

Eli's Hospice Insider

Regulations: Repeat Offender Billers May Face Door-Closing New Sanctions

CMPs, exclusion could be in store for hospices that don't show improvement.

If your MAC tells you to jump, you may have to ask "how high" or face door-closing penalties under Medicare's new recalcitrant provider policy.

The **Centers for Medicare & Medicaid Services** "has heard from contractors that providers are abusing the program and not changing inappropriate behavior," CMS says in CR 8394 issued in December. "These noncompliant providers, who refuse to comply, result in contractors' placing these providers on prepay medical review for years. Though such an activity is protecting the Trust Fund dollars on the front end, it is exhausting contractor resources which could be utilized in more productive activities," CMS says in the transmittal.

"Accordingly, CMS is taking advantage of current sanctions that we believe may address this problem," the agency pronounces in the CR. Namely, CMS urges Medicare Advantage Contractors to refer so-called "recalcitrant providers" for civil money penalties and/or exclusion.

How it will work: MACs will identify recalcitrant providers, "defined as a provider that is abusing the program and not changing inappropriate behavior even after extensive education by Medicare contractors to address these behaviors," CMS explains in the transmittal. The MAC will use five criteria for the determination (see related box, p. 28).

Next step: CMS then will either approve or deny the MAC's request to define the provider as recalcitrant, it says in the transmittal. "CMS will notify the MAC and PSC/ZPIC of approval and then coordinate with the PSC/ZPIC before they will refer the provider/supplier to the MAC for revocation."

MACs On A Rampage

On one hand: It will be nice to see fraudulent providers get what they deserve, instead of hanging around to besmirch the reputation of legit home care providers, industry veterans say.

On the other hand: CMS's newly clarified authority could be "hugely problematic," warns attorney **Robert Markette Jr.** with **Hall Render** in Indianapolis. "Right now the Medicare contractors are on a rampage" with medical review, Markette tells **Eli**. MAC auditors are making medical review calls that are "a reach," and that could influence the recalcitrant provider decisions.

Hospice providers may be especially vulnerable to this new authority, because of the rise of for-profit providers in the market, plus the growth in utilization and hospice spending.

One problem with the new policy is the wide latitude MACs will have in determining who is recalcitrant. It will be hard to pin down exactly what providers will have to do to be classified in that category, Markette expects.

"The definition is clearly too vague," agrees Washington, D.C.-based health care attorney **Elizabeth Hogue**. "Recalcitrance could be based on the 'eye of the beholder.'"

"The CR really gives CMS bold, new powers, if the staff wishes to wield them," Hogue says. "I have encountered a number of instances in which regulators have taken action without all of the facts. The definition seems to open the door to such actions."

New Policy Puts Limits On Use Of Recalcitrant Penalties

The new recalcitrant provider policy does have some safeguards that will protect hospices from overzealous MACs, however. The CR's new language specifies that the recalcitrant sanctions are only for providers who already are on prepayment review, have been educated and still continue to show no improvement, points out attorney **John Gilliland** with **The Gilliland Law Firm** in Indianapolis. Providers that "are demonstrating improvement, however slight, as a result of education" will not be subject to the penalty, CMS says in the transmittal.

"I don't feel the typical provider has much to worry about, about this," Gilliland tells **Eli**.

And MACs have to gain CMS Regional Office approval and work with the HHS Office of Inspector General on cases, the transmittal details.

CMS isn't likely to use the new authority in a widespread effort, Hogue believes □ at least not at first.

Note: The transmittal is at www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R495PI.pdf.