



CMS to Revoke Medicare Billing Privileges for Providers and Suppliers with a “Pattern or Practice” of Billing Errors

Alan C. Horowitz

On December 5, 2014, the Centers for Medicare & Medicaid Services (“CMS”) published a final rule that significantly expanded its enforcement activities. The final rule, *Requirements for the Medicare Incentive Reward Program and Provider Enrollment*, establishes new regulations that become effective February 3, 2015.¹ The new regulations expand the circumstances when a felony conviction may serve as a basis for either denial or revocation of a provider or supplier’s enrollment; allow for denial of enrollment if the supplier, provider or owner thereof was previously an owner of a provider or supplier that had a Medicare debt when that provider or supplier’s enrollment was terminated either voluntarily, involuntarily or revoked. Additionally, CMS may revoke a provider or supplier’s Medicare billing privileges if it determines that a “pattern or practice” of denied claims exists. This article briefly focuses on the latter aspect of the new regulation.

CMS previously had the regulatory authority to revoke a provider or supplier’s Medicare billing privileges where it determined that a provider or supplier submitted a claim for services that could not have been furnished to a particular beneficiary on a certain date. 42 C.F.R. § 424.435(a)(8). For example, if CMS (or its contractors) determined that a beneficiary was deceased for the period the claim covered or if the beneficiary or provider or supplier was not in the State or country at the time the services were claimed to have been provided, CMS could revoke that provider or supplier’s Medicare billing privileges. But, as illustrated below, the new regulation greatly expands CMS’ authority to revoke a provider or supplier’s billing privileges.

CMS does not define its term “pattern or practice.” However, in the newly added section to the regulation, 424.535(a)(8)(ii), CMS provides examples of what it considers to constitute a pattern or practice of submitting claims that fail to meet Medicare’s requirements. Among the factors that CMS considers as grounds for revoking billing privileges are the following:

- The percentage of submitted claims that were denied;
- The reason for the denials;
- Whether the provider or supplier has a history of final adverse actions;
- The length of time over which the pattern has continued;
- How long the provider or supplier was enrolled in Medicare; and
- Any other information CMS deems relevant to its determination.

In response to questions about denied claims that are under appeal, CMS stated that it would not consider any claim denial that had been both “fully overturned” and finally adjudicated on appeal. However, CMS refuses to consider pending appeals of claim denials because, “that could encourage providers and suppliers to file meritless appeals simply to circumvent the application [or its new authority].”²

CMS claims that its new enforcement tool will not be applied in situations where there are sporadic billing errors but rather, only “after the most careful and thorough consideration of the relevant factors.” Recognizing, that claims are “occasionally ... denied incorrectly by the contractor,” CMS states that it does not intend to revoke billing privileges for contractor errors or “sporadic and occasional errors.”³ Instead of focusing on sporadic errors, it will focus on claim denials that are

¹ 77 Fed. Reg. 72,500 (Dec. 5, 2014).

² *Id.* at 72,513.

³ *Id.*

constant, repeated and systemic. However, CMS fails to quantify “occasional” or “sporadic,” or its other relevant terms, “constant” and “repeated and systemic.” Such vagueness leads to a level of uncertainty in the enforcement process.

Instead of quantifying many key terms, CMS explains that it needs the “flexibility to address a myriad of scenarios.”⁴ It provides an example of a provider that has more than 30% of its claims denied which would not automatically trigger a revocation of billing privileges. On the other hand, CMS states that a denial rate under 30% does not mean revocation is not warranted. In the absence of numerical thresholds, many providers and suppliers may be left guessing at what point sporadic and innocent errors become “repeated” errors subject to a billing revocation.

CMS, not its contractors will make the final determination regarding revocation of billing privileges. Providers and suppliers that have their Medicare billing privileges revoked because of what CMS considers a “pattern or practice” of denied claims will have a right to file an administrative appeal.⁵ The takeaway from this new regulation is that more than ever before, providers and suppliers need to be vigilant in the area of Medicare claim submissions.

There is a silver lining in the final rule. CMS stated that it is not finalizing its proposed Incentive Reward Program (“IRP”), whereby it would pay whistleblowers and Medicare beneficiaries up to \$10 million for reporting fraud, abuse and overpayments. However, CMS left the door open noting that it “may finalize [the IRP] in future rulemaking.”⁶

⁴ *Id.*

⁵ 42 C.F.R. Part 498

⁶ 77 Fed. Reg. 72,500, 72,526.

Authors and Contributors

Alan C. Horowitz

Partner, Atlanta Office
404.873.
alan.horowitz@agg.com

not *if*, but *how*.[®]

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a “business sensibility” approach, developing a deep understanding of each client’s industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal’s prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief “not if, but how.” Visit www.agg.com.

Atlanta Office

171 17th Street NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Ave., NW,
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: <http://www.agg.com/subscribe/>

©2015. Arnall Golden Gregory LLP. This legal insight provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice. Under professional rules, this communication may be considered advertising material.