for Medicare beneficiaries with short- or long-term illnesses or injuries who are confined to their homes and need skilled nursing care on an intermittent basis, physical therapy, speech therapy, or continuing occupational therapy.<sup>4</sup> In recent years, the use of home health services has grown. From 2002 to 2009, the number of Medicare beneficiaries receiving home health services increased by nearly 29 percent (from 2.6 to 3.3 million beneficiaries) and the number of Medicare-certified HHAs increased by 59 percent (from 6,813 to 10,821 HHAs).<sup>5</sup>

All HHAs participating in Medicare must meet Federal requirements. CMS is responsible for ensuring HHAs' compliance with Federal requirements, including the Medicare conditions of participation, through the survey and certification process.<sup>6</sup> If a surveyor determines that an HHA is out of compliance, the surveyor can cite the HHA with a deficiency. To continue in Medicare, the HHA must correct the deficiency, which may include submitting a plan of correction and undergoing additional inspections by surveyors.<sup>7</sup> To incentivize an HHA to complete a plan of correction and return to compliance, CMS can place the HHA on a termination track from Medicare.

### **Federal Statutory Requirements for Intermediate Sanctions for Noncompliant HHAs**

Section 4023 of OBRA 1987 directed CMS to develop and implement, by no later than April 1, 1989, intermediate sanctions to apply to certain HHAs found to no longer be in compliance with the Medicare conditions of participation.<sup>8</sup> These intermediate sanctions must include civil money penalties, payment suspension, and appointment of temporary management.<sup>9</sup> In response to OBRA 1987, CMS issued a Notice of Proposed Rulemaking (NPRM) in 1991, proposing intermediate sanctions to apply to noncompliant HHAs.<sup>10</sup>

### **OIG Recommendation to Implement HHA Intermediate Sanctions**

In 2008, OIG issued a report regarding HHAs with repeat deficiency citations.<sup>11</sup> We found that 15 percent of HHAs received the same deficiency citation during three consecutive surveys. We also found that CMS's sanction options for HHAs with deficiency citations were limited because CMS had not implemented intermediate

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<sup>4</sup> Social Security Act §§ 1812(a)(3), 1814(a)(2)(C), 1832(a)(2)(A), and 1835(a)(2)(A).

<sup>5</sup> CMS, *Data Compendium*, 2002, 2010. Accessed at <https://www.cms.gov> on August 8, 2011. In 2009, Medicare paid \$18.9 billion for home health services, compared to \$9.6 billion in 2002.

<sup>6</sup> Social Security Act § 1891.

<sup>7</sup> CMS, *State Operations Manual* Pub. No. 100-07, ch. 2, §§ 2728, 2728A, and 2728B.

<sup>8</sup> OBRA 1987, P.L. 100-203, § 4023 (adding Social Security Act 1891(e) and (f)).

<sup>9</sup> Social Security Act 1891(f)(2)(A).

<sup>10</sup> 56 Fed. Reg. 37054 (Aug. 2, 1991).

<sup>11</sup> HHS, OIG, *Deficiency History and Recertification of Medicare Home Health Agencies*, OEI-09-06-00040, August 2008.

sanctions, leaving termination from Medicare as the only Federal sanction for noncompliant HHAs. Further, we found that CMS rarely used the termination sanction; in 2006, CMS terminated only 21 HHAs. In the 2008 report, we recommended that CMS implement the intermediate sanctions as directed by OBRA 1987. CMS concurred with the recommendation.

## METHODOLOGY

We reviewed the 1991 NPRM and related material in the Federal Register. We also reviewed CMS's response for OIG's *Compendium of Unimplemented Recommendations* (Compendium) related to the 2008 OIG recommendation for each year during 2010–2012. Additionally, during a meeting with CMS officials in December 2011, we discussed the status of HHA intermediate sanctions.

This study was conducted in accordance with the *Quality Standards for Inspection and Evaluation* issued by the Council of the Inspectors General on Integrity and Efficiency.

## RESULT

### **CMS Has Not Implemented Intermediate Sanctions as Required by Law and Recommended by OIG**

More than 20 years after Congress directed CMS to implement intermediate sanctions for HHAs found to be out of compliance with the Medicare conditions of participation, CMS has not implemented such sanctions. More specifically, CMS never issued a final rule for the 1991 NPRM, withdrawing it in August 2000.<sup>12</sup> Although CMS did not explain at the time why it withdrew the NPRM, it indicated in its concurrence to the 2008 OIG recommendation that legislative changes and other demands impeded promulgation of a final rule.<sup>13</sup>

Each year since the 2008 OIG report, CMS provided written updates on its progress toward developing a proposed rule for HHA intermediate sanctions in its written response to OIG's upcoming Compendium. In the 2010 Compendium, CMS stated that it had "drafted an alternative sanction that was under review."<sup>14</sup> In the 2011 Compendium, CMS stated that it was developing a new proposed rule for intermediate sanctions that it anticipated publishing in 2011.<sup>15</sup> In its written response to OIG for the forthcoming 2012 Compendium, CMS stated that a draft proposed rule containing alternative sanctions would be sent for clearance within CMS and that it anticipated publishing a new NPRM by September 2012.<sup>16</sup>

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<sup>12</sup> 65 Fed. Reg. 73782, 73858 (Nov. 30, 2000). Available at <http://www.gpo.gov/fdsys/pkg/GPO-UA-2000-11-30/pdf/GPO-UA-2000-11-30-9.pdf>.

<sup>13</sup> HHS, OIG, *Deficiency History and Recertification of Medicare Home Health Agencies*, OEI-09-06-00040, August 2008.

<sup>14</sup> HHS, OIG, *Compendium of Unimplemented Recommendations*, 2010. Available at <http://oig.hhs.gov/publications/docs/compendium/compendium2010.pdf>.

<sup>15</sup> HHS, OIG, *Compendium of Unimplemented Recommendations*, 2011. Available at <http://oig.hhs.gov/reports-and-publications/compendium/2011.asp>.

<sup>16</sup> CMS update transmitted to OIG in January 2012.

## **CONCLUSION**

Although CMS indicated activities toward promulgating regulations to implement HHA intermediate sanctions, it has not yet issued a proposed rule. Given the length of time since the passage of the original statute, CMS should make HHA intermediate sanctions a high priority and should complete their implementation as soon as possible. Intermediate sanctions would allow CMS to penalize HHAs found to be out of compliance with the Medicare conditions of participation and would give noncompliant HHAs an incentive to improve their practices. Without such sanctions, HHAs may face few consequences for noncompliance, other than possible termination, an option that our 2008 report found CMS rarely exercised.

This report is being issued directly in final form. If you have comments or questions about this report, please provide them within 60 days. Please refer to report number OEI-06-11-00401 in all correspondence.