



MEMORANDUM

TO: Centers for Medicare and Medicaid Services
FROM: Richard D. Raskin
RE: Proposed Rule; Competitive Acquisition for DMEPOS; CMS-1270-P
("Opportunity for Networks") – Concerns Regarding Anticompetitive Conduct by
Bidding Networks
DATE: January 23, 2007

On behalf of Apria Healthcare, we wish to call to your attention a matter of significant concern regarding the proposed rules for competitive acquisition of certain durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). The concern relates to proposed § 414.418, "Opportunity for Networks." Specifically, we believe that the provision, as proposed, may require clarification or expansion to protect against a very real threat of competitive harm from the operation of bidding networks in local and national DMEPOS markets. Indeed, we are already aware of situations where the formation of bidding networks in response to the proposed rule appears to raise serious antitrust concerns. We urge CMS to consider modifying the rule, or issuing additional guidance concurrently with the final rule itself, to make clear that the rule is not intended to create a safe harbor from antitrust prosecution.

Proposed § 414.418(a) allows two or more suppliers to "collectively submit a single bid to furnish the items included in a product category under a competitive bidding program." 71 Fed. Reg. 25701. Subsection (b)(4) of the rule states: "The network cannot be anticompetitive. The network members' market shares for a product category, when added together, cannot exceed 20 percent of the Medicare market within a competitive bidding area." Id.

As indicated in its previous comments to CMS, Apria supports the 20 percent limit set forth in subsection (b)(4). It is concerned, however, that the proposed rule as currently stated may be misinterpreted as creating a safe harbor from antitrust prosecution for networks that stay within that limit. Such an interpretation would be inconsistent with antitrust principles, and potentially damaging to competition in markets for DMEPOS.

Federal antitrust enforcers have addressed the antitrust principles applicable to contracting networks. While market share is one important consideration, it is not the sole determining factor. Before competing providers may jointly submit a proposed price to a purchaser, they must also demonstrate that they are sufficiently integrated financially or clinically to justify a joint agreement on price. See Department of Justice/Federal Trade Commission, Statements of Antitrust Enforcement Policy in Health Care, Statements 8-9 (1996) ("Health Care Statements"). In particular, the Health Care Statements establish a "safety zone" for exclusive networks where the provider members constitute 20 percent or less of the providers in the market and the providers "share substantial financial risk." Id., Statement 8.



The proposed rule contains no requirement of risk-sharing among the members in a DMEPOS network formed for the purpose of submitting collective bids. Just as important, the proposed rule does not require the network to establish that it has safeguards in place to protect against the risk that the agreed-on bid prices might be inappropriately used outside of the Medicare acquisition process. The absence of additional guidance leaves open the very real risk that the regulations will be misinterpreted as sanctioning price-fixing by competing DMEPOS providers.

In that regard, Apria is particularly concerned about reports in the trade press that networks are already in formation that pose a threat of anticompetitive behavior. Recent articles in HME News and HomeCare (copies attached) report that 35 home medical equipment providers in Tampa have formed a network to submit bids to CMS. But the network's activities will not stop there. The articles quote the network's leader as stating that the network will also be used to approach commercial insurance companies. The articles further note that an affiliated network has taken shape in Miami that includes 90 home medical equipment providers, and that additional affiliates are planned for Jacksonville and Orlando. Nothing in the articles suggests that these networks will have sufficient integration among the provider members to justify joint bidding under well-established antitrust standards.

Following the publication of these articles, Apria was approached by one of its competitors regarding the possible formation of a network in one of the competitive bidding regions. Pointing to the Tampa situation, the competitor proposed that, by joining together in a bidding network, Apria and other providers could "prevent unnecessary price erosion" and "greatly reduce our collective loss." The competitor apparently had the impression that the mere formation of a network would "circumvent any impropriety such as collusion." (Copy attached; names redacted).

In light of these circumstances, we urge CMS to make clear – in the rules themselves, or at the very least in guidance issued concurrently with the regulations – that nothing in the rules is intended to supplant or in any way alter the antitrust principles applicable to provider networks. Absent such guidance, we are concerned that providers may continue to labor under the false impression that, so long as they maintain compliance with the 20 percent limit, they will be free to collectively price their services without antitrust risk to both government and commercial payors.

Thank you for considering these comments. If you have any questions or would like any additional information, please let us know. You may contact me at (312) 853-2170 or rraskin@sidley.com.

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Independent HMEs Muscle Up to NCB

Jan 8, 2007 2:24 PM

TAMPA, Fla.--With national competitive bidding looming, some HME providers are banking on networks or rollups to give them the muscle to compete--and to survive.

Thirty-five small to medium providers in the Tampa, Fla., area in December formed Med Trust Tampa Bay LLC, a sister to Med Trust Corp. of Southern Florida, which was organized early last year.

Med Trust Tampa Bay is aggressively preparing for competitive bidding, said Robert M. Arado, administrator. His company, Caremed Respiratory Services, is spearheading the effort.

