

# Strategies For Dealing With Special Focus Facility Status<sup>1</sup>

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## I. Background and History of the “Special Focus Facility Program”.

- A. The Special Focus Facility (SFF) initiative was created in 1998 by CMS as one of the components of the Nursing Home Oversight and Improvement Program.
- B. At that time intended to reduce the number of “poorly performing” facilities who had a record of “poor survey performance” that CMS believes equates to providing poor quality of care.
  - 1. Initially CMS did not publicly identify a methodology or any other criteria for determining a SFF.
  - 2. As a primarily survey data based determination, a threshold question is raised by nursing home representatives of whether this is the right data to use to identify “quality issues.”
  - 3. The SFF program features and methodology have been gradually revealed through a series of CMS memoranda showing these changes over time.
  - 4. According to CMS S&C Letter-05-013 (dated 12/16/04) SFFs are facilities that show a “persistent pattern of substandard care” which presumably means those regulatory categories of the requirements of participation for nursing homes (42 C.F.R. §§ 483.13, 483.15 and 483.25); however this focus had changed somewhat by the time CMS S&C 08-02 was issued in 2007.

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5. The basic tenet of the program is that CMS believes that facilities with inconsistent survey cycle compliance (commonly called “yo-yo” compliance) were not addressing the underlying systemic problems that were uncovered by surveyors.
  6. State Survey Agencies (SAs) were directed, with the concurrence of their Regional CMS Offices, to “select” an SFF nursing home from a list provided by CMS and then to conduct two standard surveys per year instead of the one required by statute.
  7. CMS also requested that the SAs submit monthly status reports listing any surveys, revisits or complaint investigations of SFFs that had been conducted in that month.
  8. Based on the survey results for SFF, CMS states that it applies a policy of progressive enforcement until the nursing home either “graduates” from the list or is terminated from the Medicare/Medicaid programs.
- C. In 2005, CMS expanded the SFF program through the issuance of S&C-05-13 and later in 2007, revised that memorandum with the issuance of S&C-08-02. These two memoranda basically describe the program and its salient features as it stands today.
1. States and CMS initially selected two SFFs for each state. The number of SFFs per state now varies based upon the total number of nursing homes in the state. This range is from 0 (AK) to 6 (CA) facilities and expanded the total number to 135, an increase of about 30%. In theory, this number is supposed to remain fairly static because once a facility graduates from the list or is terminated, another is to be selected.

2. A current unresolved question is that for some states, since this formula was initially derived, the number of nursing homes has decreased. To date, there is no tangible evidence that CMS is adjusting the total SFF per state based upon those who have less facilities since S&C-05-13 was issued.
3. Instead of using one year's worth of survey data, three years' worth of data is to be compiled and considered. Based on the most recent revision to the scoring algorithm, the data is weighted depending on how recent the survey used to tabulate the score is in relationship to the three surveys.
4. While states will select from the expanded list of candidates using the scoring algorithm, supposedly there are other factors that will be considered. Presumably, this does not necessarily mean that those candidates receiving the highest scores in ranking will be selected using that state's allotment. These other factors have not been specifically identified. What is stated is that CMS formally makes the final designation based upon the state's recommendation.
5. The list of SFF candidates is compiled once a quarter using the scoring algorithm for the last three surveys, including complaint deficiencies.
6. SFFs that significantly improve will graduate from the list. The graduation criteria is two consecutive certification surveys where no deficiencies were cited at a scope/severity level greater than an "E" and no deficiencies greater than an "E" from an intervening complaint survey.
7. Life Safety Code ("LSC") surveys and deficiencies are not included in the scoring algorithm and are not counted towards being selected for program designation as the intent of the program is to focus on quality of life and care

issues. LSC survey results will, however, prevent graduation from the list if there is a finding of actual harm. LSC surveys are to be conducted at the same SFF survey frequency.

8. More robust enforcement policies were announced by CMS in S&C-05-13:
  - a. Sanctions are required if significant progress does not occur.
  - b. While progress was not, at first, definitively defined, CMS directed each state to apply appropriate “discretion” in a manner consistent among all affected facilities in determining significant progress.
  - c. S&C-05-13 states that “decreases in the scope and severity of deficiencies or decreases in the number of deficiencies” are examples of such criteria.
  - d. In S&C-05-13, CMS also stated that complaint survey results may not be used to determine that a facility’s performance has improved, but can be used in enforcement actions. This policy was revised in S&C-08-02.
  - e. Significant progress can now be equated to mean, based upon the categories of SFFs, survey results where a facility has had one succeeding survey with no deficiencies cited at a scope/severity level greater than an “E” and without an intervening complaint related deficiency of an “E” or greater. There is no reference to “substandard” quality of care as appeared in earlier transmittals.

