

The Military Health Care Fraud and Abuse Prevention Program: The Department of Defense Issues Proposed Regulations regarding TRICARE and Civil Monetary Penalties

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The U.S. Department of Defense (“DOD”) claims that fraud and abuse is inhibiting the ability of the Defense Health Agency (“DHA”), the agency responsible for administering TRICARE, to support and deliver “integrated, affordable, and high-quality health service to all DOD beneficiaries” and to be “a responsible steward of taxpayer dollars.” Noting that the Department of Justice (“DOJ”) has limited resources to prosecute those who commit fraud and abuse against the TRICARE program, the DOD now seeks to step in and ramp up enforcement.

On May 1, 2019, the DOD issued a [proposed rule](#) that would implement the DOD’s authority to impose civil monetary penalties (“CMPs”), as described in [Section 1128A](#) of the Social Security Act, against providers and suppliers who commit fraud and abuse against the TRICARE program, creating the “Military Health Care Fraud and Abuse Prevention Program” (the “Program”). If the Program is finalized, TRICARE providers and suppliers would be subject not only to prosecution by the DOJ for alleged fraud and abuse, but also to CMPs imposed by DOD, opening up these individuals and entities to more risk and new financial liability.

In implementing its CMP authority, the DOD states that it would adopt the Department of Health and Human Services’ (“HHS”) “well-established CMP rules and procedures” to “enable both TRICARE and TRICARE providers to rely upon Medicare precedents and guidance issued by the HHS Office of Inspector General (“OIG”) regarding conduct that implicates” the CMP law. The rule, as proposed, closely follows the organization and substance of HHS’s CMP regulations, and, like the HHS regulations, addresses the following:

- Liability for penalties and assessments;
- Determinations regarding the amount of penalties and assessments;
- CMPs and assessments for false and fraudulent claims and other similar misconduct;

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- Penalties and assessments for unlawful kickbacks;
 - CMPs and assessments for contracting organization misconduct;
 - Procedures for the imposition of CMPs and assessments;
 - Judicial review;
 - Time limitations for CMPs and assessments;
 - Statistical sampling; and
 - Appeals.

The proposed rule's significant overlap with the HHS regulations, and the DOD's assertion that TRICARE providers may "rely upon Medicare precedents and guidance," are noteworthy, suggesting that, if the rule is finalized, TRICARE providers and suppliers may look to OIG sub-regulatory authorities for guidance in interpreting the DOD regulations. The extent to which the DOD may permissibly rely on such authorities as mandatory, however, may ultimately be subject to much debate (and litigation).

In a similar vein, as Medicare and Medicaid providers and suppliers must frequently negotiate settlements with both the DOJ and HHS, such an obligation would likely now be imposed on TRICARE providers and suppliers when subject to potential prosecution. As "CMPs may be imposed in addition to criminal proceedings," the DOD foresees its CMP authority as serving "a complementary function to the criminal justice process," which would "provide additional deterrence to fraudulent actions against the Federal TRICARE Program and the recovery of funds lost to fraud and abuse."

For health care providers and suppliers who serve Medicare, Medicaid, and TRICARE beneficiaries, the Program may also complicate the analysis of which government agency will be addressing any potential CMP violations. DOD notes in the proposed rule that "[a]llegations of fraud will be referred promptly for investigation" to criminal investigators and the DOJ, but that "[i]n cases where DOJ or the appropriate DCIO [Defense Criminal Investigative Organization] does not participate the case will be governed by either DHA's or HHS's CMPL authorities depending on whether the relevant claims are primarily TRICARE Claims or Medicare Claims." However, particularly in the early stages of investigating an alleged violation, it may not be clear which type of claims will dominate, leaving the primary agency ultimately adjudicating the claims also unclear.

The DOD anticipates that the proposed rule would reduce Defense Health Program requirements by \$74M from FY 2020 – FY 2024. Comments must be submitted by July 1, 2019.

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