

G. Sanctions (Subpart I)

Section 1932(e)(1) of the Act requires, as a condition for entering into or renewing contracts under section 1903(m) of the Act, that State agencies establish intermediate sanctions that the State agency may impose on an MCO that commits one of six specified offenses: (1) failing substantially to provide medically necessary items and services that are required by law, or are required under the MCO's contract with the State; (2) imposing premiums or charges in excess of those permitted under title XIX; (3) discriminating among enrollees based on health status or requirements for health care services; (4) misrepresenting or falsifying information; and (5) failing to comply with statutory requirements that apply to physician incentive plans. Under section 1932(e)(1)(A) a State may also impose sanctions against MCOs and PCCMs for distributing, directly or through an agent or contractor, marketing materials that contain false or materially misleading information. Proposed §438.700 contained the above provisions from section 1932(e)(1) of the Act.

In section 1932(e)(2) of the Act, Congress described the types of sanction authority that would satisfy the State's obligation to have intermediate sanctions. For the most part, the State has discretion to choose which of these sanctions to use. However, the State is required to have authority to appoint temporary management under section 1932(e)(2)(B), and to permit individuals to terminate without cause under section 1932(e)(2)(C). This is because section 1932(e)(3) requires the State to impose at least those two sanctions if an MCO repeatedly fails to meet the requirements of sections 1903(m) or 1932. The other provisions that would clearly satisfy the State's obligation to have intermediate sanction

authority include authority to impose civil money penalties for specified violations, up to specified maximum amounts, and to suspend enrollment or payment for new enrollees.

These provisions were reflected in proposed §438.702(a).

Under section 1932(e)(2)(B), one of the sanctions that would satisfy section 1932(e)(1) is for the State to oversee the operation of the MCO “upon a finding by the State that there is continued egregious behavior by the organization or there is a substantial risk to the health of enrollees . . . or to assure the health of the organization’s enrollees.” Given the extraordinary nature of the sanction of taking over management of an MCO, we proposed in §438.706 that this sanction be imposed **only** when those egregious circumstances exist.

The requirement in section 1932(e)(1), that the State have intermediate sanction authority as a condition of contracting, only applies to contracts with MCOs. It does not place a similar requirement on States with respect to PCCMs. However, subsections (e)(1)(A) and (e)(2)(D) and (E) refer to “managed care entities,” and thus envision that the State would choose to apply those sanctions to PCCMs as well.

Section 1932(e)(4) of the Act authorizes State agencies to terminate the contract of any MCO or PCCM that fails to meet the requirements in sections 1932, 1903(m), or 1905(t) of the Act. This provision was included in proposed §438.708. However, if the State chooses that remedy, under section 1932(e)(4)(B) the State is required to provide a hearing before terminating a contract. Proposed §438.710 set forth requirements that apply to the notice to the MCO or PCCM, and to the pre-termination hearing. Under section 1932(e)(4)(C), enrollees may be notified of their right to disenroll immediately without

cause in the case of any entity subject to a termination hearing. Proposed §438.722 described the provisions for disenrollment during the termination hearing process. Finally, in §438.724, we proposed that States be required to notify CMS whenever it imposes or lifts a sanction.

Under section 1903(m)(5) of the Act, CMS has its own direct authority to impose sanctions when Medicaid-contracting MCOs commit offenses that are essentially the same as those identified in section 1932(e)(1) of the Act. Section 1903(m)(5) is currently implemented by regulations codified at 42 CFR §434.67. We proposed to move those regulations to proposed §438.730. However, we inadvertently made substantive changes, including omission of parts of the original regulation text dealing with denial of payment, and expanding the State plan requirement previously found in §434.67(i). The final rule conforms the text of §§438.726 and 438.730 to the text of §434.67. We proposed in §438.726 to broaden the State plan requirements to include a plan to monitor for violations that involve the actions and failures to act that are specified in part 438 and to implement the provisions of part 438. We received no comments on this change and will maintain as it was proposed in this final rule. It also incorporates into §438.726 the text of the existing §434.22, which was cross-referenced by §434.67(e), and which was inadvertently eliminated in the proposed changes to the regulation. Finally, there were certain ambiguities in the original regulation text which we are clarifying. In particular, §434.67(c) was not clear with respect to who would forward the notice of sanction to the OIG at the same time it was sent to the MCO. We have clarified that it is sent by CMS.