- f. The improvement that is needed for a facility to graduate from the list is now definitively stated to be SFF survey results that demonstrate that the facility's practices have caused no actual harm, i.e., no deficiencies greater than an "E" in two consecutive standard surveys and no deficiencies greater than an "E" in an intervening complaint survey.
  - g. Enforcement sanctions should be of increasing severity where progress has not occurred and should include Civil Money Penalty/Denial of Payment for New Admissions.
  - h. Eighteen months and three surveys without progress by a SFF will, according to CMS, precipitate a notice of termination from the Medicare/Medicaid programs.<sup>2</sup>
  - i. CMS will consider a facility's status and progress as a SFF in setting any time frame for a reasonable assurance period before a nursing home can reenter the Medicare program.
9. CMS claims that improvements to the ASPEN information system will enable the agencies to extract the necessary survey data to make these determinations on an expedited basis.

D. CMS SFF Public and Facility Notice and Transparency.

- 1. CMS S&C 08-02 requires public and facility notices once a facility has been designated as a SFF:

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<sup>2</sup> In one letter to a SFF for whom CMS was terminating Medicare program participation, CMS said: "We would consider withdrawing this termination, if you will enter into a binding agreement which specifies how the facility will achieve long term improvement in maintaining compliance with the Medicare and Medicaid Requirements for Long Term Care facilities. If you are interested in entering into such an agreement, please let us know immediately."

- a. The state will notify the facility and the “accountable parties” (noted as the Administrator, Chairperson of the Governing Body or full Governing Body and the owners and operators as holders of the provider agreement, including owners of the real estate).
- b. Additional parties that will receive a copy of this notice are the State Ombudsman Office and the State Medicaid Director.
- c. A model letter was attached to S&C 08-02. In addition to a description of the SFF program, the notice is to contain the following advisements:
  - i. The facility has been selected as an SFF.
  - ii. The basis of the selection—in general terms—a persistent pattern of poor quality in its last three standard surveys.
  - iii. The consequences of the selection including termination of its provider agreement if significant improvement is not made over the course of the next three standard surveys or 18 months, whichever is shorter.
  - iv. Irrespective of the advisement, other provisions of the Social Security Act remain in force and require termination if substantial compliance is not achieved in 6 months of a survey finding non-compliance as defined by the Act and that termination can occur at any time if CMS finds evidence of serious harm.

- v. That SFF designation cannot be appealed through the federal system to the Departmental Appeals Board, although the right to informal dispute resolution of any deficiency on a survey that leads to SFF designation and the right to appeal the basis of an enforcement action remain for a SFF.
- d. Subsequent CMS Memorandum S&C-09-05 summarizes CMS' attempt to make the SFF program transparent:
  - i. Future changes in the SFF program will be posted on the CMS website:  
<http://www.cms.hhs.gov/certificationandcompliance/downloads/sfflist.pdf>.
  - ii. S & C-08-02 Memorandum can be found at:  
<http://www.cms.hhs.gov/SurveyCertificationGenInfo/PMSR/list.asp#TopOfPage>
- e. Timeline of CMS release of SFF information:
  - i. November 29, 2007 – CMS began publishing the names of SFF nursing homes that had not improved at:  
[http://www.cms.hhs.gov/CertificationandCompliance/12\\_NHs.asp#TopOfPage](http://www.cms.hhs.gov/CertificationandCompliance/12_NHs.asp#TopOfPage)
  - ii. February 2008 – CMS began publishing the names of all SFF nursing homes that participate in the program.
  - iii. April 2008 – CMS began identifying SFF nursing homes with a special icon on Nursing Home Compare at [www.medicare.gov](http://www.medicare.gov).

