



CMS Expands Authority to Revoke Providers' Medicare Enrollment While Medicare Overpayment Appeals are Pending ALJ Review

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On September 10, 2019, the Centers for Medicare and Medicaid Services (CMS) announced new authority to revoke providers' Medicare enrollment and any corresponding provider agreements or supplier agreements through revisions to 42 C.F.R. § 424.535 - Revocation of Enrollment in the Medicare Program. These new regulatory provisions became effective on November 4, 2019,¹ and within days, CMS issued a notice of revocation to a provider's Medicare enrollment under these new enforcement provisions.

In particular, CMS moved to revoke a provider's Medicare enrollment on the basis of referral of debt to the United States Department of Treasury.² The basis for the debt in question was an alleged overpayment amount that is currently pending appeal before an Administrative Law Judge (ALJ). Referrals for debts arising while an ALJ hearing is pending is particularly egregious in light of the provider's statutory right to a hearing and decision within ninety days, which CMS systematically fails to provide due to what many courts have referred to as "extraordinary delays" of between three and five years.³ Notwithstanding CMS's failure to comply with its statutory-mandated requirement to provide a timely hearing and decision, CMS is now using its new expanded authority to revoke a provider's Medicare enrollment while the provider awaits its ALJ hearing.

The use of CMS's expanded authority to revoke a provider's Medicare enrollment serves as another reason why providers mired by the CMS backlog may want to consider seeking injunctive relief to stay the payment of alleged overpayments until ALJ decisions can be issued, particularly where the provider faces the risk of closure. Although not all injunctive actions have met with success, at least two appellate jurisdictions have granted providers the right to seek injunctive relief on the basis that CMS's delay could constitute a violation of the provider's due process rights.⁴ Depending on the jurisdiction in which providers are located, injunctive relief may be the only opportunity for withstanding the extraordinary delays currently facing providers.

To see the Final Rule, click [here](#). For more information, please contact [Ms. Plowman](#) or [Ms. Mech](#).

¹ See 84 Fed. Reg. 47794 -47857 (Sep. 10, 2019).

² One of the new enforcement reasons includes referral of debt to United States Department of Treasury. See 42 C.F.R. § 424.535(a)(17). In determining whether a revocation under this provision is appropriate, CMS should consider the following factors: (i) the reason(s) for the failure to fully repay the debt; (ii) whether the provider or supplier has attempted to repay the debt; (iii) whether the provider or supplier has responded to CMS's requests for payment (to the extent this can be determined); (iv) whether the provider or supplier has any history of final adverse actions or Medicare or Medicaid payment suspensions; (v) the amount of the debt; and (vi) any other evidence that CMS deems relevant to its determination.

³ See 42 U.S.C. § 1395ff(d)(1)(A); 42 C.F.R. § 405.1016.

⁴ See *Family Rehab. Inc. v. Azar*, 886 F.3d 496, 499 (5th Cir. 2018); *A1 Diabetes & Med. Supply v. Azar*, 937 F.3d 613, 615 (6th Cir. 2019).

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