

# REGULAR

(See instructions on reverse)

For use by Secretary of State only

## NOTICE PUBLICATION/REGULATIONS SUBMISSION

STD. 400 (REV. 01-2013)

<b>OAL FILE NUMBERS</b>	NOTICE FILE NUMBER <b>Z-2012-1009-04</b>	REGULATORY ACTION NUMBER <b>2013-1021-025</b>	EMERGENCY NUMBER
per agency request <i>YD</i>		For use by Office of Administrative Law (OAL) only	
AGENCY WITH RULEMAKING AUTHORITY California Department of Public Health		AGENCY FILE NUMBER (if any) DPH-09-012	

2013 OCT 21 PM 2:24  
 OFFICE OF ADMINISTRATIVE LAW

ENDORSED FILED IN THE OFFICE OF  
 2013 DEC -5 PM 2:09  
*Debra Bowen*  
 DEBRA BOWEN  
 SECRETARY OF STATE

### A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
<b>OAL USE ONLY</b> <input checked="" type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn	NOTICE REGISTER NUMBER <b>2012, 432</b>		PUBLICATION DATE <b>10/26/2012</b>

### B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Administrative Penalties - GACH, APH and SH	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) Z-2012-1009-04
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)				
<table border="1"> <tr> <td rowspan="3"><b>SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)</b></td> <td>ADOPT 70951, 70952, 70953, 70954, 70955, 70956, 70957, 70958, 70958.1, 70959, 70960, 71701, 71702, 71703</td> </tr> <tr> <td>AMEND</td> </tr> <tr> <td>REPEAL 22</td> </tr> </table>	<b>SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)</b>	ADOPT 70951, 70952, 70953, 70954, 70955, 70956, 70957, 70958, 70958.1, 70959, 70960, 71701, 71702, 71703	AMEND	REPEAL 22
<b>SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)</b>		ADOPT 70951, 70952, 70953, 70954, 70955, 70956, 70957, 70958, 70958.1, 70959, 70960, 71701, 71702, 71703		
		AMEND		
	REPEAL 22			

3. TYPE OF FILING			
<input checked="" type="checkbox"/> Regular Rulemaking (Gov. Code §11346) <input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4) <input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute. <input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h)) <input type="checkbox"/> File & Print <input type="checkbox"/> Other (Specify) _____	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100) <input type="checkbox"/> Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)  
**July 23, 2013 through August 9, 2013**

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs. title 1, §100)
<input checked="" type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a)) <input type="checkbox"/> Effective on filing with Secretary of State <input type="checkbox"/> \$100 Changes Without Regulatory Effect <input type="checkbox"/> Effective other (Specify) _____

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY
<input checked="" type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660) <input type="checkbox"/> Fair Political Practices Commission <input type="checkbox"/> State Fire Marshal <input type="checkbox"/> Other (Specify) _____

7. CONTACT PERSON COLEEN KEELAN	TELEPHONE NUMBER 440-7439	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) <i>cdph.ca.gov</i> Coleen.Keelan@cdph.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE <i>Belinda Whitsett</i>	DATE <i>10-21-13</i>
TYPED NAME AND TITLE OF SIGNATORY BELINDA WHITSETT, ACTING DEPUTY DIRECTOR AND CHIEF COUNSEL	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

DEC 05 2013

Office of Administrative Law

**ADOPT**

**California Code of Regulations, title 22, division 5**

**Chapter 1. General Acute Care Hospitals**

**Article 10. Hospital Administrative Penalties**

**§ 70951. Applicability.**

(a) This article only applies to the assessment of administrative penalties pursuant to Health and Safety Code Section 1280.3. This article does not apply to:

- (1) Minor violations as defined in Section 70952.
- (2) Settlement of any enforcement action, or
- (3) Penalties assessed by the department under laws other than Health and Safety Code Section 1280.3, including but not limited to Health and Safety Code Sections 1278.5, 1280.15, 1280.4, 1317.3, 1317.4, and 1317.6 (a).

