PUBLICATION

New Medicare Provider Affiliation Reporting Requirements Delayed

April 08, 2021

In a March 24, 2021 CMS MLN Matters Special Edition Article, SE21003, CMS announced that "[i]n light of the pandemic and various other factors, we will not begin updating the Form CMS-855 applications with affiliation disclosure sections for at least another 12 months." The "Program Integrity Enhancements to the Provider Enrollment Process" Rule (Medicare Provider Affiliation Rule) was finalized on September 10, 2019, requiring, _inter alia_, providers and suppliers initially enrolling or revalidating to disclose all affiliations that it or any of its owning or managing employees or organizations have had within the previous five years with a currently or formerly enrolled Medicare, Medicaid, or CHIP provider or supplier that has a disclosable event. The terms "affiliation" and "disclosable event" are defined in 42 C.F.R. § 424.502.

While this new guidance suggests that the Medicare 855 applications may not need to be updated for another year, it does not appear to impact the ability of CMS to apply these rules to situations where a Medicare provider or supplier has not yet reported or is not currently required to report the affiliation to CMS, as set forth in 42 C.F.R. § 424.519(i).

However, the March 24, 2021 MLN Matters article includes some interesting dicta concerning the Medicare Provider Affiliation Rule. Specifically, it states the following:

We believe these affiliation disclosure provisions will allow us to better track current and past relationships between and among different providers and suppliers. In addition, they will help us find and take action on affiliations among providers and suppliers posing an undue risk to Medicare, Medicaid, and the Children's Health Insurance Program (CHIP).

Based on authority in Section 1866(j)(5) of the Social Security Act (the Act), we initially proposed requiring affiliation disclosures from all providers and suppliers on all initial and revalidation Medicare enrollment applications. However, in light of commenter feedback, we decided to adopt a "phased-in" approach to the affiliation disclosure provisions.

We will issue affiliation disclosure requests on a discretionary basis. We have the authority to request that a provider or supplier disclose all applicable affiliations if we become aware that the provider or supplier likely has at least one potentially problematic affiliation. Further, we may become aware of an affiliation through internal data or other means. In practice, we will not request affiliation disclosures until we revise the Form CMS-855 applications with affiliation disclosure sections. This includes online enrolment applications in the Provider Enrollment Chain and Ownership System (PECOS).

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Medicare will review each affiliation on a case-by-case basis, reviewing the undue risk factors outlined at 42 CFR Section 424.519(f). We are not focusing on technicalities based on remote associations to past administrative actions. The affiliation provisions in the Final Rule also apply to Medicaid and CHIP providers. State Medicaid Agencies (SMAs) will provide further guidance to their Medicaid and CHIP providers before operationalizing the Medicaid and CHIP affiliation provisions.

Given the punitive nature of some aspects of the Medicare Provider Affiliation Rule, it is certainly welcome to see CMS guidance that the agency will not focus on technicalities based on remote associations to past administrative actions and reassuring to know that CMS "in practice" may not request affiliations until it revises the Medicare 855 applications. However, it remains to be seen whether CMS will continue to issue sub-regulatory guidance that perhaps recognizes some of the burdens and impact of the Medicare Provider Affiliation Rule while it attempts to "stop fraud before it happens by keeping problematic providers and suppliers out of our Federal Health insurance programs."

For more information, please contact any member of the Baker Donelson Reimbursement Team.