

February 23, 2012

Marilyn Tavenner, Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Re: Follow Up Regarding Charging Retail Pharmacies Twice for Medicare Enrollment Application Fees

Dear Administrator Tavenner:

We are writing to follow-up on our November 18 letter and your response on January 19, 2012. We respectfully continue to disagree with CMS' interpretation of the ACA requirement regarding duplicative fee-for-service (FFS) Medicare enrollment/revalidation fees. We believe that the interpretation of the relevant ACA provision is in plain violation of statute, to the extent that CMS is requiring Medicare provider/supplier enrollees to pay an enrollment/revalidation application fee twice, if the provider/supplier enrolls or revalidates through both an 855S and 855B enrollment/revalidation form. These fees hit small independent pharmacies disproportionately who are already overly burdened in Part B by excessive accreditation fees, aggressive audits, and low payments. Pharmacies are simply at the breaking point with these additional dual revalidation fees.

Section 6401(a)(2)(C)(ii) of ACA provides, as follows:

“(ii) INSTITUTIONAL PROVIDERS.—Except as provided in clause (iii), the Secretary shall impose a fee on each institutional provider of medical or other items or services or supplier (such as a hospital or skilled nursing facility) with respect to which screening is conducted under this paragraph in an amount equal to—

“(I) for 2010, \$500; and

“(II) for 2011 and each subsequent year, the amount determined under this clause for the preceding year, adjusted by the percentage change in the consumer price index for all urban consumers (all items; United States city average) for the 12-month period ending with June of the previous year.

The statute states that “each institutional provider” of items or services shall pay the fee. The statute does not indicate that a single institutional provider who provides two different types of services or items (i.e. vaccinations and DME supplies) shall pay a fee for each item or service. Had Congress intended such a result it would have drafted language stating that “the Secretary shall impose a fee on each institutional provider type” or that the fee shall be imposed “on each institutional provider for each type of medical or other item or service supplied.” The plain language of the statute indicates that Congress intended the fee to be applied once to each institutional provider.

Despite the plain meaning of the statutory language to apply the fee once to each institutional provider, CMS, at 76 CFR 5914, stated that “entities or individuals that enroll only in Medicare or only in Medicaid as more than one kind of institutional provider, for example, a DMEPOS supplier and a home health agency, will be required to submit the fee for each enrollment.” CMS’ overly broad expansion of the statutory language undermines the plain language of the statute. CMS has expanded the scope of the statutory application fee without the statutory foundation for doing so.

If Congress had intended for a single provider to pay two different fees, according to the type of service provided, it would have said so. Accordingly, CMS is in plain violation of the ACA statutory requirement on application fees and should revise the relevant regulation to require each institutional provider to pay a single application/revalidation fee, regardless of whether or not that provider has enrolled or revalidated using multiple 855 forms.

More disturbing is the fact that the pharmacy is paying twice for the same fraud waste and abuse screening. An established 855S pharmacy pays for medium level screening, which includes lower level screening. If that pharmacy is also an 855B pharmacy, it pays a second time for the lower level screening, which is already included in the medium level screening. The pharmacy is paying twice for the same lower level screening. What additional security can be obtained for Medicare by requiring a duplicative lower-level screening? Pharmacies are among the very lowest risk for Medicare fraud, waste and abuse.

CMS should not penalize small independent community pharmacies who are trying to serve Medicare patients simply because CMS cannot figure out an internal administrative procedure to designate those pharmacies that are submitting two separate 855 forms to only have to pay for one higher level screening. To the average pharmacy, it makes little sense to waive one set of fees for screenings for pharmacies that are enrolled in both Medicare and Medicaid –which are run by two separate entities – but not for pharmacies that use two separate 855 forms, yet serve Medicare patients within the same program. We urge the agency to reconsider this decision and only charge pharmacies a single revalidation fee. Thank you.

Sincerely,



John M. Coster, Ph.D., R.Ph.
Senior Vice President, Government Affairs

Cc: Senate Finance Committee Majority and Minority Staff
House Ways and Means Committee Majority and Minority Staff
Peter Budetti, Deputy Administrator, Center for Program Integrity, CMS