

Center for Regulatory Effectiveness

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September 9, 2009

Ms. Charlene Frizzera
Administrator (Acting)
Center for Medicare and Medicaid Services
Room 314G
200 Independence Avenue, SW
Washington, DC 20201

RE: Need for Extension of DMEPOS Supplier Accreditation Deadline

Dear Ms. Frizzera:

I am writing to request that CMS exercise its authority under the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) by extending the deadline for DMEPOS suppliers participating in the competitive bidding program to submit “evidence of accreditation by an accreditation organization” by three months until January 1, 2010. Specifically, Congress’ Statement of Purpose at the beginning of MIPPA states that the law was enacted,

*“to improve beneficiary access to preventive and mental health services, to enhance low-income benefit programs, and **to maintain access to care in rural areas, including pharmacy access, and for other purposes.**”*

There has been a crush of DMEPOS providers that have been going through the accreditation program resulting in unexpected surveying/processing delays for at least some Accrediting Organizations (AOs). A recent trade press article quoted a senior official of an AO explaining that in addition to the time it takes an applicant to put together policies and procedures so that they are ready for survey, “follow-up activity (if they are not survey-ready) can put them over the deadline.”¹ Of particular concern, the provider who is the subject of the article:

1. “is faced with the prospect of losing his Medicare billing privileges Oct. 1” and
2. “is the only Medicare provider in a rural area that covers 10,000 square miles.”

¹ <http://www.hmenews.com/?p=article&id=hm200909INcP7>

The provider goes on to ask a question that CRE now presents to CMS, “And what about all those patients? Does Medicare want to leave them in the hospital?”

In short, unless the deadline for accreditation is extended by three months, rural Medicare patients will find themselves cut off from essential DME supplies – in direct contravention to one of the fundamental purposes of MIPPA, “to maintain access to care in rural areas.”

We have been informed that about 200 full service home medical equipment suppliers, a significant number of them rural, will need to voluntarily terminate their participate in Medicare program or have their billing privileges revoked. In either case, it is the beneficiaries who will suffer as they scramble to find a new DMEPOS provider, which in some cases may not be possible.

I note that CMS has the obvious legal authority to extend the accreditation statutory deadline as evidenced by the agency’s previous extensions of statutory deadlines – including very extensive delays – when it finds there is need for such an extension. For example, in the attached CMS Notice of Proposed Rulemaking (NPRM) published on November 28, 2003, the agency explains why they did not meet an October 1, 2002 for implementing a rule. As CMS explained,

“Section 124 [of the Balanced Budget Refinement Act] also required that the payment system for inpatient psychiatric services be implemented for cost reporting periods beginning on or after October 1, 2002. The creation of each new payment system requires an extraordinary amount of lead-time to develop and implement the necessary changes to our existing computerize claims processing systems. In order to meet the BBRA requirement to develop an adequate patient classification system, we undertook two research projects. It became apparent that the two research projects could not be completed in time for us to implement an inpatient psychiatric facility prospective payment system by October 1, 2002. It was impossible for us to analyze our existing administrative data in a sufficient amount of time to go through notice and comment rulemaking and implementation of the inpatient psychiatric facility prospective payment system by the statutory deadline. This delay enabled us to analyze our existing administrative data to determine the feasibility and validity of using these data to develop the proposed inpatient psychiatric facility prospective payment system. We are using a combination of available facility and patient specific data for this proposed rule. Our research efforts will continue and will be used to refine the proposed system.”²

Thus, CMS determined that it had the legal authority to delay, for an extended period of time, a statutory deadline without any new Congressional authority. In the case of the NPRM cited above, the final rule was not published until November 15, 2004 with an effective date of January 1, 2005, two years and

² 68 Fed. Reg. 66921-22, Friday, November 28, 2003.

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three months after the statutory deadline.³ Therefore, CMS clearly has the authority to extend the supplier accreditation deadline in MIPPA by a mere three months to prevent Medicare beneficiaries from being cut off from life-sustaining equipment and supplies.

I will be calling your office to arrange a meeting to discuss this crucial rural health care access issue with you or a designated member of your staff.

The Center for Regulatory Effectiveness (CRE) is a regulatory watchdog which has been working on issues pertaining to the DMEPOS Competitive Bidding Round 1 Rebid. For more information about CRE, please see http://www.thecre.com/emerging/Jim_Tozzi_Bio.html.

Sincerely,

/s/

Jim Tozzi
Member, Board of Advisors

Attachment

³ 69 Fed. Reg 66922, Monday, November 15, 2004.