Comment: One commenter requested clarification as to which sanctions were

mandatory and which were discretionary.

Response: Section 1932(e)(1) of the Act requires, as a condition for entering into or renewing contracts under section 1903(m) of the Act, that State agencies must establish intermediate sanctions that the agency may impose on an MCO that commits one of the specified offenses in §438.700(b). The type of sanction and the discretion to apply sanctions is generally up to the State agency. However, if it finds that an MCO has repeatedly failed to meet substantive requirements in section 1903(m) or section 1932 of the Act, or this Part, then the State must impose temporary management, must permit beneficiaries to disenroll without cause, and must notify them of the right to disenroll. See section 1932(e)(3) of the Act, and proposed §§438.706(b) and 438.702(a)(3).

Comment: Many commenters suggested that PIHPs and PAHPs be subject to the same sanctioning as MCOs.

Response: We disagree with the suggestion. The PIHP and PAHP regulations are based on the authority under section 1902(a)(4) of the Act to provide for methods of administration that are “found by the Secretary to be necessary for...proper and efficient administration.” While we believe this provides the authority to establish requirements that apply to PIHPs and PAHPs, we do not believe it provides the authority to promulgate regulations that would authorize a State to impose civil money penalties, or other sanctions that are provided for by the Congress only in the case of MCOs. However, States may cover PIHPs and PAHPs under their own State sanction laws, and we encourage States to do so whenever they believe it necessary.

Comment: A commenter requested clarification of whether the requirement for a

pre-termination hearing in proposed §438.710(b) applies if the State is terminating an MCO or PCCM contract under State authority and not the authority in §438.708.

Response: A State that is not relying on the authority in §438.708 to terminate an MCO or PCCM contract should follow only the State procedures related to the authority they are exercising to terminate the MCO or PCCM contract. To the extent the State is relying on the authority under §438.708, the State must meet the requirements for a pre-termination hearing. The State may exercise the disenrollment options provided in §438.722 regardless of the underlying authority on which they are basing termination.

Comment: One commenter was unclear about whether the notice to CMS under proposed §438.724(a) was required only for sanctions specified in §438.702(a) or if it also applied to State operated penalty systems such as a progressive penalty point accumulation system.

Response: Under §438.724, notice to CMS is only required when a State imposes an intermediate sanction for one of the violations in §438.700(b). To the extent the State has sanctions that it imposes for additional violations, notice to CMS is not required, but encouraged. We have added clarifying language to the regulation text.

Comment: Many commenters suggested notification to CMS was appropriate but that beneficiaries have the right to know when a plan has been sanctioned and that publication of the notice should be required in the regulations. These commenters recommended that the State publish a notice describing the intermediate sanction imposed, explaining the reasons for the sanction and specifying the amount of any civil money penalty. Further, this notice should be published no later than 30 days after the State

imposes the sanction, and the notice should be published in the newspaper of widest circulation in each city within the MCO's service area that has a population of 50,000 or more or in the newspaper of widest circulation in the MCO's service area, if there is no city with a population of 50,000 or more in that area. Several other commenters supported limiting the notification requirements to notifying CMS noting that publication is an unnecessary expense and inconsistent with current insurance practices.

Response: We agree that widespread publication would be an unnecessary expense. We also believe requiring public publication could discourage a State from imposing sanctions and could unnecessarily alarm enrollees. In addition, a State is not prohibited from publishing sanction information.

Comment: One commenter requested that we clarify in proposed §438.726 that States can delegate certain functions to other entities as an acceptable way of accomplishing the goal of enrollee protection.

Response: The State agency is ultimately responsible for implementation of the provisions of this subpart but may delegate appropriate functions to other entities as part of their process.

Comment: One commenter indicated that it is crucial that the State's ability to delegate certain functions to other entities be explicitly recognized as an acceptable method for accomplishing the goal of enrollee protection through the use of sanctions and temporary management.

Response: We believe that the regulation, as written, maintains the State's ability to delegate functions. We recognize that with the imposition of temporary management, the

State may need to delegate activities to another department within the State. We have maintained flexibility for States to determine what best fits their needs.