Eli's Rehab Report

Regulations: New Payment Suspension Rules Could Put A Target On Your Back

New anti-fraud regs increase CMS's reach to combat fraud and abuse.

All it will take to bring down your facility under the weight of a fraud charge will be one disgruntled employee or competitor call to a new hotline, if a new proposal takes effect.

In the past, therapists and patients who have tried to report Medicare fraud have complained that their information has fallen on deaf ears. But now the feds might be going too far in the other direction.

The Centers for Medicare & Medicaid Services has proposed a number of anti-fraud regulations based on the health care reform law, including new authority to impose payment suspensions on suspicious Medicare providers. To trigger the suspension, CMS would have to have a "credible allegation of fraud," according to the proposed rule published in the Sept. 23 Federal Register.

Credible allegations of fraud can come from fraud hotlines, claims data, audits, qui tam cases, law enforcement investigations, and other sources, CMS says in the rule. And the allegations must have "inidicia of reliability."

CMS will have to consult with the HHS Office of Inspector General and, if necessary, the Department of Justice to determine what's credible on a case-by-case basis, the rule proposes.

Payment suspensions can also trigger if a provider fails to submit an "acceptable" cost report to its intermediary, the rule says.

Fraud Suspicions May Kill Your Cash Flow

"Suspension of payments will cause a significant adverse impact on cash flow for providers, especially given the broad definition proposed for a 'credible allegation of fraud,'" warns attorney **Julie Mitchell** with Mitchell Day Health Law Firm in Ridgeland, Miss. "What we are looking at ... is significant in terms of financial cash flow to providers, regardless of whether the allegations are well founded or not."

The standards for triggering a payment suspension "are relatively amorphous," worries attorney **Robert Markette Jr.** with Gilliland & Markette in Indianapolis. "It is not clear what will be considered to be 'indicia of reliability,' but it seems this is a fairly low standard for a preemptive suspension of payments."

Watch out: "The regs make it appear that it will be relatively easy for the government to rely upon even an anonymous hotline tip" to impose a suspension, Markette says. "Given that the standard of proof to start the suspension is relatively low, this means a provider could be put out of business even though they have not done anything wrong."

"When did a call to the fraud hotline become a credible allegation of fraud?" asks Washington, D.C.-based health care attorney **Elizabeth Hogue**. The lack of specifics on what constitutes an "acceptable" cost report is also worrying, Hogue says.

No Appeals Of Payment Suspensions

"With this expanded power, all providers should be wary of CMS's ability to suspend all payments for an extended term without advance notice," warns the National Association for Home Care & Hospice. NAHC hopes CMS will use the

payment suspension power "very cautiously. Once it is triggered, the resulting harm is usually permanent and an innocent provider would have no real recourse."

That's because there are very few due process protections involved with the suspension, says attorney **Joel Hamme** with Powers Pyles Sutter & Verville in Washington, D.C. All home care providers "should be concerned about the ability of the government to suspend payments due to suspicion of fraud," Hamme tells **Eli**.

"The reg gives providers no real ability to challenge the suspension, which makes this very onerous," Markette points out.

Court is out, too: "As the Medicare program is voluntary, there is no right to payment up front," Mitchell reminds providers. "So seeking judicial relief may prove to be very difficult."

CMS proposes making payment suspensions in 180-day increments, with the ability to extend the 180-day periods for a variety of reasons. In the rule, CMS even discusses revisiting a suspension that has been in place for two or three years, Markette notes. "For most providers, there would be nothing to revisit," he says. "The provider would be out of business."

In fact, a provider whose payments are suspended due to a suspicion of fraud may find itself going out of business before the investigation is finished, even if it doesn't take nearly that long, Markette adds.

When contemplating a payment suspension, CMS should be "mindful of the impact that payment suspension may have upon a provider," the agency says in the rule. But without restrictions placed on the suspension authority, industry reps worry that blameless providers will be forced to shut their doors.

Timeline: The payment suspension rule would go into effect March 23, 2011. Comments on the rule are due Nov. 16.

Resource: The rule is at http://edocket.access.gpo.gov/2010/pdf/2010-23579.pdf.