## II. Strategies for Dealing with SFF Status<sup>3</sup>.

### A. Requesting SFF Methodology and Program Criteria.

1. To challenge designation as a SFF, a facility arguably needs to be able to obtain from the state and federal governments the methodology and criteria that was used to place that facility on the SFF list.
2. On October 10, 2008, CMS released the scoring methodology via CMS S&C-09-05. This memorandum revealed that the fifteen (15) facilities with the most survey points are placed on a list of potential SFF for that state. The state licensing agency uses information from the state survey to make a recommendation to CMS regarding which facilities should be designated SFF. CMS makes the ultimate decision.
3. This gives the facility some information about how it becomes eligible to be a SFF, but does not reveal the criteria of other factors considered, if any, and how the state makes its recommendation. Nor is there any available information on how CMS determines whether to accept or reject the state agency's recommendation.
4. Without the ability to obtain detailed information regarding this methodology and criteria until recently, SFF's have been forced to operate in an undefined framework. Early on, facilities could only speculate at how to prevent being placed on the list, particularly in view of the fact there may be other criteria

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than the scoring methodology. An argument may exist that this violates a facility's substantive due process rights (discussed in Section III C below).

5. Without all of the criteria and information on whether the scoring methodology has been tested or verified, facilities are left to assume that CMS' ultimate decision to designate a facility a SFF still remains somewhat subjective and vague.
  6. For a SFF to defend itself or plead its case as to why it should not be designated, it must have all of the information regarding the methodology and criteria used as to how the SFF list was compiled and whether the methodology and criteria have been tested and validated.
- B. Freedom of Information Act ("FOIA") Requests (5 U.S.C. §552).
1. State "FOIA" Request Experiences:
    - a. Since SFF designation is based on a facility's survey history, access to survey information and even surveyor notes and impressions during the surveys may be essential information for facilities trying to either avoid designation or to be removed from the SFF list.
    - b. The American Health Care Association ("AHCA") developed a form letter for facilities to use to make a state FOIA request for SFF information, including survey data and documents, as well as the criteria used to place a facility on the SFF list and whether that criteria has been testified or verified.
    - c. Using this request form, representatives of facilities from various states sent FOIA requests to state survey agencies for this SFF data.

All such requests were formally denied at least in part based upon another CMS administrative memorandum to state survey agencies:

- (i) CMS Memorandum 07-06, *Release of Federal Documents by State Survey Agency (SA)*, January 12, 2007, instructs state agencies that they cannot release information and documents that were acquired solely as an agent of CMS.
  - (ii) CMS contends in this memorandum that with the exception of Form 2567 (Statement of Deficiencies Report), any record in the ASPEN, OSCAR, ACTS databases may only be disclosed by CMS. CMS cites 45 C.F.R. Part 2 as the basis for the requirement that states refer all FOIA requests for such records to CMS.
  - (iii) Although state agencies also use the information and data collected during surveys for state licensing of facilities, CMS contends that if the information or record contained in the federal database is *also* used in the certification survey process, federal law preempts and prevents states from disclosing the record according to CMS.
- d. Based on some recent evidence, it also appears that any request for information related to the survey process including the SFF program, is being denied under what is known as the “deliberative process” exemption in federal law.

1. The “Deliberative Process” FOIA Exemption.
  - a. 5 U.S.C. 552(b)(5), known as the deliberative process exemption, protects from disclosure under FOIA all “inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.”
  - b. Courts usually apply a two-pronged test to determine whether the deliberative process exemption applies:
    - i. Predecisional – the communication must occur before the agency adopts the policy. Jordan v. U.S. Dep’t of Justice, 591 F.2d 753 (D.C. Cir. 1978).
    - ii. Deliberative – the communication must be part of back-and-forth agency communication, such as making recommendations or expressing opinions. Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975).
  - c. In its denial of FOIA requests, CMS claims that this exemption applies to all survey related information, including the SFF program documents as well as to surveyor notes and data collected during surveys, with the exception of the Statement of Deficiencies.
    - i. While some of the SFF program information would likely be considered predecisional for the purposes of the deliberative process exemption, a substantial question exists as to whether this information meets the other prong of the test.

