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Follow the Rules for Protested Amounts on Your Cost Reports or Lose Your Right to Appeal

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For cost reporting periods ending on or after December 31, 2008, the new regulations governing appeals before the Provider Reimbursement Review Board (PRRB) require that, in order to appeal an issue to the PRRB, a provider either (1) expressly claim a cost as an allowable cost on its cost report or (2) if CMS policy indicates the cost is not allowable, include the cost on the cost report as a protested amount. 42 C.F.R. § 405.1835(a)(1)(ii). The new PRRB rules also state that for cost reporting periods ending on or after December 31, 2008, a provider must demonstrate how it followed the applicable procedures for filing cost reports under protest, for any appealed self-disallowed items. PRRB Rule 7.2.C.

This new criterion has its basis in the statutory requirement for PRRB jurisdiction that a provider must be "dissatisfied" with its intermediary's final determination. 42 U.S.C. § 1395oo(a)(1)(A)(1). In the past, this requirement has been interpreted to mean that a provider must claim the cost on its cost report and have the cost disallowed by its intermediary, unless the provider failed to claim the cost on its cost report because it was acting consistent with CMS regulations, rules or instructions. In this latter case, the courts had determined that no claim need be included on the cost report, as to claim the cost would be futile in light of the agency's direction to the contrary and the intermediary had no ability to allow the cost. There are additional concerns about the propriety of claiming costs where the agency has instructed that such costs are not allowable, so many providers would omit these costs from their cost report and still be entitled to appeal them under the existing case law.

The new regulation and rule are subject to challenge on the basis that they restrict a provider's right to appeal beyond what is permitted by the statute. An individual or entity's right to its "day in court," in this case a provider's right to have its grievance heard by the PRRB, is usually construed in favor of granting the right to be heard. The statute as interpreted by the courts has allowed providers to appeal issues it has not claimed on its cost report, even when the cost is not on the protested amount line, if it did not claim the cost in order to comply with CMS policy that the cost was not allowable. The new regulation and rule would not afford providers the same right to appeal these issues, as it would require providers to include the costs on the protested line item on the cost report as a prerequisite to a right to appeal the cost.

Ober|Kaler's Comments: Although the new requirement is subject to challenge, it would be a costly and lengthy ordeal, as CMS would likely appeal

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any adverse decision up through the courts. Providers are better advised to include on their cost reports any cost that they may wish to later appeal, either as a claimed cost or as part of the protested amount. If claiming the cost as a protested amount, be sure to include information with the submission of your cost report that identifies the specific costs included on the protested line. The intermediary or Medicare contractor will disallow the costs on the protested line, and then the provider has a right to have its appeal heard by the PRRB.

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