"[We are] forging ahead to meet all the requirements to satisfy CMS guidelines for the competitive bid," he said, noting that most of the Med Trust members are accredited. "We are rigorously working with those who are not to get them accredited."

Arado said he hopes all members of Med Trust will be accredited in four months.

In addition, he said, "We're asking all members to increase the credit lines with their vendors. We need to come in as a network with big dollars in credit lines ... Medicare will see that we are a strong player."

Meanwhile, three South Carolina providers--Adaptive Medical in Spartanburg, ApneaRx in Clemson and Mobile Health Care in Greenville--were rolled up into the newly formed Southern Home Medical, a publicly held company that debuted last month. Nearly a dozen more companies are considering joining SHM, according to Greg Tucker, owner of Adaptive Medical and president and CEO of the new company.

Dennis Nowak, RT, owner of ApneaRx, believes the move positions his company and the others for competitive bidding.

"It's a great alternative for anyone who is worrying about competitive bidding and other things that are facing us in DME," he said, noting that under the Southern Home Medical umbrella, "you can purchase better equipment, get better pricing and make a profit at lower charge rates."

Besides, he noted, "There's a chance I wouldn't be in business if I didn't do it."

Waterloo, Iowa-based VGM Group is also forming a network for its members who want to participate.

"We decided to do this because we knew [providers] were going to need help and, simultaneously, we were

getting requests," said Jim Walsh, president and general counsel for the buying group.

Walsh sees some benefits, especially for small providers. Being in a network could mean they wouldn't have to work outside their geographical area or service needs they are not equipped or accustomed to handling, he said.

But not everyone favors networks. In a September *HomeCare* magazine survey, 61 percent of providers said they planned to bid on their own rather than as part of a network, with 32 percent saying they'll take the network route. While 49 percent of respondents said they think networks are workable, 43 percent said they aren't, giving as their main concerns too much dependence on other companies and headaches with administration and billing. (See "Ready or Not," *HomeCare*, September 2006.)

Walsh also had some cautions for providers. "We are concerned that smaller providers might fall into networks that don't get the job done," he said. The network "has to be able to technically handle the business ... do the paperwork associated with this, get the payments out to the individual providers without tripping over the obstacles CMS is famous for putting in your way ... Network administrators are going to be holding their money."

Providers must choose wisely, Walsh said. "They're putting their business at risk. Once that deadline goes by, they aren't doing Medicare for a long while." When the bid contracts are awarded, they will extend for three years.

Arado is confident his network has its ducks in a row. "The only drawback we see is if the whole thing is a wash with Medicare and they aren't able to take care of competitive bidding, and we would have put in all this money. But without [the network], we're going to see a fallout of providers that we haven't ever seen before. We have a better chance as a group than by ourselves."

Meanwhile, VGM, under its Last Chance for Patient Choice organization, remains poised to file a federal lawsuit challenging competitive bidding on constitutional and other grounds. All it's waiting for is the announcement from CMS of the 10 MSAs.

"Once those unfortunate entities have been announced," said John Gallagher, VGM's vice president, government relations, "we'll be looking for articulate end-users who would be willing to sign onto a class-action lawsuit."

For more information on Last Chance, visit www.lastchanceforpatients.org.

For more on Southern Home Medical, see "Taking Stock of the Market," *HomeCare*, December 2006.

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NEWSWIRE

Florida network forms to tackle NCB
01.01.2007

TAMPA, Fla. - A group of 35 home medical equipment providers in and around Tampa have created a network to take advantage of buying power and other economies of scale intended to help them survive and thrive.

Med Trust Tampa Bay is a direct, but separate, offshoot of Med Trust Corp. of South Florida, which was developed in Miami early last year. Approximately 90 HME providers belong to the Miami organization, said Javier Talamo, who spearheaded that group.

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competitive bidding as a network. CMS plans to kick off competitive bidding some time this year.

Additionally, by helping members get accredited and enforcing a strict standard of conduct, Med Trust aims to ensure compliance with all state and federal requirements, said Robert M. Arado, owner of CareMed Respiratory Services in Tampa, the force behind the new group.

"I've been in this business for 37 years and over the last 20 years, Florida has had a bum rap: a few (bad apples) have labeled the whole industry in Florida as a questionable industry," he said. "This is an excellent opportunity for us to clean this up. We are going to be very strict in who we accept in to the network."

In addition to the Tampa- and Miami-based Med Trust groups, Arado has plans to start up similar networks in Orlando and Jacksonville.

"We will be able to go into insurance companies and say, 'We are a member of Med Trust and have statewide coverage,'" he said. "We have an opportunity to compete with large companies."

HME RESOURCES

SOURCE BOOKS

State of the Industry 2006

As you prepare bids for competitive bidding, we think it's only right that you get a snapshot of who's doing how much of what in any given marketplace. This is a start. We hope it's useful.

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