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Weigh In with Comments on CMS Proposed Rule for Medicare IRP by June 28

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The Centers for Medicare and Medicaid Services (CMS) issued a proposed rule entitled "Medicare Program; Requirements for the Medicare Incentive Reward Program and Provider Enrollment" on April 29, 2013. This proposed rule, particularly the language governing revocation of Medicare billing privileges, should be of real interest and concern to providers and suppliers participating in the Medicare program. **Comments on the proposed rule are due to CMS by June 28, 2013.** In addition, Paperwork Reduction Act (PRA) comments may be submitted to the Office of Information and Regulatory Affairs (OIRA) within 60 days.

CMS is attempting to expand its current revocation authority set forth in 42 CFR § 424.535. The preamble to the proposed rule highlights broad discretion that would be given to CMS, which many Medicare providers and suppliers may find particularly dangerous. CMS states in part:

"Our proposed new paragraph (a)(8)(ii) would permit revocation if we determine that the provider or supplier has a pattern of billing for services that do not meet Medicare requirements such as, but not limited to, the requirement that the service be reasonable and necessary....We believe that our proposed revocation reason is important because it would place providers and suppliers on notice that they are under a legal obligation to always submit correct and accurate claims. Providers and suppliers would know that a failure to do so may result in revocation of their Medicare billing privileges if such failures establish a pattern of incorrect or inaccurate claims...

While we solicit comment on what should qualify as a "pattern or practice" under our proposed change, we envision that a common – though by no means the only – scenario in which [revocation] could apply would be one where a provider or supplier is placed on prepayment review and a significant number of its claims are denied for failing to meet medical necessity requirements over time...."

The revocation authority described in the proposed rule is broad and ill-defined. Under this proposal, a provider or supplier could have its billing privileges revoked based on initial claim determinations even though history demonstrates that a vast amount of claims are overturned during the appeal process. With the high "error rates" assessed by contractors on many providers and suppliers, there appears to be very little limitation as to when a revocation could occur.

Similar to the Zone Program Integrity Contractor (ZPIC) discretionary authority to suspend payments without appeal rights in accordance with 42 C.F.R. § 405.375(c), the discretionary revocation authority in the proposed rule is troublesome. Providers and suppliers should address due process concerns in their comments.

The proposed rule would also increase rewards paid to Medicare beneficiaries and others whose tips about suspected fraud lead to the recovery of funds. The Incentive Rewards Program (IRP) was enacted to encourage whistleblowers to report suspicious activity related to acts or omissions that constitute grounds for sanctions under the fraud and abuse provisions 1128, 1128A and 1128B of the Social Security Act. Under this proposed rule, CMS would increase the rewards for overpayment recoveries from 10 percent of the overpayments recovered in the case or $1,000, whichever is less, to 15 percent of the final amount collected applied to the first $66,000,000 for the sanctionable conduct. Eligibility is limited to the first individual who

provides the specific information which leads to the collection of Medicare funds based on the sanctionable conduct. An individual would not be eligible for an IRP reward if he/she has filed a qui tam action under the False Claims Act. The determination as to whether an individual meets the reward criteria would be within the exclusive discretion of CMS.

In addition, the proposed rule would amend the definition of "enrollment" to clarify the distinction between enrollment for the sole purpose of ordering or certifying Medicare-covered items and services and enrollment granting a provider or supplier billing privileges; allow CMS to deny Medicare enrollment if the enrolling provider, supplier or owner thereof had an ownership relationship with a previously-enrolled provider or supplier that had a Medicare debt; allow CMS to deny enrollment or revoke billing privileges if the provider, supplier, owner or managing employee thereof was convicted of a felony within the past ten years; and limit the ability of ambulance suppliers to "back bill" for services prior to enrollment. The proposed rule would also limit the circumstances in which a revoked provider or supplier may submit a corrective action plan (CAP).

We are assisting clients in submitting comments on this proposed rule and encourage you to do the same.