

(b) *Reduction of penalty amount.* (1) If the facility waives its right to a hearing in accordance with the procedures specified in paragraph (a) of this section, HCFA or the State reduces the civil money penalty amount by 35 percent.

(2) If the facility does not waive its right to a hearing in accordance with the procedures specified in paragraph (a) of this section, the civil money penalty is not reduced by 35 percent.

[59 FR 56243, Nov. 10, 1994; 62 FR 44221, Aug. 20, 1997]

§ 488.438 Civil money penalties: Amount of penalty.

(a) *Amount of penalty.* (1) The penalties are within the following ranges, set at \$50 increments:

(i) *Upper range—\$3,050–\$10,000.* Penalties in the range of \$3,050–\$10,000 per day are imposed for deficiencies constituting immediate jeopardy, and as specified in paragraph (d)(2) of this section.

(ii) *Lower range—\$50–\$3,000.* Penalties in the range of \$50–\$3,000 per day are imposed for deficiencies that do not constitute immediate jeopardy, but either caused actual harm, or caused no actual harm, but have the potential for more than minimal harm.

(2) *Per instance penalty.* When penalties are imposed for an instance of noncompliance, the penalties will be in the range of \$1,000–\$10,000 per instance.

(b) *Basis for penalty amount.* The amount of penalty is based on HCFA's or the State's assessment of factors listed in paragraph (f) of this section.

(c) *Decreased penalty amounts.* Except as specified in paragraph (d)(2) of this section, if immediate jeopardy is removed, but the noncompliance continues, HCFA or the State will shift the penalty amount imposed per day to the lower range.

(d) *Increased penalty amounts.* (1) Before a hearing requested in accordance with § 488.432(a), HCFA or the State may propose to increase the per day penalty amount for facility noncompliance which, after imposition of a lower level penalty amount, becomes sufficiently serious to pose immediate jeopardy.

(2) HCFA does and the State must increase the per day penalty amount for

any repeated deficiencies for which a lower level penalty amount was previously imposed, regardless of whether the increased penalty amount would exceed the range otherwise reserved for nonimmediate jeopardy deficiencies.

(e) *Review of the penalty.* When an administrative law judge or State hearing officer (or higher administrative review authority) finds that the basis for imposing a civil money penalty exists, as specified in § 488.430, the administrative law judge or State hearing officer (or higher administrative review authority) may not—

(1) Set a penalty of zero or reduce a penalty to zero;

(2) Review the exercise of discretion by HCFA or the State to impose a civil money penalty; and

(3) Consider any factors in reviewing the amount of the penalty other than those specified in paragraph (f) of this section.

(f) *Factors affecting the amount of penalty.* In determining the amount of penalty, HCFA does or the State must take into account the following factors:

(1) The facility's history of noncompliance, including repeated deficiencies.

(2) The facility's financial condition.

(3) The factors specified in § 488.404.

(4) *The facility's degree of culpability.* Culpability for purposes of this paragraph includes, but is not limited to, neglect, indifference, or disregard for resident care, comfort or safety. The absence of culpability is not a mitigating circumstance in reducing the amount of the penalty.

[59 FR 56243, Nov. 10, 1994, as amended at 64 FR 13360, Mar. 18, 1999]

§ 488.440 Civil money penalties: Effective date and duration of penalty.

(a)(1) The per day civil money penalty may start accruing as early as the date that the facility was first out of compliance, as determined by HCFA or the State.

(2) A civil money penalty for each instance of noncompliance is imposed in a specific amount for that particular deficiency.

(b) The per day civil money penalty is computed and collectible, as specified in §§ 488.432 and 488.442, for the