(b) This article applies only to incidents occurring on or after April 1, 2014. As to such incidents, the hospital's compliance history prior to April 1, 2014, including deficiencies constituting immediate jeopardy, shall be considered in assessing administrative penalties as provided in this article and under Health and Safety Code Section 1280.3 (a) and (b).

(c) Incidents occurring prior to April 1, 2014, shall be subject to administrative penalties as described in Health and Safety Code Section 1280.1(d).

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Sections 1280.1 and 1280.3, Health and Safety Code.

**§ 70952. Definitions.**

(a) As used in Health and Safety Code Section 1280.3 and this article:

(1) "Actual financial harm" means concrete financial loss for medical costs incurred by a patient, where the loss was not covered or reimbursed by health insurance.

(2) "Deficiency" means a licensee's failure to comply with any law relating to the operation or maintenance of a hospital as a requirement of licensure under the Health and Safety Code or this division.

(3) "Hospital licensing requirements," "hospital licensing standards," and "licensure requirements" refer to the requirements in Health and Safety Code, Division 2, Chapter 2, and Division 107, Part 2, Chapter 2.5, Article 1 applicable to hospitals, and the regulations adopted thereunder.

(4) "Minor violation" means any violation of law relating to the operation or maintenance of a hospital that the department determines has only a minimal relationship to the health or safety of hospital patients. This definition shall not apply to violations of Health and Safety Code, Division 107, Part 2, Chapter 2.5, Article 1 (Hospital Fair Pricing Policies).

(5) "Repeat deficiencies" means violations of hospital licensing requirements or federal certification standards in the same or substantially similar regulatory grouping of requirements, which are found during an inspection, subsequently corrected, and found again at a subsequent inspection.

(6) "Substantial compliance" means a level of compliance with state hospital licensing standards and with federal laws that set forth the conditions of participation for hospitals in the Medicare program, such that any identified deficiencies pose no greater risk to patient health and safety than the potential for causing minimal harm.

(7) "Willfulness," "willfully," or "willful" mean that the person doing an act or omitting to do an act intends the act or omission, and knows the relevant circumstances connected with the act or omission.

(8) "Willful violation" means that the licensee, through its employees or contractors, willfully commits an act or makes an omission with knowledge of the facts, which bring the act or omission within the deficiency that is the basis for an administrative penalty.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.

**§ 70953. Penalty Calculation.**

Administrative penalties assessed pursuant to Health and Safety Code Section 1280.3 shall be assessed following the procedures set forth in this article, except that penalties for a violation of Health and Safety Code, division 107, part 2, chapter 2.5, article 1 (§ 127400 *et seq.*) shall be calculated under Section 70959. The penalty assessed for any violation in accordance with this article shall not exceed the maximum penalty specified in Health and Safety Code section 1280.3.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.

**§ 70954. Determining the Initial Penalty for Each Violation.**

(a) An initial penalty shall be determined for each deficiency, considering the nature, scope and severity of the deficiency by using the matrix set forth in subdivision (d).

(b) Severity of the deficiency.

(1) Severity of actual and potential harm to patients shall be considered when using the matrix. The categories for degree of severity based on actual or potential patient harm are defined as follows:

Level 1—No actual patient harm but with potential for no more than minimal harm.

Level 2—No actual patient harm but with potential for more than minimal patient harm, but no immediate jeopardy.

Level 3—Actual patient harm that is not immediate jeopardy.

Level 4—Immediate jeopardy to patient health or safety that is likely to cause serious injury or death.

Level 5—Immediate jeopardy to patient health or safety that caused serious injury to a patient.

Level 6—Immediate jeopardy to patient health or safety that caused the death of a patient.

(2) In determining the level of severity using the matrix in subdivision (d), the following factors shall be considered:

(A) The patient's physical and mental condition.

(B) The probability and severity of the risk that the violation presents to patients.

(c) Scope of the noncompliance.

(1) The scope of the noncompliance with hospital licensure requirements shall be considered using the matrix set forth in subsection (d).

(2) The scope of the noncompliance shall be assessed as follows:

(A) Isolated:

- (i) One or a very limited number of patients affected, or
- (ii) One or a very limited number of staff involved, or
- (iii) The situation occurred only occasionally, or
- (iv) The situation occurred in a very limited number of locations.

