

PG Alert

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TRICARE Proposes Civil Monetary Penalties Authority

Scott R. Grubman (Chilivis Cochran Larkins & Bever LLP, Atlanta, GA)

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In late April 2019, the United States Department of Defense (DOD) issued a proposed rule that would permit it to impose civil monetary penalties (CMPs) against health care providers for defrauding TRICARE, the military health insurance program.¹ These proposed CMPs would give the DOD power to go after health care providers who violated TRICARE rules and regulations similar to the administrative authority that the U.S. Department of Health and Human Services Office of Inspector General (HHS-OIG) has to impose civil monetary penalties against health care providers who violate Medicare rules and regulations.

In issuing its proposed rule, the DOD cited what it believes to be rampant fraud related to claims submitted to TRICARE for compound drugs. According to the DOD, while it paid approximately \$5 million for compound drugs in 2004, it paid more than \$1.3 billion for those same drugs in 2015. According to the proposed rule, “[t]he astronomical increase in expenditures related to compound drugs was almost solely due to fraud and abuse.” The DOD’s proposed rule stated that while the U.S. Department of Justice (DOJ)

[I]s responsible for the prosecution of all fraud and abuse in all Federal healthcare programs, including Medicare, TRICARE, and the Federal Employees Health Benefits Program [it] does not have unlimited resources [and therefore] must prioritize cases and is unable to prosecute a large portion of those entities who commit fraud and abuse in the TRICARE programs.

The DOD believes that “the establishment of a CMP Program within the DoD will serve as a complementary function to the criminal justice process and provide additional deterrence to fraudulent actions against the Federal TRICARE Program and the recovery of funds lost to fraud and abuse.”

Similar to the OIG’s CMP authority, the DOD’s proposed rule would permit the imposition of penalties for a wide range of conduct including, but not limited to:

- knowingly presenting or causing to be presented a claim that:
 - is for items or services that were not provided as claimed;
 - is for an item or service and the claim is false or fraudulent;
 - is for a service furnished by an individual who is not a licensed physician;
 - is for an item or service furnished by a person who is excluded from participating in federal health care programs;
 - is for an item or service that is not medically necessary;
- arranging or contracting with an individual that the person knows has been excluded from federal health care programs;
- violations of the Anti-Kickback Statute;
- knowingly making, using, or causing to be made or used a false record or statement material to a false or fraudulent claim for payment;
- failure to grant timely access to the OIG for purposes of audits, investigations, and evaluations;
- knowingly making or causing to be made any false statement, omission, or misrepresentation of a material fact in any application, bid, or contract to participate or enroll as a provider or supplier; and
- knowingly retaining an overpayment.

In its proposed rule, the DOD states that the Defense Health Agency (DHA) will coordinate with other law enforcement agencies, including the DOJ and Defense Criminal Investigative Organizations (DCIOS) in resolving all CMP matters and that “[a]llegations of fraud will be referred promptly for investigation to the appropriate [entity].” DHA will also coordinate with HHS where Medicare claims are involved. As to the amounts of the CMPs under the DOD’s proposed rule, the DOD will follow the Civil Monetary Penalty Inflation Adjustment Act, found at 32 C.F.R. Part 269.

The DOD’s rule is simply a proposed rule, and will not be finalized until after a notice and comment period. Stakeholders are permitted to

submit comments to the DOD's proposed rule within 60 days from the date the proposed rule is published in the *Federal Register* (May 1, 2019).

¹ The DOD's Proposed Rule can be found online at <https://federalregister.gov/d/2019-08858>.

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1620 Eye Street NW, 6th Floor, Washington, DC 20006-4010
P. 202-833-1100 F. 202-833-1105