

## **DMEPOS Update: Physicians and Certain Other Professionals Now Exempt from DMEPOS Accreditation Requirements and MIPPA Delays Competitive Bidding, Terminates Round 1 Contracts**

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In the wake of reforms under the Medicare Improvements for Patients & Providers Act (“MIPPA”),<sup>1</sup> the Centers for Medicare & Medicaid Services (“CMS”) announced at a September 3, 2008 open door forum that physicians and certain other health care professionals who supply durable medical equipment, prosthetics, orthotics, and supplies (“DMEPOS”) no longer need to become accredited to obtain a supplier number from the National Supplier Clearinghouse (“NSC”). MIPPA also terminated competitive bidding Round 1 contracts and delayed the start of the competitive bidding program until 2009 in order to allow reforms to be made to the program.

### **CMS Announces Physicians and Other Professionals Are Exempt From DMEPOS Accreditation Requirements**

The DMEPOS accreditation rule was originally released in August 2006 and required that occupational therapists, physicians, physical therapists, and other persons who supply DMEPOS must be accredited by a CMS-approved accreditation organization in order to bill Part B for DMEPOS provided to beneficiaries.<sup>2</sup> CMS made its announcement regarding physician and other practitioner exemptions from the DMEPOS accreditation requirements in the wake of the July 2008 passage of MIPPA, which provides that eligible professionals and other persons are exempt from meeting the September 30, 2009 accreditation deadline unless CMS determines that the quality standards are specifically designed to apply to such professionals and other persons. We discuss MIPPA reforms in more detail below.

The accreditation exemption was prompted by several professional associations, including the American Medical Association, and other organizations, which coordinated their lobbying efforts and sent a letter to the Department of Health and Human Services Secretary Michael Leavitt on July 24, 2008, requesting that he use the authority granted by MIPPA to exempt physicians and other licensed health professionals from the accreditation requirement.<sup>3</sup> In response, Acting CMS

Administrator Kerry Weems used his discretion to exempt certain health care professionals from the accreditation requirements.

In its September 3, 2008 announcement, CMS clarified that all professionals listed under Section 1848(k) of the Social Security Act, as well as several others, are exempt.<sup>4</sup> This list includes:

- Physicians
- Physical Therapists
- Occupational Therapists
- Qualified Speech Language Pathologists
- Physician Assistants
- Nurse Practitioners
- Clinical Nurse Specialists
- Certified Registered Nurse Anesthetists
- Certified Nurse Midwives
- Clinical Social Workers
- Clinical Pathologists
- Registered Dietitians
- Nutritional Professionals
- Orthotists
- Prosthetists
- Opticians
- Audiologists
- Podiatrists

This is good news for physicians and other practitioners affected by this announcement because it means that, for now, they will not be subject to the financial burden of accreditation, which can range from \$2,000 to \$5,000 over a 3-year period.<sup>5</sup> CMS confirmed that this change will be retroactive to June 30, 2008 and has advised that providers who have been denied NSC supplier numbers for failing to meet the DMEPOS accreditation requirements **should resubmit their applications** to NSC.<sup>6</sup>

DMEPOS accreditation and quality standards for these professionals, however, are not wholly dead. CMS announced that this most recent action is only a delay in the accreditation requirements and quality standards. Revised standards for DMEPOS will be issued in 2009.<sup>7</sup>

Other DMEPOS suppliers that were not specifically exempted by CMS, such as home medical equipment providers, pharmacists and pharmacies, must still comply with the September 3, 2009 accreditation deadline and submit their applications for accreditation **by January 31, 2009** in order to ensure that they can become enrolled as a DMEPOS supplier **by the September 30, 2009 deadline**.<sup>8</sup> If a DMEPOS supplier that is subject to accreditation fails to become accredited, NSC will revoke the DMEPOS billing privileges on **October 1, 2009**.

### **Competitive Bidding Round 1 Contracts Terminated and Competitive Bidding Program Delayed**

The Medicare Improvements for Patients & Providers Act of 2008 or MIPPA was enacted on July 15, 2008. By approving this legislation Congress delayed the start of the Medicare DMEPOS Competitive Bidding Program until 2009 to allow reforms to be made to the program.