- ii. The deliberative prong of the test requires that the information be related to the policy making process (Texaco P.R., Inc. v. Dep't of Consumer Affairs, 60 F.3d 867, 884 (1<sup>st</sup> Cir. 1995) (quoting Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1116 (9<sup>th</sup> Cir. 1988)).
  - iii. A document "... is deliberative if it constitutes a statement of opinion regarding final policy rather than a description of the ultimate policy itself." United States v. Cicilline, No. 07-10008-NMG, 2008 WL 427286, at \*1 (D. Mass. Feb. 13, 2008).
  - iv. The deliberative process privilege does not shield documents that simply state or explain a decision the Government has already made. Sears, Roebuck & Co., 421 U.S. at 151-152.
  - v. Without further qualification, it would appear that survey data and documents, as well as the criteria used to place a facility on the SFF list and whether those criteria have been tested or verified, are not descriptions of the SFF policy but would simply explain a decision that the government has already made. They also appear to be unrelated to the policymaking process, and under Sears, Roebuck, & Co., such documents should not be shielded from FOIA requests.
2. The American Health Care Association ("AHCA") Federal FOIA Request for SFF Criteria and Methodology.

- a. On behalf of AHCA, Reed Smith LLP has submitted a FOIA request to CMS', Director of Freedom of Information Group in Baltimore, MD, on Sept 26, 2008 for SFF materials. Shortly thereafter, CMS released C&S 09-05 (10/10/08) that published, for the first time, the SFF scoring algorithm.
- b. This FOIA request was for "all documents concerning the criteria used to designate a skilled nursing facility as a SFF as well as the criteria used to remove a SNF from that designation." Specifically, AHCA requested letters, memoranda, reports, contracts, proposals, final opinions, staff manuals, policy statements, and any additional agency records concerning the development and implementation of the SFF criteria. It also requested any correspondence concerning designation/removal of SFF from list between CMS and respective state agencies.
- c. AHCA requested that this be expedited, under 55 Fed. Reg. 51,342 (Dec. 13, 1990) and 5 U.S.C. §552(a)(6)(E) on the grounds that it anticipated the urgent need for this information in connection with potential appeals of penalties imposed against nursing facilities who are designated as SFF.
- d. CMS has denied this request for expedited processing; stating that there was no "compelling need," as defined by the statute, and that there was no deadline in litigation or deadline imposed by a governmental agency for commenting on a proposed regulation.

- e. Therefore, the request will be processed in accordance with the agency's "first-in, first out" practice. This practice often results in significant delays.
- f. On January 21, 2009, as one of his first official orders after taking office, President Obama issued a memorandum directing the Attorney General to issue new guidelines governing FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency. In this memorandum, President Obama states: "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." This guidance will be published in the *Federal Register*.

### **III. Legal Issues and Potential Recourse.**

#### **A. Challenging the Methodology as an Extension of the Survey Process.**

- 1. 42 U.S.C. §1395i-3(g)(2)(C) of the Nursing Home Reform Act requires CMS to adopt survey protocols that have been tested and validated. Specifically, it states: "Standard and extended surveys shall be conducted— (i) based upon a protocol which the Secretary has developed, tested, and validated by not later than January 1, 1990..."

2. Based on anecdotal information, CMS has not developed, tested, or validated the SFF program criteria and methodology, as may be required by 42 U.S.C. §1395i-3(g)(2)(C), even though the SFF program and designation is clearly based on survey data. Because the SFF program is a product of the standard and extended survey protocol covered by 42 U.S.C. §1395i-3(g)(2)(C), the SFF program may be covered by the statute, which may require that SFF program criteria and methodology be tested and validated.
3. Given the serious consequences of SFF designation, is there a question of whether the CMS SFF program criteria, including the scoring methodology should be tested and validated?
4. CMS has also revealed that placement on the SFF list is based on survey data. However, CMS acknowledges that when citing deficiencies, surveyor interpretation and application of Medicare and Medicaid requirements varies from region to region, and state to state.
5. CMS cites 42 U.S.C. § 1396r(g)(2)(c), which provides that failure of the Secretary to develop, test, or validate such protocols or to establish such minimum qualifications shall not relieve any state of its responsibility to conduct surveys—would this apply to SFF program criteria?
6. CMS apparently offers no informal or formal process for ensuring that the state agency review offers an unbiased assessment of the findings.
7. Thus, an argument may exist that the untested and unverified SFF program criteria and methodology violate 42 USC §1395i-3(g)(2)(C).

