

PUBLICATION

Medicare Revocation Consequences Worsened – Further Reenrollment Restrictions

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CMS recently finalized the most significant changes to enrollment since the 2006 enrollment rules were initially adopted.

Overview of the New Rule

In its "Program Integrity Enhancements to the Provider Enrollment Process," final rule with comment period, CMS now requires Medicare, Medicaid, and Children's Health Insurance Program (CHIP) providers and suppliers to:

disclose any current or previous direct or indirect affiliation with a provider or supplier that (1) has uncollected debt; (2) has been or is subject to a payment suspension under a federal health care program; (3) has been or is excluded by the Office of Inspector General (OIG) from Medicare, Medicaid, or CHIP; or (4) has had its Medicare, Medicaid, or CHIP billing privileges denied or revoked.

84 Fed. Reg. 47794, 47794 (Sept. 10, 2019).

One other aspect of the new rule permits CMS to prevent revoked providers and suppliers from enrolling or reenrolling in the Medicare program under a different name or business identity. 42 C.F.R. § 424.530(a)(12); 84 Fed. Reg. at 47822. The former rules allowed a revoked provider or supplier to transfer assets to a new legal entity and reenroll under the new entity while appealing the revocation. Even when a revocation appeal was successful, the revoked provider or supplier experienced the lost revenue and expense of setting up a new business.

However, that all changed with the revised regulations that became effective November 4, 2019, authorizing CMS to:

Deny [or revoke] a provider's or supplier's Medicare enrollment . . . if CMS determines that the provider or supplier is currently revoked under a different name, numerical identifier, or business identity, and the applicable reenrollment bar period has not expired.

84 Fed. Reg. at 47822.

The restriction on reenrolling after a revocation under a different name or business identity is contained in the rulemaking under a section entitled "Other Proposed Provisions Affecting the Medicare Program Only" and should not be taken lightly. Without any expedited appeal process, the new rule could take away a provider's or supplier's ability to mitigate damages and stay in business.

It is in the discussion in the Final Rule that CMS explains why it believes revoked providers and suppliers should not be afforded a second chance to enroll or be a part of the Medicare program. Specifically, CMS concludes that providers and suppliers that "evade" a revocation or reenrollment bar by opening a new provider or supplier organization are really operating "fronts, whereby associates, family members, or other individuals pose as owners and managers of the entity on behalf of the persons who actually operate, run, or

profit from the business." 84 Fed. Reg. at 47822. Unfortunately, CMS's reasoning fails to consider the number of improper revocations that result in reversal on appeal.

Degree of Commonality

To determine whether a provider or supplier is in fact a currently revoked entity, CMS will consider the following factors to investigate the degree of commonality and involvement in a provider or supplier organization:

- Owning and managing employees and organizations, regardless of whether they have been disclosed on the Form CMS-855 application (since the definitions of 'owner' and 'managing employee' in § 424.502 do not require the individual or organization to be listed on the [Form CMS-855](#) in order to qualify as such).
- Geographic location (for example, same city or county).
- Provider or supplier type (for example, same provider type).
- Business structure.
- Any evidence indicating that the two parties are similar or that the provider or supplier was created to circumvent the revocation or the reenrollment bar.

84 Fed. Reg. at 47822-47823.

CMS has determined that it may take this action without regard to whether the newly enrolling entity or currently enrolled entity poses an undue risk of fraud, waste, or abuse. This is because CMS was relying on its "general rulemaking authority" under the enrollment process for providers and suppliers and because it believes "that behavior designed to evade the reenrollment bar poses an inherent risk." 84 Fed. Reg. at 47823. CMS asserts that it will "review all of the circumstances" before determining whether businesses meet the "commonality" test; however, similar to other recent expansive changes to Medicare enrollment, due process protections simply do not exist.

What This Means

CMS has greatly expanded its enrollment authority with these finalized changes, so much so that it seems a far cry from its stated purpose to help "combat fraud, waste, and abuse" especially as the agency will not even consider this purpose when deciding whether entities are "effectively identical" or determining that a new entity was established to avoid the revocation or reenrollment bar. Since revocations may occur for minor, inadvertent errors, this change likely will have the unintended consequence of affecting good actors who, prior to finalization of this rule, were simply trying to find a way to move on after a revocation.