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CMS Proposes Rule To Revise Certain DMEPOS Supplier Standards

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On April 4, 2011, the Centers for Medicare and Medicaid Services (CMS) released a Proposed Rule revising four (4) of the thirty (30) Medicare supplier standards applicable to suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). In general, these revisions include changes that:

- would remove the highly criticized definition of, and modify requirements regarding, "direct solicitation";
- allow DMEPOS suppliers, including DMEPOS competitive bidding program contract suppliers, to contract with licensed agents to provide DMEPOS supplies unless prohibited by state law;
- remove the requirement for compliance with local zoning laws; and
- modify certain state licensing requirement exceptions.

These revisions come on the heels of last year's Final Rule (75 Fed. Reg. 52629), effective on September 27, 2010, which imposed stricter program standards for DMEPOS. The Final Rule clarified, expanded, and added to the existing enrollment requirements for DMEPOS suppliers to receive and maintain billing privileges in the Medicare program. For more information on the Final Rule, see Brian D. Jent, Regan E. Tankersley, and Blake Griese, [CMS Finalizes Additional DMEPOS Enrollment Requirements](#) (Oct. 14, 2010).

Discussion of the Proposed Revisions

The Proposed Rule includes the following revisions:

Direct Solicitation of Beneficiaries

The supplier standards govern direct solicitation of beneficiaries. The current supplier standards include a broad prohibition on direct solicitation of beneficiaries that prohibits email, instant messaging, or in-person contact, without the beneficiary's consent, for the purpose of marketing the DMEPOS supplier's healthcare products or services. In addition, the current supplier standard requires that a referring physician obtain written permission before the supplier may contact the beneficiary.

In the Proposed Rule, CMS acknowledged that this standard had been criticized as overly broad and as prohibiting marketing activities in a manner that would not be possible for DMEPOS suppliers to implement. CMS indicated it will further investigate how to address its concerns regarding abusive DMEPOS marketing practices. In the interim, CMS has instructed its DMEPOS suppliers to apply the restrictions on telephone solicitation that were in effect prior to the 2010 Final Rule.

The Proposed Rule removes the reference to "direct solicitation" and states DMEPOS suppliers are prohibited from contacting a beneficiary by telephone when supplying a Medicare-covered item unless:

- the supplier has received written permission from the beneficiary to contact the beneficiary by telephone concerning the furnishing of a covered item;
- the supplier has furnished a covered item to the beneficiary and is contacting the beneficiary to coordinate the delivery of the item; or
- the contact concerns a covered item other than one already furnished to the beneficiary, and the supplier has furnished at least one covered item to the beneficiary within the previous 15 months.

CMS indicated it will continue to actively monitor this issue and address as necessary, through further rulemaking, the prohibition of making any potentially unwanted and unsolicited communications between DMEPOS suppliers and beneficiaries.

Contractual Arrangement Issues

At present, a DMEPOS supplier cannot contract with a third party to provide the licensed service(s). This requirement was developed to add another layer of oversight in the form of state law to prevent operations where entities enroll in Medicare only to subcontract out the operations to DMEPOS suppliers that do not or cannot participate in the Medicare program. This provision has led to confusion among suppliers as to who they may contract with under the Medicare Program. The Proposed Rule, therefore, seeks to clarify that a DMEPOS supplier may contract with an individual or entity to provide the licensed service(s) unless such a contractual arrangement is expressly prohibited by state law.

Local Zoning Requirements

The current supplier standards require DMEPOS suppliers to comply with all local zoning requirements under state and municipal laws. The Proposed Rule eliminates this requirement as CMS notes it is redundant and difficult to verify compliance at the federal level. While CMS explained that it expects DMEPOS suppliers to comply with all local zoning requirements, CMS determined that enforcement of those requirements is best left to local authorities who are more familiar with the requirements and, therefore, should not be included among the supplier standards.

Minimum Square Footage Requirement

Under the current rule, DMEPOS suppliers are to maintain a physical location measuring at least 200 square feet in size, except for state-licensed orthotic and prosthetic personnel providing custom fabricated orthotics or prosthetics in private practice. The Proposed Rule expands the exception so that if a state does not offer licensure for orthotic and prosthetic personnel providing custom fabricated orthotics or prosthetics in private practice, then those non-state licensed suppliers in private practice would also meet this exception. If the suppliers' state does offer licensure in this practice area, the exception would apply only to those holding the applicable licensure.

Open and Accessible Requirement

Currently, a DMEPOS supplier's location is required to be staffed during posted business hours and remain open and accessible to the public at least 30 hours a week. There are limited exceptions, including for licensed non-physician practitioners furnishing services to their own patients as part of their professional services. To clarify any confusion on the matter, the Proposed Rule deletes the "non-physician practitioners" language and directly references Sections 1861 (p) and (g) of the Social Security Act for a list of the certain outpatient physical therapy and outpatient occupational therapy services qualifying for the exception.

Opportunity to Comment

DMEPOS suppliers and other interested parties have until June 3, 2011, to review and comment on the Proposed Rule. A copy of the Proposed Rule is available at: <http://www.gpo.gov/fdsys/pkg/FR-2011-04-04/pdf/2011-7885.pdf>.

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