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ADVISORY

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CONGRESS RAMPS UP SURVEY ENFORCEMENT FOR MEDICARE HOSPICE PROGRAMS

Tucked away in the recently enacted 5,500+ page Consolidated Appropriations Act of 2021 (the "Act") are important provisions tightening up the survey and enforcement procedures for Medicare hospice programs. The Act (**Pub. L. 116-260**) was signed into law on December 27, 2020. Among other things, the Act's hospice provisions require that the Secretary of Health and Human Services (the "Secretary"), by October 1, 2022, develop intermediate sanctions, including civil monetary penalties, and impose these sanctions on Medicare-certified hospice programs in response to survey deficiencies.

This spotlight on hospice survey enforcement comes as no surprise. For a few years, Congress has considered several bills to put more rigor into the Medicare survey process for hospices, including the Helping Our Senior Population in Comfort Environments Act ("HOSPICE Act"). This legislative effort was fueled by a series of **recent reports** that the Department of Health and Human Services' Office of Inspector General ("OIG") issued highlighting quality of care issues among Medicare-certified hospices. Many provisions of the HOSPICE Act were incorporated into the Act. While this development was inevitable, hospice industry representatives were able to temper the impact and ensure that some helpful provisions were included.

SUMMARY OF KEY REQUIREMENTS

The Act addresses survey procedures for Medicare hospice programs, requires public disclosure of survey results and enforcement actions and provides the Secretary with enforcement options and penalties to address deficiencies. Following is a short list of the key provisions:

Survey Frequency
Standard surveys of Medicare hospice programs must be conducted by a state or local survey agency, or approved accreditation body, not less often than every 36 months. This provision codifies the current, informal timing for hospice Medicare surveys, despite efforts during the legislative process to require more frequent, annual surveys.

Public Transparency
Each state or local survey agency and each approved accreditation body must submit inspection reports, enforcement actions and any other information that the Secretary determines appropriate regarding hospice surveys. The information must include (even for accreditation bodies) the Form CMS-2567. Not later than October 1, 2022, the information submitted must be published on the Centers for Medicare & Medicaid Services (CMS) public website.

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Immediate Jeopardy
The legislation addresses immediate jeopardy, requiring that the Secretary take immediate action to ensure removal of jeopardy and correction of deficiencies or terminate hospice certification.

Intermediate Sanctions
By October 1, 2022, the Secretary must develop and implement a range of remedies to address hospice program survey results along with procedures for appealing the imposition of remedies. Congress listed three types of remedies that must be developed and imposed: (i) civil monetary penalties of no more than $10,000 per day, (ii) suspension of Medicare payments and (iii) appointment of a temporary manager. Congress left the implementation details to the Secretary, directing the Secretary to develop procedures for establishing the conditions under which remedies will be imposed, the amounts of fines to be imposed (with incrementally more severe fines for repeated or uncorrected deficiencies) and the severity of each remedy.

MEDICARE HOSPICE SURVEY PROCESS PROVISIONS

For many Medicare-certified providers, guidelines on how surveys are conducted, including the staffing and training of survey teams, are not addressed in statute but rather in CMS program guidance. Here, Congress decided to address these topics directly in the statute as follows:

Survey Inconsistencies
The Secretary and each state must implement programs to measure and reduce inconsistency in the application of survey results among surveyors.

Survey Teams and Conflicts of Interest
Starting October 1, 2021, surveys must be conducted by a multidisciplinary team of professionals, including a registered nurse. States must abide by specific conflict of interest rules in staffing surveys starting on October 1, 2021; a surveyor who (i) is serving or has served over the past two years as a member of the staff, or as a consultant to, the hospice program surveyed or (ii) has a personal or familial financial interest in the program being surveyed may not serve on the team surveying that program.

Surveyor Training
The Secretary must provide for "comprehensive" training of state and federal surveyors, as well as accreditation surveyors, in conducting hospice program surveys, including review of written plans for providing hospice care. This must be done by October 1, 2021, and no individual may serve as a member of a survey team unless the person has successfully completed a training and testing program.

The new Secretary will be tasked with implementing the Act's provisions. Hospice providers should be on the lookout for future regulatory activity during the ramp up to implementation.