B. Procedural Due Process.

1. There is no process to appeal designation as a SFF, which may deprive a SFF of its property interest without due process of law.
  - a. No person may be deprived of life, liberty, or property without due process of law (U.S. Const., Amend. V).
  - b. Health care providers have a constitutionally protected property interest in continued participation in the Medicare and Medicaid programs. See e.g., Case v. Weinberger, 523 F.2d 602, 606 (2<sup>nd</sup> Cir. 1975).
  - c. Is there some form of hearing (or informal dispute resolution) that should be made available to SFFs based on their property interests? See Patchogue Nursing Center v. Bowen, 797 F.2d 1137 (2<sup>nd</sup> Cir. 1986).
2. Since there is no federal appeals process, will federal-question jurisdiction be barred by 42 U.S.C. §405(h) and the holding in Illinois Council in the rest of a civil suit? Shalala v. Illinois Council on Long Term Care, 529 U.S. 1 (2000).
  - a. Illinois Council held that the Social Security Act (42 U.S.C. §405(h)) requires Medicare claims to be channeled through administrative review before federal courts can hear them, unless the party seeking federal jurisdiction can show that a specific exception applies.
  - b. Bowen v. Michigan Academy of Family Physicians, 476 U.S. 677 (1986) is recognized as an exception, as the court recognized that

when there is no review available outside of federal court, administrative remedies do not have to be exhausted.

- c. A SFF designation may fall in this category because there is no review or appeal mechanism for the SFF designation or methodology. This perhaps differs from Illinois Council, since denying any administrative review mechanisms for SFF designation could mean there is no avenue in which to “channel.”
- d. Even if a SNF appeals a deficiency finding, which can take months or even years, CMS will not remove it from the SFF list during such an appeal unless it meets program “graduation” criteria.
- e. In comparison to the Illinois Council rationale for “channeling”, involving “isolated incidents” or “minor penalties,” do the consequences of the SFF designation that may include severe consequences ranging from severe reduction in census, loss of VA and managed care contracts, five star listing and ultimately, loss of Medicare and Medicaid participation status avoid the requirement of administrative exhaustion?

### C. Substantive Due Process.

- 1. Has CMS adopted and applied the SFF program criteria and methodology with fair notice of the process?

2. “Health care providers have a constitutionally protected property interest in continued participation in the Medicare and Medicaid programs” (See e.g. Case v. Weinberger, 523 F.2d 602, 606 (2<sup>nd</sup> Cir 1975).
3. The federal courts have recognized that fair notice of a regulatory obligation is an implicit component of the constitutional due process analysis:
  - a. The due process clause prevents the application of a regulation that fails to give fair warning of the conduct it prohibits or requires (See Satellite Broad Co. v. FCC, 824 F.2d 1,3 (D.C. Cir. 1987) “Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”); Gates & Fox Co. v. OSHRC, 790 F.2d 154, 156 (D.C. Cir. 1986) (“The due process clause prevents...the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.”).
  - b. General Electric v. EPA, 53 F.3d 1324 (D.C. Cir. 1995) said that because due process requires that parties receive fair notice before being deprived of property, the EPA could not penalize GE for asserted regulatory violations when GE lacked “fair warning of the EPA’s interpretation of the regulations.”
4. Substantive due process may require that a facility receive adequate notice of the methods and criteria used to designate or graduate a facility from the SFF list.

D. Equal Protection Claim.

1. Does SFF designation treat similarly situated facilities differently, without a legitimate government interest in such treatment, in violation of the Equal Protection Clause?
  - a. Equal protection claims challenging federal actions may be brought under the 5<sup>th</sup> Amendment due process clause. The argument would probably be stated as follows:
    - i. The SFF designation is federal action.
    - ii. The system treats similarly situated facilities differently, violating the equal protection clause. A facility that receives SFF designation in one state might be better than facilities that have more deficiencies that are located in another state, but do not end up as SFF because their state's facilities perform worse overall.
    - iii. There is no legitimate government interest in ranking comparable facilities in two different states differently.  
  
Residents in each state have the same interests as residents in another state.
2. To avoid violating the Equal Protection Clause, arguably, CMS must treat similarly performing facilities in different states the same way. Has CMS tested and validated the SFF designation process so as to ensure standardization among region and states?

