HHS Proposes Significant Changes to Administrative Appeals Process

On December 28, 2007, the Department of Health and Human Services (HHS) issued a proposed rule that would significantly reduce the independence and authority of the Departmental Appeals Board (DAB) in reviewing enforcement and other administrative decisions by HHS. If the proposal is implemented, providers, suppliers, and states will face much steeper hurdles in reversing adverse HHS actions at the agency level and will be forced to resort to the courts more frequently for redress.

The DAB is the adjudicative body that provides the final agency review of a range of federal health care-related enforcement actions, including:

- the imposition of civil monetary penalties (CMPs), exclusions, and assessments by the Office of the Inspector General (OIG) under the false claims and fraud and abuse provisions of the Social Security Act;
- initial determinations by the Centers for Medicare & Medicaid Services (CMS) regarding provider sanctions and exclusions from federal health programs;
- enforcement actions against laboratories under Medicare and the Clinical Laboratories Improvement Amendments of 1988; and
- appeals by states of CMS disallowances of federal funding for state Medicaid program expenditures.

Certain types of DAB reviews would not be subject to the new rule, such as appeals of Medicare Local Coverage Determinations and National Coverage Determinations.

Currently, DAB decisions are considered final agency decisions. The rule would allow the Secretary to review and overturn DAB decisions "to correct errors in the application of law or deviation from published guidance." In order to "maintain flexibility to tailor the process to the needs of the particular case," the proposed rule does not provide any right to briefing or other procedures for Secretarial review. Nor does the rule offer detailed standards for the Secretary's review. In addition, the rule would require the DAB to consider published, and in certain circumstances *unpublished*, agency guidance, "to ensure that the decisions of the Board reflect the considered judgment of the Department." These changes would affect cases that are still under Board review as of the effective date of a final rule.

Over the years, the volume and complexity of the issues reviewed by the DAB have grown considerably. In a substantial number of cases, the DAB has overruled civil monetary penalties, disallowances, and other penalties and enforcement actions imposed by the federal government against providers and other entities. These decisions by the DAB constituted final agency action. Although it is unclear how Secretarial review of DAB decisions would operate in practice, it is likely that it will be much more difficult for appellants to prevail in administrative appeals at the agency level, requiring a greater number of appeals to be taken to federal court (where the odds of success are lower). Under this rule, the Secretary's authority to overturn DAB decisions would be equivalent to the CMS Administrator's authority to overturn decisions of the Provider Reimbursement Review Board (PRRB); in practice, the CMS Administrator reverses a significant portion

of PRRB decisions that were favorable to providers (and fails to review many decisions unfavorable to providers). The proposed rule is particularly concerning given that the DAB would be required to consider unpublished guidance in its decisions. This change would call into question the fairness and openness of the administrative appeal process.

Public comments are due by 5 p.m. on January 28, 2008, and may be submitted by email to randolph.pate@hhs.gov or by mail to: Randy Pate, HHS, 200 Independence Ave. SW., Room 415F, Washington, D.C. 20201. The Proposed Rule is available online at http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-6221.pdf.

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