WAIVER OF LIABILITY AND COMPLIANCE WITH THE PATIENT PROTECTION AND AFFORDABLE CARE ACT'S ADDITIONAL DOCUMENTATION REQUIREMENTS

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The Patient Protection and Affordable Care Act (the Affordable Care Act) has made a number of changes to the Medicare program in an effort to assure that the providers, physicians, and other suppliers participating in the Medicare program bill accurately for their services or supplies. Among these changes are additional documentation requirements on referrals to programs at high risk of waste and abuse. Compliance with these documentation requirements may result in increased cost and inconvenience to providers. In addition, the failure to comply with the new requirements may limit a provider's ability to assert the "waiver of liability" defense in a future Medicare audit.

When overpayments are identified in Medicare cases for the reason that the services were not "medically necessary", or for certain custodial care or homecare determinations, the "waiver of liability" defense can be used. The statutory authority for the "waiver of liability" defense is set forth in Section 1879(a) of the Social Security Act, which relieves a provider of liability for an overpayment if the provider "did not know and could not reasonably have been expected to know that payment would not be made." If successful, the provider will be reimbursed for the services even if they were determined not to be medically necessary when reviewed.

To effectively assert the "waiver of liability" defense, it is important that providers be aware of and in compliance with relevant Medicare requirements. Several federal cases illustrate the importance of compliance with documentation requirements. In these cases, suppliers of durable medical equipment (DME) appealed the Medicare contractor's determination that the power wheel chairs they provided were not medically necessary. The suppliers asserted the waiver of liability

defense. However, they had failed to retain certain documentation substantiating their equipment claims, as required by Medicare. The failure to comply with these record retention requirements proved fatal to the suppliers' waiver of liability defense and the court held that the suppliers knew or should have known that their claims were deficient.

On July 6, 2010, the Centers for Medicare and Medicaid Services (CMS) implemented a provision of the Affordable Care Act that adds requirements for providers, physicians, and other suppliers to provide documentation on referrals to programs at high risk of waste and abuse.

Previously, 42 C.F.R. § 424.516(f) required a provider or supplier of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) to maintain ordering and referring documentation received from a physician or eligible professional for seven (7) years from the date of service. Physicians and eligible professionals were also required to maintain such written ordering and referring documentation for seven (7) years from the date of service.

Provisions of the Affordable Care Act expanded the existing documentation requirements to include orders and referrals for covered home health, laboratory, imaging, and specialist services in addition to the documentation requirements for DMEPOS. As a result, a provider or supplier who furnishes the ordered services is required to maintain documentation for seven (7) years from the date of service and, upon the request of CMS or a Medicare contractor, to provide access to that documentation. Likewise, Physicians and eligible professionals who order or refer items of DMEPOS or laboratory, imaging, and specialist services are also required to maintain documentation for seven (7) years from the date of the order, certification, or referral, and, upon the request of CMS or a Medicare contractor, to provide access to that documentation.

The documentation required includes both written and electronic documents relating to written orders or request for payment for items of DMEPOS and home health, laboratory,

imaging and specialist services. The documentation requirements also include the NPI of the physician who ordered the home health services and the NPI of the physician or eligible professional who ordered or referred the DMEPOS, laboratory, imaging or specialist services.

Many providers of ordered or referred services affected by these new requirements are not positioned to determine whether services are medically necessary and payment will be made. In these cases, the determination of medical necessity rests with the referring or ordering physician. As a result, the performing providers and suppliers have a strong waiver of liability defense if overpayments are later identified. However, the failure to comply with the Affordable Care Act's additional documentation requirements or other regulatory requirements may prevent them from effectively asserting this defense on appeal.