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OFFICE OF THE ATTORNEY GENERAL



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October 22, 2007

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Steve E. Phurrough, M.D., MPA
Director, Coverage and Analysis Group
Centers for Medicare & Medicaid Services
Mail Stop C1-09-06
7500 Security Boulevard
Baltimore, MD 21244

Re: Request for clarification regarding Medicaid "covered outpatient drugs"

Dear Dr. Phurrough:

In working on state actions recently against various pharmaceutical manufacturers for off-label promotion causing the filing of false Medicaid claims, it has come to our attention that many state Medicaid programs are liberally reimbursing -- and presumably receiving Federal Financial Participation ("FFP") -- for outpatient drugs used for indications that are neither FDA-approved nor supported in the relevant compendia. Clarification on the permissible scope of FFP-eligible reimbursement by state Medicaid programs for covered outpatient drugs is critically important.

More specifically, §1927 of the Social Security Act (42 U.S. Code §1396r-8, often referred to as OBRA '90) provides:

- in subsection (k)(3) that the term "covered outpatient drug" excludes "a drug or biological used for a medical indication which is not a medically accepted indication."
- in subsection (k)(6) that the term "medically accepted indication" means any use approved by the FDA or "supported" in one or more specified compendia
- in subsection (g)(1)(B)(i) that the specified compendia are American Hospital Formulary Service Drug Information, United States Pharmacopeia-Drug Information (or its successor publications) and the DRUGDEX Information System

ISSUE #1: Does CMS interpret federal law to restrict FFP for state Medicaid programs to uses of otherwise "covered outpatient drugs" that are either FDA-approved or supported in the specified compendia?

ISSUE #2: If the answer to question #1 is yes, has the federal government delegated to the states any authority to approve exceptions, i.e., to expand FFP-eligible Medicaid prescription drug coverage? (e.g., May a state grant its Drug Utilization Review Board the authority to approve FFP-eligible Medicaid reimbursement for off-label indications not supported in the specified compendia?)

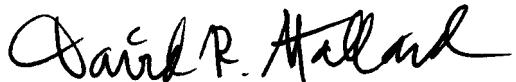
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Your clarification regarding these Medicaid drug coverage issues is respectfully requested.

Very truly yours,



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/DRS

cc: David Frank, Director, Medicaid Integrity Group