(B) Pattern:

- (i) More than a very limited number of patients affected, or
- (ii) More than a very limited number of staff involved, or
- (iii) The situation occurred in several locations, or
- (iv) The same patient(s) had been affected by repeat occurrences.

(C) Widespread:

- (i) Situation was pervasive throughout the hospital or
- (ii) The situation represented a systemic failure that affected or had the potential to affect a large portion or all of the hospital's patients.

(d) The matrix set forth in this subdivision shall be used to determine the initial penalty for a deficiency by selecting a penalty percentage from the range provided in the matrix cell that corresponds to the appropriate scope of noncompliance and the severity of harm categories. The percentages in each cell of the following matrix shall be applied

to the maximum administrative penalties as set forth in Health and Safety Code section 1280.3:

- (1) \$25,000 for any deficiency that does not constitute an immediate jeopardy,
- (2) \$75,000 for the first deficiency constituting an immediate jeopardy,
- (3) \$100,000 for the second deficiency constituting an immediate jeopardy, and
- (4) \$125,000 for the third deficiency and every subsequent deficiency constituting an immediate jeopardy.

An immediate jeopardy penalty shall be considered a first administrative penalty if the date the violation occurred is over three years from the date of violation of the last issued immediate jeopardy penalty, the hospital has not received additional immediate jeopardy violations, and the department finds that the hospital has been in substantial compliance for over three years prior to the date of the violation that is the subject of the penalty calculation.

**Scope and Severity Matrix**

		SCOPE		
		Isolated	Pattern	Widespread
<b>S E V E R I T Y</b>	Severity Level 6— Immediate jeopardy to patient health or safety—Death	100%	100%	100%
	Severity Level 5— Immediate jeopardy to patient health or safety—Serious injury	60%	70%	80%
	Severity Level 4— Immediate jeopardy to patient health or safety—Likely to cause serious injury or death	40%	50%	60%
	Severity Level 3— Actual patient harm that is not immediate jeopardy	60%	80%	100%
	Severity Level 2— No actual patient harm but with potential for more than minimal harm, not immediate jeopardy	20%	50%	70%
	Severity Level 1— No actual patient harm but with potential for no more than minimal harm	No penalty		
Minor Violation	No Penalty			

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.

**§ 70955. Initial Penalty Adjustment Factors.**

(a) The initial penalty shall be adjusted to calculate the base penalty using the following guidelines:

(1) Patient's physical and mental condition.

(A) The initial penalty shall be adjusted upward by 10 percent, if the violation caused actual harm to the patient at severity level 3 or 5 resulting in a physical or mental impairment that substantially limits one or more of the major life activities of a patient, or the loss of bodily function, if the impairment or loss lasts more than seven days or is still present at the time of discharge from the hospital, or the loss of a body part, or

(B) The initial penalty shall be adjusted upward by 5 percent, if the violation caused actual harm to the patient at severity level 3 or 5 resulting in a physical or mental impairment that substantially limits one or more of the major life activities of a patient, or the loss of bodily function, if the impairment or loss lasts more than three days.

(2) The initial penalty shall be adjusted upward by 1 percent, if the violation caused actual financial harm to the patient, based on information acquired by the department during the normal course of the investigation.

(3) For factors beyond the hospital's control that restrict the hospital's ability to comply with licensure requirements, the initial penalty shall be adjusted downward by 5 percent, if the hospital developed and maintained disaster and emergency programs as required by state and federal law that were appropriately implemented during a disaster.

(4) The initial penalty shall be adjusted upward by 10 percent if the deficiency was the result of a willful violation.

(b) Adjustment of the initial penalty in accordance with the factors provided in subdivision (a) may result in an adjusted initial penalty percentage that is higher or lower than the percentage shown in the originally selected matrix cell.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.

**§ 70956. Base Penalty.**

The base penalty for a deficiency is the cumulative adjusted initial penalty as determined under Sections 70954 and 70955. For the purpose of penalty calculation, the base penalty may exceed the statutory maximum, so long as the final penalty does not exceed the statutory maximum.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.

