

## Auditing Loophole in Medicare Part D

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American Pharmacies' members are frequently at the mercy of insurance companies, their affiliates (i.e., pharmacy benefit managers) and third party administrators. One essential area where they are most targeted financially is that of audits, whether it is in regard to an unlawful notification of an on-site audit or an erroneous demand for chargebacks. Many pharmacists forfeit deserved reimbursement in order to continue the dubious privilege of doing business with the tormentor, rather than fight the audit. The audit is really a mechanism for these entities to get in the door to recoup tens of thousands of dollars from small pharmacies, particularly independent pharmacies with lesser resources. American Pharmacies' members should be aware of the auditors' recent technique, which involves an auditing loophole in Medicare Part D.

Typically, when a pharmacist responds to an unlawful or erroneous audit, the "prompt payment to providers" rules (also known as SB 418), as codified in the Texas Insurance Code, is the sword that provides some defense and protection. This frequently results in some initial success in opposing the audits and chargebacks, despite the Texas Department of Insurance's lack of responsiveness in assisting pharmacists with enforcing the statutes against insurance companies and their affiliates.

Recently, the auditors and their attorneys are responding to the pharmacists' assertions that the requested audits are unlawful under Texas law with the response that Texas law is inapplicable because "the records being audited are *all* Medicare Part D claims." Unfortunately, the auditors' attorneys are correct, in that the Texas Insurance Code does not apply to audits, *if the only records subject to the audit are truly Medicare claims*. Of course, pharmacists' initial response should be to attempt to limit the scope of the audit to ensure the audit truly is only in regard to Medicare claims. The "Pharmacist's Guide to the On-Site Audit," as posted on American Pharmacies' Members' Only section of the website can assist and guide in this effort. Assuming that it is established with the auditor that the payments from the claims subject of the audit come from Medicare funds (and the only claims being audited are Medicare claims), then the Texas Insurance Code's provisions do not apply, because federal law, in the form of The Social Security Act and Medicare regulations, *preempts* state (Texas) law. The basis for the auditors' exemption is pursuant to federal law, and the Centers for Medicare & Medicaid Services ("CMS") have confirmed this position with a written response, demonstrating that CMS is in agreement with the auditors' position.

Numerous third party contracting organizations signed Medicare Part D participation contracts on behalf of hundreds of pharmacies. These contracts further committed the pharmacists to compliance with 42 CFR 423.505(i)(2), which is the regulation containing this loophole. Many of the contracts make specific reference to the statute and required

the pharmacy to adhere to its requirements. Thus, the contract provides *another* basis (in addition to the federal regulation) for the auditors to audit the pharmacy. This is very common; many third party contracting organizations were pressured by their pharmacies to sign the Medicare Part D participation contracts to ensure participation in the retail network. Often, these contracts were presented as "take it or leave it" kind of agreement by the auditors and their affiliates. The effects are now being realized, as pharmacists are left defenseless to oppose the sweeping, extensive audits.

Essentially, at this time, there is not law to prevent the audit from occurring, *if* it is strictly limited to Medicare Part D claims. This is a gigantic loophole for auditing that cannot be prevented with our former protection of Texas law. This is one more devastating consequence of Medicare Part D, which is obviously related to the federal government's relinquishment of extensive power and control to these Medicare Part D "contractors" (the insurance companies, their affiliates and third party administrators).

This exception allows for rampant auditing in regard to Medicare Part D claims; it is difficult to explain to pharmacists that the Texas law is preempted in that regard by federal law. This Medicare Part D exception looks to be a golden ticket that auditors will utilize more and more to enter pharmacies. It is quickly becoming a prominent excuse to avoid compliance with Texas law, and American Pharmacies is pursuing political, legislative and legal solutions in this regard, which will need to occur at the federal level.

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