

# PUBLICATION

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## Professionals Beware – Potential Loss of Medicare Billing Privileges Based on Minor Licensing Disputes

August 26, 2019

The Centers for Medicare & Medicare Services (CMS) recently proposed sweeping changes that would permit the denial of a Medicare enrollment application or a billing privilege revocation for professionals eligible to individually enroll. These proposed changes were buried on one of the 808 pages of the proposed 2020 Physician Fee Schedule among the proposed new requirements for opioid treatment programs. In taking this action, CMS has arguably introduced some of the most significant and substantial changes to the rules for obtaining and maintaining Medicare enrollment, since the rules were first established in 2006. These new regulations would apply to physicians and other eligible professionals, which includes advanced practice nurses, therapists, and even physician assistants who are not even granted billing privileges to revoke.

**Comments on the Proposed Rule are due by 5:00 p.m. on September 27, 2019.**

Has your practice ever had a professional fined or reprimanded by a state licensing board for failing to timely complete required continuing education courses or simply to settle a matter that would be too costly and/or risky to file an administrative appeal? Or, have you assisted a professional in seeking treatment for an addiction or mental health problem through a structured rehabilitation program in lieu of disciplinary action? Or, perhaps had a professional who agreed to abstinence from drugs or alcohol and random drug testing, even in the absence of a diagnosed addiction, simply to provide evidence that no addiction exists?

On a single page within a section describing proposed changes to the enrollment of opioid treatment programs (OTP), CMS has inserted what at first glance may appear to be an innocuous one-paragraph statement applying enrollment approval and revocation rules for opioid treatment programs to all physicians and other eligible professionals. 84 Fed. Reg. 40482, 40723 (August 14, 2019, Proposed Rule). ("Sections 424.530(a)(15) and 424.535(a)(22) would apply to physicians and other eligible professionals in OTP and non-OTP settings. Revocation or denial action could be taken against physicians and other eligible professionals in solo practice or who are part of a group or any other provider or supplier type.").

However, if this Proposed Rule is finalized, CMS would have the authority to deny enrollment or revoke current Medicare billing privileges for those physicians and eligible professionals who have ever

been subject to prior action from a state oversight board, federal or state health care program, Independent Review Organization (IRO) determination(s), or any other equivalent governmental body or program that oversees, regulates, or administers the provision of health care with underlying facts reflecting improper physician or other eligible professional conduct that led to patient harm.

84 Fed. Reg. at 40723.

CMS expressed concern that state licensing boards may choose "to impose a relatively minor sanction on a physician or other eligible professional for conduct that we deem more serious." *Id.* CMS announced that it, "rather than state boards, is ultimately responsible for the . . . protection of its beneficiaries." *Id.* This statement ignores the charge of all state licensing boards to protect the public from harm, which includes Medicare beneficiaries. Under the guise of its "general rulemaking authority," CMS wants to be empowered with the

"discretion to . . . determine whether, in the agency's view, the physician's or other eligible professional's conduct warrants revocation or denial," even when CMS has not been involved in the licensing board disciplinary process to evaluate the genesis of the complaint, the truth of the allegations, and the reasoning to settle, often with admission of wrongdoing. *Id.*

### Nature of Patient Harm

Although CMS promises that it will not automatically revoke billing privileges or deny enrollment based on "very modest sanction[s]," there are numerous revocation cases that have occurred for minor noncompliance that call CMS's exercise of discretion into question. CMS states it would "only take such a measure after the most careful consideration" of the "nature of the patient harm," "the nature of the physician's or other eligible professional's conduct" and the "number of type(s) of sanctions or disciplinary actions" imposed. *Id.* In considering whether an action constitutes patient harm, CMS will consider, inter alia:

- License restriction(s) pertaining to certain procedures or practices;
- Required compliance appearances before State oversight board members;
- Required participation in rehabilitation or mental/behavioral health programs;
- Required abstinence from drugs or alcohol and random drug testing;
- Administrative/monetary penalties;
- Formal reprimand(s);
- If applicable, the nature of the IRO determination(s); or
- Any other information that CMS deems relevant to its determination.  
*Id.* (emphasis added).

CMS's ability to deny enrollment or revoke billing privileges based on these types of board actions considering "[a]ny other information that CMS deems relevant to its determination" is perhaps CMS's most extensive reach yet into professional practice matters. These proposed changes will not only affect specialty physicians (often in short supply) and eligible professionals working in areas where there are health professional shortages, but also physicians and other nonphysician practitioners working in hospital enrolled group practices providing ER coverage and other needed services, and professionals providing medical direction and attending physician services in nursing facilities. And, a Medicare revocation leads to a **mandated cross-termination of participation in Medicaid and other federal payer programs**. In short, this new denial and revocation authority will affect far more physicians and other eligible professionals than the "high risk" Medicare-enrolled opioid treatment programs for whom these new revocation and denial bases were introduced.

### Baker Donelson Comments

With the comment period ending **September 27, 2019**, there is not much time to submit comments on CMS's proposal to expand its enrollment approval and revocation authorities in such an unprecedented and far-reaching manner. We urge professional practices, hospitals, nursing facilities and other providers that would risk losing valuable and otherwise qualified professionals, who would be prohibited from rendering services to federal payer patients to submit comments and feedback to CMS to prevent these unneeded and massive changes from occurring. Physician groups, therapy practices, hospitals, nursing facilities, and other affected organizations should reach out to professional and trade associations to alert those organizations to these proposed changes. Take heed of these proposed changes. If finalized, and if utilized in the same manner as other enrollment regulations authorizing CMS to deny or revoke billing privileges, the supply of qualified professionals to treat Medicare and Medicaid patients will dwindle.

For more information, please contact any member of the Firm's [Health Law Reimbursement Group](#).