**§ 70957. Adjustments to the Base Penalty.**

(a) The base penalty shall be adjusted considering each of the following adjustment factors:

(1) Immediate correction of the violation. When the department determines that a hospital subject to an administrative penalty promptly corrects the noncompliance for which the administrative penalty was imposed, the base penalty shall be adjusted downward by 20 percent, provided that all of the following apply:

(A) The hospital identified and immediately corrected the noncompliance. The correction of the noncompliance must have occurred before the noncompliance was identified by the department. Within ten calendar days of the date that the hospital identified the noncompliance, the hospital shall complete corrective action and take appropriate steps necessary to prevent the violation from recurring, with prompt and detailed documentation of these actions;

(B) The noncompliance that was corrected did not constitute immediate jeopardy, or result in the death of a patient;

(C) Met mandatory reporting requirements before it was identified by the department; and,

(D) A penalty was not imposed for a repeat deficiency that received a penalty reduction under this article within the twelve-month period prior to the date of violation.

(2) Compliance history with related State and federal laws. A hospital's compliance history refers to its record of compliance with licensure requirements under the Health and Safety Code, and the regulations adopted thereunder, and with federal laws that set forth the conditions of participation for hospitals in the Medicare program, for a period of three years prior to the date the administrative penalty is issued.

(A) The base penalty shall be adjusted downward by five percent if hospital inspections within the last three years noted no state or federal deficiencies that

resulted in patient harm or immediate jeopardy (severity levels 3 through 6, inclusive).

(B) The base penalty shall be increased five percent if the hospital has three or more repeat deficiencies that pose a risk of more than minimal harm to patient health or safety (severity levels 2 through 6, inclusive) within the three year period immediately prior to the date of violation.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.

**§ 70958. Final Penalty.**

The final penalty for a deficiency is the cumulative adjusted base penalty as determined under section 70957, or the maximum penalty specified in Health and Safety Code section 1280.3, whichever is lower.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.

**§ 70958.1 Penalties Imposed by Department of Managed Health Care**

A penalty assessment under Health and Safety Code section 1280.3 may be adjusted under Health and Safety Code section 1280.6 after the department reviews the investigation report and penalty issued by the Department of Managed Health Care to determine whether the criteria in Health and Safety Code section 1280.6 are satisfied.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Sections 1280.3 and 1280.6, Health and Safety Code.

**§ 70959. Penalties for Violations of Hospital Fair Pricing Policies Requirements.**

(a) Administrative penalties assessed for a violation of Health and Safety Code, division 107, part 2, chapter 2.5, article 1 (§ 127400 *et seq.*) shall be calculated under this section.

(b) The initial penalty for each deficiency shall be determined, considering the extent of noncompliance with the requirement violated by the hospital. The categories for extent of noncompliance from requirements and corresponding initial penalties are defined as follows:

(1) Major - The action or inaction deviates from the requirement to such an extent that the requirement is completely ignored and none of its provisions are complied with, or the function of the requirement is rendered ineffective because some of its provisions are not complied with. The initial penalty for this category is \$25,000.

(2) Moderate - The action or inaction deviates from the requirement, but it complies to some extent, although not all of its important provisions are complied with. The initial penalty for this category is \$12,500.

(3) Minimal - The action or inaction deviates somewhat from the requirement. The requirement functions nearly as intended, but not as well as if all provisions had been met. A violation in this category is a minor violation and no administrative penalty is assessed.

(c) The initial penalty shall be adjusted to calculate the base penalty using the following guidelines:

(1) The initial penalty shall be adjusted upward by 5 percent, if the violation caused actual financial harm to the patient, based on information acquired by the department during the normal course of the investigation.

(2) The initial penalty shall be adjusted upward by 10 percent if the deficiency was the result of a willful violation.

(d) The base penalty for a deficiency is the cumulative adjusted initial penalty as determined under subdivisions (b) and (c). For the purpose of penalty calculation, the base penalty may exceed the statutory maximum, so long as the final penalty does not exceed the statutory maximum.