Pursuant to MIPPA, Round 1 contracts are terminated, and DMEPOS items and services that had been included in Round 1 of the competitive bidding program can be

furnished by **any** enrolled DMEPOS supplier in accordance with existing Medicare rules.<sup>9</sup> Payment for these items and services will be made under the Medicare fee schedule. Although the legislation delays the competitive bidding program, it potentially saves the Medicare program billions of dollars because CMS will reduce the Medicare fee schedule for the bidded DMEPOS items and services by 9.5% nationwide effective January 1, 2009. This 9.5% reduction creates the same savings that the competitive bidding program would have provided and allows Medicare beneficiaries to continue to receive DMEPOS from local suppliers.<sup>10</sup>

MIPPA comes after much industry criticism. In June 2008, several lawsuits were filed in an effort to stop the commencement of the competitive bidding program. Critics argued that the competitive bidding program improperly excluded hundreds of qualified suppliers, which would reduce services and access to care for Medicare beneficiaries. Critics also argued that limiting the number of DMEPOS suppliers would ultimately translate into higher costs for longer hospital stays, more frequent emergency room visits, and more acute care services. For example, in cities where Round 1 of the competitive bidding program was implemented on July 1, 2008, reports were made of patients who were forced to stay longer in hospitals while providers scrambled to locate hospital beds, power wheelchairs, home oxygen equipment, and other DMEPOS items and services needed for these patients to continue their recovery and therapy at home.<sup>11</sup>

### Understanding MIPPA Section 154

The following is a summary of MIPPA’s key reforms from Section 154:

<p>Bidding Delay</p>	<ul style="list-style-type: none"> <li>• The legislation terminates contracts under competitive bidding Round 1 and will restart the contracting process in 2009, delaying Round 1 program implementation for 18 months; contracts awarded under Round 1 will be implemented in January 2010</li> <li>• The Round 2 contracting process will begin in 2011</li> <li>• Payment adjustments in non-bid areas may not take effect until Round 2 is completed</li> </ul>
<p>Bidding Process Reforms</p>	<ul style="list-style-type: none"> <li>• CMS must notify bidders of paperwork discrepancies and give them an opportunity to correct those discrepancies within a reasonable timeframe</li> <li>• CMS has the authority to subdivide MSAs with populations of 8 million or more</li> <li>• The legislation exempts from competitive bidding, for at least 5 years, rural areas and MSAs not selected under Round 1 or Round 2 with populations of 250,000 or less</li> <li>• Suppliers bidding on diabetic testing supplies must offer brands covering at least 50 percent of the market by volume<sup>12</sup></li> </ul>

	<ul style="list-style-type: none"> <li>• Before using its authority to adjust prices in non-bid areas, CMS must issue a regulation and consider how prices set through competitive bidding compare to costs for such DMEPOS items and services in non-bid areas</li> <li>• The Office of Inspector General (OIG) must verify any calculations used to determine the pivotal bid amounts and winning bid amounts</li> </ul>
Quality Measures	<ul style="list-style-type: none"> <li>• All suppliers must be accredited by <b>October 1, 2009</b> to ensure that all suppliers, whether billing Medicare directly or subcontracting, are accredited</li> <li>• Contracting suppliers must disclose all subcontracting relationships to CMS</li> <li>• The legislation excludes physicians and other practitioners from DME accreditation</li> <li>• The legislation establishes a separate ombudsman within CMS to handle supplier and beneficiary issues related to the competitive bidding program</li> </ul>
Other Reforms	<ul style="list-style-type: none"> <li>• The legislation excludes complex rehab—defined as group 3 power wheelchairs and above and the accessories furnished with them—from the competitive bidding program</li> <li>• The legislation excludes negative pressure wound therapy from Round 1 and requires CMS to evaluate how these items are coded and paid</li> <li>• The legislation excludes Puerto Rico from Round 1 rebidding because CMS did not receive enough valid bids in many of the product categories to award contracts in the original Round 1 bidding<sup>13</sup></li> <li>• Physicians and other treating practitioners may supply off-the-shelf orthotics to patients without being awarded a contract</li> <li>• Hospitals in bidding areas may supply the same DMEPOS items and services that physicians and other practitioners are allowed to supply—those considered an integral part of professional services, e.g., walkers, canes, crutches—without being awarded a contract</li> <li>• The legislation ensures that podiatrists and other practitioners can prescribe DMEPOS items and services by using a broader definition of “physician”<sup>14</sup></li> <li>• The legislation delays a mandated Government Accountability Office (“GAO”) report to coincide with Round 1 and to expand the scope of this report</li> </ul>

