

Client Alert

*A report for clients and friends
of the firm*

March 2001

Some Medicare intermediaries are requiring providers to submit a "representation letter" attesting to the accuracy of previously-filed cost reports. Submitting this letter may give rise to additional civil and criminal liability.

Representation Letters Required by Fiscal Intermediaries

Some Medicare fiscal intermediaries have begun to ask providers, at the close of their year-end audit, to file a letter containing certain representations regarding their cost reports. In this letter, a provider must represent that its cost report was accurate or must identify and disclose specific documentation relevant to any defects in the cost report as filed. A provider that does not furnish this letter is told that its payments from Medicare will be terminated.

To date, neither HCFA nor any fiscal intermediary has identified the legal basis for requiring this filing, which has become known as a "representation letter." Nonetheless, the filing of this letter may create a basis for civil or criminal charges in addition to those providers already confront. Therefore, all providers should carefully consider the legal implications of furnishing a representation letter.

Background

Under Part A of the Medicare Act a provider must file a cost report, typically within five months after the end of its fiscal year. When the provider files a cost report it must execute a certification page. On this page, an officer or administrator of the provider must confirm that the report is based on the books and records of the provider and that it is a true, correct

and complete statement of the data. The officer also must confirm that s/he is familiar with applicable Medicare laws and regulations.

This certification carries explicit warnings. The officer is warned that any misrepresentations of information may be punishable by criminal, civil and administrative actions, fines, and imprisonment under federal law. Also, misrepresentations can lead to the termination of the provider's participation in the Medicare program.

Representation Letters

In the last six months some intermediaries, apparently acting on their own, have demanded additional representations from providers, distinct from those on the certification page filed with the year-end cost reports. These demands are outlined in a request the intermediary issues to the provider toward the end of the audit but before the exit conference.

Typically, the intermediaries ask a provider to make three separate representations:

First, the provider must state whether it prepared "a reserve cost report or accounting journal entries that disclose potential exposure to the Medicare program cost report settlement determination."

Second, the provider must state whether it has any knowledge of "questionable issues that should be disclosed to the intermediary (other than issues identified on the protested item line)."

Third, the provider must state whether it is "aware of any other circumstances which may prevent the submission of an open, accurate and honest cost report."

Generally, the provider must make these representations in writing, on its letterhead and signed by an officer with authority to sign the original cost report. In addition, if relevant, the provider must submit with the letter copies of any cost report, journal entries, or other documentation relevant to the issues or items it has disclosed.

Considerations Regarding Representation Letters

A provider confronted with a request for a representation letter should carefully consider the implications of any response. To date, neither HCFA nor any intermediary has identified the statutory or regulatory basis for this demand. In fact, some intermediaries have elected not to demand this type of letter from the providers they service because, in light of the original certification page, the representation letter is redundant and therefore unnecessary.

Nevertheless, a representation letter may compound the penalties to which the provider is already subject under existing law. A provider that files incorrect claims in the cost report already confronts the threat of a range of civil and criminal penalties, especially in today's aggressive enforcement environment. A provider that submits a representation letter that fails to identify those errors could be subject to an additional set of fines and penalties, including five years in prison.

In light of the questionable basis for representation letters and the additional problems that a representation letter may create, a provider should carefully evaluate an intermediary's request for a letter. First, this enforcement tactic simply highlights each provider's need to scrutinize its cost reporting and its claims processing. Providers already are facing enforcement threats on account of unintentional mistakes rather than fraudulent claims. The filing of a representation letter can give rise to a threat of even more civil and criminal penalties. This addi-

tional exposure may make it more difficult to defend against the government's charges of fraud and abuse, regardless of the merits of the government's case.

The financial, accounting, and legal problems of a representation letter will vary from provider to provider. For example, a provider with problems in past audits, or a company in a segment of the health care industry now under closer scrutiny, may face risks greater than other companies in filing a representation letter. Therefore, each provider must consider its unique position in the highly-charged enforcement environment in developing its response to a representation letter.

Second, a provider should consider its options in responding to the request for a representation letter from its intermediary. For example, a provider might ask the intermediary for the legal basis for the request before it submits a response.

Alternatively, the provider may be able to file a letter that contains less comprehensive statements than the blanket representations sought by the intermediary. Finally, a provider should evaluate whether its intermediary actually will terminate payments if the provider does not file a representation letter. Similar approaches may minimize the fraud and abuse exposure that a provider generates by answering a request.

Has Your Address Changed?

Please let us know if your mailing address needs to be updated. Contact Deborah Chernoff with the correct information either via email: dchernoff@proskauer.com or fax: 212.969.2900. Thank you.

For further information, please contact:

Thomas H. Brock	tbrock@proskauer.com	202.778.1106
William Cowden	wcowden@proskauer.com	202.416.6807
or any other member of Proskauer's Health Care Department in:		
New York, NY	212.969.3000	Washington, DC 202.416.6800
Boca Raton, FL	561.241.7400	Los Angeles, CA 310.557.2900
Newark, NJ	973.274.3275	

This client alert is intended solely to provide general information and is not intended to be legal advice applicable to specific matters.

© 2001 Proskauer Rose LLP

You can also visit us on our Website at www.proskauer.com