(e) The base penalty shall be adjusted considering each of the following adjustment factors:

(1) Immediate correction of the violation. When the department determines that a hospital subject to an administrative penalty promptly corrects the noncompliance for which the administrative penalty was imposed, the base penalty shall be adjusted downward by 20 percent, provided that all of the following apply—

(A) The hospital identified and immediately corrected the noncompliance before it was identified by the department;

(B) Within 10 calendar days of the date that the hospital identified the noncompliance, the hospital shall complete corrective action and steps necessary to prevent the violation from recurring, with prompt and detailed documentation of these actions; and

(C) A penalty was not imposed for a repeat deficiency that received a penalty reduction under this article within the twelve-month period prior to the date of violation.

(2) Compliance History. The base penalty shall be increased ten percent if the hospital has had one or more other violations of Health and Safety Code, division 107, part 2, chapter 2.5, article 1 (§ 127400 *et seq.*) within the three year period immediately prior to the date of violation.

(f) The final penalty for a deficiency is the cumulative adjusted base penalty as determined under subdivision (e), or the maximum penalty specified in Health and Safety Code section 1280.3, whichever is lower.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.

**§ 70960. Small and Rural Hospitals.**

(a) A small and rural hospital that has been assessed an administrative penalty under H&SC Section 1280.3 may request:

- (1) Payment of the penalty extended over a period of time if immediate, full payment would cause financial hardship; or
- (2) Reduction of the penalty, if extending the penalty payment over a period of time would cause financial hardship; or
- (3) Both a penalty payment plan and reduction of the penalty.

(b) The small and rural hospital shall submit its written request for penalty modification as described in subsection (a) to the department within ten days after the issuance of the administrative penalty. The request shall describe the special circumstances showing financial hardship to the hospital and the potential severe adverse effects on access to quality care in the hospital.

(c) Upon timely request from a small and rural hospital under subsection (b), the department may approve a penalty payment plan, reduce the final penalty, or both, if in the judgment of the department, immediate, full payment of the penalty would cause financial hardship to the hospital and thereby severely reduce access to quality care in the hospital. The department's decision shall be based on information provided by the small and rural hospital in support of its request and on hospital financial information from the Office of Statewide Health Planning and Development or other governmental agency.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.

## Chapter 2. Acute Psychiatric Hospitals

### Article 8. Hospital Administrative Penalties

#### § 71701. Applicability.

(a) This article only applies to the assessment of administrative penalties pursuant to Health and Safety Code Section 1280.3. This article does not apply to:

- (1) ~~Minor violations as defined in Section 70952,~~
- (2) Settlement of any enforcement action, or
- (3) Penalties assessed by the department under laws other than Health and Safety Code Section 1280.3, including but not limited to Health and Safety Code Sections 1278.5, 1280.15, 1280.4, 1317.3, 1317.4, and 1317.6 (a).

(b) This article applies only to incidents occurring on or after April 1, 2014. As to such incidents, the hospital's compliance history prior to April 1, 2014, including deficiencies constituting immediate jeopardy, shall be considered in assessing administrative penalties as provided in this article and under Health and Safety Code Section 1280.3 (a) and (b).

(c) Incidents occurring prior to April 1, 2014, shall be subject to administrative penalties as described in Health and Safety Code Section 1280.1(d).

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Sections 1280.1 and 1280.3, Health and Safety Code.

**§ 71702. Penalty Assessment.**

Administrative penalties for an acute psychiatric hospital under Health and Safety Code Section 1280.3 shall be assessed following the procedures set forth in Chapter 1, Article 10, with the exception of Sections 70951 and 70959 [hospital fair pricing policies]. The administrative penalty assessed for any violation in accordance with this article shall not exceed the maximum penalty specified in Health and Safety Code section 1280.3.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.

**§ 71703. Small and Rural Hospitals.**

A small and rural hospital may request and the department may approve modification of an administrative penalty under the procedures set forth in Section 70960.

Authority: Sections 1280.3, 100275(a), 131050, 131051, 131052, and 131200, Health and Safety Code. Reference: Section 1280.3, Health and Safety Code.