## Conclusions

MIPPA introduced reforms affecting the DMEPOS competitive bidding program in response to industry complaints and concerns about deficiencies in the program. As a result of MIPPA reforms, for the immediate future, physicians and certain other professionals do not have to become accredited to supply DMEPOS to their patients. Competitive bidding Round 1 contracts are terminated, and the implementation of the competitive bidding program is delayed until 2009, allowing beneficiaries to obtain DMEPOS from any Medicare supplier, not just those suppliers who won bids.

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Endnotes

- <sup>1</sup> H.R. 6331, P.L. 110-275, § 154 (2008).
- <sup>2</sup> 71 Fed. Reg. 48,354 (Aug. 17, 2006).
- <sup>3</sup> “CMS Exempts Physicians, Practitioners From DMEPOS Accreditation,” Inside CMS, vol. 11, no. 18 (Sept. 4, 2008).
- <sup>4</sup> 42 U.S.C. § 1395w-4(k)(3); “CMS Exempts Physicians, Practitioners From DMEPOS Accreditation,” Inside CMS, vol. 11, no. 18 (Sept. 4, 2008). Based on a Sept. 17, 2008 call to CMS, pedorthists are among the providers currently exempt from accreditation, and CMS will be issuing rulemaking to that effect in the near future.
- <sup>5</sup> American Occupational Therapy Association, “CMS Announces That Occupational Therapists Are Exempt From DMEPOS Accreditation Requirements,” <http://www.aota.org/News/AdvocacyNews/ExemptDMEPOS.aspx> (Sept. 5, 2008).
- <sup>6</sup> “CMS Exempts Physicians, Practitioners From DMEPOS Accreditation,” Inside CMS, vol. 11, no. 18 (Sept. 4, 2008); American Occupational Therapy Association, “CMS Announces That Occupational Therapists Are Exempt From DMEPOS Accreditation Requirements,” <http://www.aota.org/News/AdvocacyNews/ExemptDMEPOS.aspx> (Sept. 5, 2008).
- <sup>7</sup> See American Board for Certification in Orthotics, Prosthetics & Pedorthics, “CMS Grants Orthotists, Prosthetists & Pedorthists Exemption to the Mandatory Accreditation Deadline,” [http://www.abcop.org/News\\_Item.asp?mode=print&news\\_id=0905200801](http://www.abcop.org/News_Item.asp?mode=print&news_id=0905200801) (Sept. 8, 2008).
- <sup>8</sup> “CMS Exempts Physicians, Practitioners From DMEPOS Accreditation,” Inside CMS, vol. 11, no. 18 (Sept. 4, 2008).
- <sup>9</sup> H.R. 6331, P.L. 110-275 § 154(b).
- <sup>10</sup> “CMS Exempts Physicians, Practitioners From DMEPOS Accreditation,” Inside CMS, vol. 11, no. 18 (Sept. 4, 2008).
- <sup>11</sup> Press Release, *Homecare Group Urges Congress to Overturn Medicare Veto and Thanks Congressman Altmire for Leadership in Preserving Access to Homecare*, American Association for Homecare (Jul. 15, 2008), <http://www.aahomecare.org>.
- <sup>12</sup> This requirement does not apply to Round 1.
- <sup>13</sup> Round 2 of the competitive bidding program will include the 70 MSAs previously selected by the Secretary.
- <sup>14</sup> This was a drafting error in the Medicare Modernization Act of 2003 that is being corrected.