

(5) Demonstrated that the non-compliance is correctable and that a high percentage of the violations were corrected.

§ 158.609 Determining the amount of penalty—aggravating circumstances.

For every violation subject to a civil monetary penalty, if there are substantial or several aggravating circumstances, HHS may set the aggregate amount of the penalty at an amount sufficiently close to or at the maximum permitted by § 158.606 of this subpart to reflect that fact. HHS considers the following circumstances to be aggravating circumstances:

(a) The frequency of violation indicates a pattern of widespread occurrence.

(b) The violation(s) resulted in significant financial and other impacts on the average affected individual.

(c) The entity does not provide documentation showing that substantially all of the violations were corrected.

§ 158.610 Determining the amount of penalty—other matters as justice may require.

HHS may take into account other circumstances of an aggravating or mitigating nature if, in the interests of justice, they require either a reduction or an increase of the penalty in order to assure the achievement of the purposes of this Part, and if those circumstances relate to the entity's previous record of compliance or the gravity of the violation.

§ 158.611 Settlement authority.

Nothing in § 158.606 through § 158.610 of this subpart limits the authority of HHS to settle any issue or case described in the notice furnished in accordance with § 158.603 of this subpart or to compromise on any penalty provided for in §§ 158.606 through 158.610 of this subpart.

§ 158.612 Limitations on penalties.

(a) *Circumstances under which a civil monetary penalty is not imposed.* HHS does not impose any civil monetary penalty on any failure for the period of time during which none of the responsible entities knew, or exercising rea-

sonable diligence would have known, of the failure. HHS also may not impose a civil monetary penalty for the period of time after any of the responsible entities knew, or exercising reasonable diligence would have known of the failure, if the failure was due to reasonable cause and not due to willful neglect and the failure was corrected within 30 days of the first day that any of the entities against whom the penalty would be imposed knew, or exercising reasonable diligence would have known, that the failure existed.

(b) *Burden of establishing knowledge.* The burden is on the responsible entity or entities to establish to HHS's satisfaction that no responsible entity knew, or exercising reasonable diligence would have known, that the failure existed.

§ 158.613 Notice of proposed penalty.

(a) *Contents of notice.* If HHS proposes to assess a penalty in accordance with this Part, it must provide the issuer written notice of its intent to assess a penalty, which includes the following:

(1) A description of the requirements under this Part that HHS has determined the issuer violated.

(2) A description of the information upon which HHS based its determination, including the basis for determining the number of affected individuals and the number of days or weeks for which the violations occurred.

(3) The amount of the proposed penalty as of the date of the notice.

(4) Any considerations described in § 158.607 through § 158.610 of this subpart that were taken into account in determining the amount of the proposed penalty.

(5) A specific statement of the issuer's right to a hearing.

(6) A statement that failure to request a hearing within 30 days after the date of the notice permits the assessment of the proposed penalty without right of appeal in accordance with § 158.615 of this subpart.

(b) *Delivery of Notice.* This notice must be either hand delivered, sent by certified mail, return receipt requested, or sent by overnight delivery service with signature upon delivery required.