

To our clients and friends:



HEALTH ALERT

JUNE 19, 2007

Boston

Washington

New York

Stamford

Los Angeles

Palo Alto

San Diego

London

www.mintz.com

One Financial Center
Boston, Massachusetts 02111
617 542 6000
617 542 2241 fax

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
202 434 7300
202 434 7400 fax

666 Third Avenue
New York, New York 10017
212 935 3000
212 983 3115 fax

707 Summer Street
Stamford, Connecticut 06901
203 658 1700

OIG Withdraws Proposed “Substantially in Excess” Rule

On June 18, 2007, the Office of Inspector General (“OIG”) for the Department of Health and Human Services withdrew its September 15, 2003 proposed rule clarifying the scope of its authority under the “substantially in excess” provision.¹ The proposed rule was the latest chapter in the long history of the OIG’s attempts to provide interpretive guidance on the statute that permits the exclusion of an individual or entity from participation in the federal health care programs if the individual or entity submits (or causes the submission of) bills or requests for payment that are substantially in excess of usual charges or costs.

The primary purpose of the proposed rule was to clarify the meaning of certain key terms. First, the OIG defined the term “usual charges” as either the provider’s average charge or the provider’s median charge (referred to as the “fiftieth percentile method”). In addition, the OIG established that the term “substantially in excess” meant only those charges or costs that are more than 120 percent of usual charges or costs. Finally, the OIG sought to clarify the statutory “good cause” exception by stating that it would not seek exclusion if excessive charges or costs are due to unusual circumstances or medical complications requiring additional time, effort or expense; increased costs associated with serving Medicare or Medicaid beneficiaries; or other good cause.

The OIG decided to withdraw the proposed rule, on which it received 323 comments from interested parties, because it did not have enough information to establish a single, fixed numerical benchmark for “substantially in excess” that could apply equitably across all health sectors and all items and services. Another factor leading to the OIG’s decision was that it could not ensure that a final rule would not have the unintended effect of increasing health care costs across the industry.

Nevertheless, the OIG made clear that it will continue to evaluate

203 658 1701 fax

1620 26th Street
Santa Monica, California 90404
310 586 3200
310 586 3202 fax

1400 Page Mill Road
Palo Alto, California 94304
650 251 7700
650 251 7739 fax

9255 Towne Centre Drive
San Diego, California 92121
858 320 3000
858 320 3001 fax

The Rectory
9 Ironmonger Lane
London EC2V 8EY England
+44 (0) 20 7726 4000
+44 (0) 20 7726 0055 fax

billing patterns on a case-by-case basis and closely review instances where providers and suppliers charge the Medicare and Medicaid programs substantially more than other payors without good cause. The OIG specifically mentioned the fact that Medicare fee schedules that serve as payment ceilings may not reflect market rates if they become outdated or if the methods used to update them do not capture prevailing market rates and expressed concern that providers and suppliers may continue to charge the government at these rates while charging lower market rates to other customers, including private insurers. Finally, the OIG made clear that, when evaluating usual charges for purposes of the substantially in excess provision, providers and suppliers do not need to consider free or substantially reduced charges offered to uninsured or underinsured patients who are self-paying patients.

In the absence of final regulations, providers and suppliers are left with scant guidance on the OIG's interpretation of the substantially in excess provision. Given the OIG's renewed commitment to enforcement of the substantially in excess provision, providers and suppliers should reevaluate current pricing practices to ensure compliance.

¹ See Section 1128(b)(6)(A) of the Social Security Act; 42 C.F.R. § 1001.701.

* * * * *

If you would like further information on any subject covered in this Alert, please contact Karen S. Lovitch (202.434.7324, KSLovitch@mintz.com) or the Mintz Levin attorney who ordinarily handles your legal affairs.

Copyright © 2007 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

The above has been sent as a service by the law firm of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. and may be considered an advertisement or solicitation. The content enclosed is not intended to provide legal advice or to create an attorney-client relationship. The distribution list is maintained at Mintz Levin's main office, located at One Financial Center, Boston, Massachusetts 02111. If you no longer wish to receive electronic mailings from the firm, please notify our marketing department by going to www.mintz.com/unsubscribe.cfm.