E. Application of Federal Administrative Procedure Act (APA) Rulemaking Provisions.

1. Does implementation of the SFF criteria and methodology require formal APA rulemaking, particularly compliance with public notice and comment requirements?
  - a. The APA defines “rule” as whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency...; 5 U.S.C. 551(4).
  - b. Section 553 of the APA requires an agency involved in rulemaking to provide adequate notice and publication of the proposed rule in the Federal Register, afford interested persons an opportunity to comment, publish the final rule with a statement of basis and purpose not less than 30 days before its effective date, and grant interested persons the right to petition for the issuance, modification or repeal of a rule (5 U.S.C. §553).
  - c. Substantive rules that are not promulgated in accordance with notice and comment rulemaking proceedings are invalid and are not enforceable (5 U.S.C. §553(b)).
  - d. “A substantive rule grants rights, imposes obligations, or produces other significant effects on private interests while an interpretative rule is an agency’s intended course of action, its tentative view of the meaning of a particular statutory term, or internal house-keeping

measures organizing agency activities.” White v. Shalala, 7 F.3d 296, 304 (2d Cir. 1993).

- e. “A substantive rule is a rule issued by an agency in accordance with law that is not organizational, procedural, interpretative, or a statement of policy (Attorney General’s Manual on the Administrative Procedure Act 27 (Dep’t of Justice 1947)). In addition, substantive rules implement agency policy by providing a tangible framework for interested parties (Syncor Int’l Corp. v. Shalala, 127 F.3d 90, 95 (D.C. Cir. 1997)) (“[A] substantive rule modifies or adds to a legal norm based on the agency’s own authority. That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking. And, it is because the agency is engaged in lawmaking that the APA requires it to comply with notice and comment.”).
- f. On October 28, 2008, CMS issued a letter to state Medicaid directors clarifying the federal government’s right to share in state False Claims Act recoveries. Following the issuance of this letter, the state of Alabama filed a lawsuit against CMS in federal court asking for injunctive relief and alleging, among other things, that the agency did not undergo applicable notice and comment requirements. Alabama v. CMS, M.D. Ala., No. 2:08-cv-00881-TFM, complaint filed Nov. 3, 2008.



F. Application of State Administrative Procedure Acts.

1. Most states (about 2/3) have implemented administrative procedure statutes that govern state agency conduct. More than half of the states have followed the Model State APA when constructing their statutes, while the others have modeled theirs after the Federal APA.
2. Is the SFF designation a “limitation” on the operating license of the facility, making the enforcement action subject to the state APA due process protections?
  - a. State licensing agencies are responsible for recommending to CMS which facilities in their state should be designated as SFF. SFF designation limits a facility’s operating license because it can ultimately lead to termination of Medicare and Medicaid participation if a facility cannot graduate from the SFF within the allotted time.
  - b. State agencies recommending facilities for SFF designation must therefore afford those facilities with process required by that state’s APA.
3. In Colorado, for example, C.R.S. §24-4-104(6) states: “No previously issued license shall be revoked, suspended, annulled, limited, or modified, except as provided in subsection (3) of this section, until after hearing as provided in section 24-4-105.”
  - a) Subsection (3), referenced above, requires the agency to give the licensee notice in writing of objective facts or conduct established upon a full investigation, and requires the agency to afford the licensee an opportunity

to submit written data, views, and arguments and give the licensee a reasonable opportunity to comply with all lawful requirements.

- b) Section 24-4-105, referenced above, entitles the affected parties to an agency adjudicatory hearing and decision.

#### G. The Information Quality Act (IQA)

1. The IQA (sometimes called the Data Quality Act “DQA”) took effect on October 1, 2002, and requires federal agencies to issue information quality guidelines regarding information they disseminate, and provide mechanisms for affected persons to correct inaccurate information. The purpose of the IQA is to make sure that agencies use and disseminate accurate information to the public. It applies to all federal agencies that are subject to the Paperwork Reduction Act.
2. CMS IQA guidelines can be found on the Health and Human Services Information Quality Web Site:  
<http://aspe.hhs.gov/infoQuality/Guidelines/CMS-9-20.shtml>
3. Affected individuals may file a complaint with CMS to seek correction of information disseminated by the agency. The required procedures and substance of the complaint can be found in the CMS IQA guidelines. The agency will determine whether a correction is warranted, and will respond to requests for correction within 60 calendar days of receipt. The complainant then has 30 days to appeal the agency’s decision or corrective action.

4. Courts have held that there is no judicial review of IQA information correction requests. See Salt Institute v. Leavitt, 440 F.3d 156, 159 (4<sup>th</sup> Cir. 2006), In re Operation of the Missouri River System Litigation, 421 F.3d 618 (8<sup>th</sup> Cir. 2005), Americans for Safe Access v. United States HHS, 2007 U.S. Dist. LEXIS 89257 (N.D. Cal., Nov. 20, 2007).