

§ 411.370 Advisory opinions relating to physician referrals.

(a) *Period during which CMS will accept requests.* The provisions of §§ 411.370 through 411.389 apply to requests for advisory opinions that are submitted to CMS after November 3, 1997, and before August 21, 2000, and to any requests submitted during any other time period during which CMS is required by law to issue the advisory opinions described in this subpart.

(b) *Matters that qualify for advisory opinions and who may request one.* Any individual or entity may request a written advisory opinion from CMS concerning whether a physician's referral relating to designated health services (other than clinical laboratory services) is prohibited under section 1877 of the Act. In the advisory opinion, CMS determines whether a business arrangement described by the parties to that arrangement appears to constitute a "financial relationship" (as defined in section 1877(a)(2) of the Act) that could potentially restrict a physician's referrals, and whether the arrangement or the designated health services at issue appear to qualify for any of the exceptions to the referral prohibition described in section 1877 of the Act.

(1) The request must involve an existing arrangement or one into which the requestor, in good faith, specifically plans to enter. The planned arrangement may be contingent upon the party or parties receiving a favorable advisory opinion. CMS does not consider, for purposes of an advisory opinion, requests that present a general question of interpretation, pose a hypothetical situation, or involve the activities of third parties.

(2) The requestor must be a party to the existing or proposed arrangement.

(c) *Matters not subject to advisory opinions.* CMS does not address through the advisory opinion process—

(1) Whether the fair market value was, or will be, paid or received for any goods, services, or property; and

(2) Whether an individual is a bona fide employee within the requirements of section 3121(d)(2) of the Internal Revenue Code of 1986.

(d) *Facts subject to advisory opinions.* CMS considers requests for advisory

opinions that involve applying specific facts to the subject matter described in paragraph (b) of this section. Requestors must include in the advisory opinion request a complete description of the arrangement that the requestor is undertaking, or plans to undertake, as described in § 411.372.

(e) *Requests that will not be accepted.* CMS does not accept an advisory opinion request or issue an advisory opinion if—

(1) The request is not related to a named individual or entity;

(2) CMS is aware that the same, or substantially the same, course of action is under investigation, or is or has been the subject of a proceeding involving the Department of Health and Human Services or another governmental agency; or

(3) CMS believes that it cannot make an informed opinion or could only make an informed opinion after extensive investigation, clinical study, testing, or collateral inquiry.

(f) *Effects of an advisory opinion on other Governmental authority.* Nothing in this part limits the investigatory or prosecutorial authority of the OIG, the Department of Justice, or any other agency of the Government. In addition, in connection with any request for an advisory opinion, CMS, the OIG, or the Department of Justice may conduct whatever independent investigation it believes appropriate.

[63 FR 1655, Jan. 9, 1998]

§ 411.372 Procedure for submitting a request.

(a) *Format for a request.* A party or parties must submit a request for an advisory opinion to CMS in writing, including an original request and 2 copies. The request must be addressed to: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: Advisory Opinions, P.O. Box 26505, Baltimore, MD 21207.

(b) *Information CMS requires with all submissions.* The request must include the following:

(1) The name, address, telephone number, and Taxpayer Identification Number of the requestor.

(2) The names and addresses, to the extent known, of all other actual and

potential parties to the arrangement that is the subject of the request.

(3) The name, title, address, and daytime telephone number of a contact person who will be available to discuss the request with CMS on behalf of the requestor.

(4) A complete and specific description of all relevant information bearing on the arrangement, including—

(i) A complete description of the arrangement that the requestor is undertaking, or plans to undertake, including: the purpose of the arrangement; the nature of each party's (including each entity's) contribution to the arrangement; the direct or indirect relationships between the parties, with an emphasis on the relationships between physicians involved in the arrangement (or their immediate family members who are involved) and any entities that provide designated health services; the types of services for which a physician wishes to refer, and whether the referrals will involve Medicare or Medicaid patients;

(ii) Complete copies of all relevant documents or relevant portions of documents that affect or could affect the arrangement, such as personal services or employment contracts, leases, deeds, pension or insurance plans, financial statements, or stock certificates (or, if these relevant documents do not yet exist, a complete description, to the best of the requestor's knowledge, of what these documents are likely to contain);

(iii) Detailed statements of all collateral or oral understandings, if any; and

(iv) Descriptions of any other arrangements or relationships that could affect CMS's analysis.

(5) Complete information on the identity of all entities involved either directly or indirectly in the arrangement, including their names, addresses, legal form, ownership structure, nature of the business (products and services) and, if relevant, their Medicare and Medicaid provider numbers. The requestor must also include a brief description of any other entities that could affect the outcome of the opinion, including those with which the requestor, the other parties, or the immediate family members of involved physicians, have any financial rela-

tionships (either direct or indirect, and as defined in section 1877(a)(2) of the Act and §411.351), or in which any of the parties holds an ownership or control interest as defined in section 1124(a)(3) of the Act.

(6) A discussion of the specific issues or questions the requestor would like CMS to address including, if possible, a description of why the requestor believes the referral prohibition in section 1877 of the Act might or might not be triggered by the arrangement and which, if any, exceptions to the prohibition the requestor believes might apply. The requestor should attempt to designate which facts are relevant to each issue or question raised in the request and should cite the provisions of law under which each issue or question arises.

(7) An indication of whether the parties involved in the request have also asked for or are planning to ask for an advisory opinion on the arrangement in question from the OIG under section 1128D(b) of the Act (42 U.S.C. 1320a-7d(b)) and whether the arrangement is or is not, to the best of the requestor's knowledge, the subject of an investigation.

(8) The certification(s) described in §411.373. The certification(s) must be signed by—

(i) The requestor, if the requestor is an individual;

(ii) The chief executive officer, or comparable officer, of the requestor, if the requestor is a corporation;

(iii) The managing partner of the requestor, if the requestor is a partnership; or

(iv) A managing member, if the requestor is a limited liability company.

(9) A check or money order payable to CMS in the amount described in §411.375(a).

(c) *Additional information CMS might require.* If the request does not contain all of the information required by paragraph (b) of this section, or, if either before or after accepting the request, CMS believes it needs more information in order to render an advisory opinion, it may request whatever additional information or documents it deems necessary. Additional information must be provided in writing, signed by the same person who signed

the initial request (or by an individual in a comparable position), and be certified as described in §411.373.

[63 FR 1655, Jan. 9, 1998]

§411.373 Certification.

(a) Every request must include the following signed certification: "With knowledge of the penalties for false statements provided by 18 U.S.C. 1001 and with knowledge that this request for an advisory opinion is being submitted to the Department of Health and Human Services, I certify that all of the information provided is true and correct, and constitutes a complete description of the facts regarding which an advisory opinion is sought, to the best of my knowledge and belief."

(b) If the advisory opinion relates to a proposed arrangement, in addition to the certification required by paragraph (a) of this section, the following certification must be included and signed by the requestor: "The arrangement described in this request for an advisory opinion is one into which [the requestor], in good faith, plans to enter." This statement may be made contingent on a favorable advisory opinion, in which case the requestor should add one of the following phrases to the certification:

(1) "if CMS issues a favorable advisory opinion."

(2) "if CMS and the OIG issue favorable advisory opinions."

[63 FR 1656, Jan. 9, 1998]

§411.375 Fees for the cost of advisory opinions.

(a) *Initial payment.* Parties must include with each request for an advisory opinion submitted through December 31, 1998, a check or money order payable to CMS for \$250. For requests submitted after this date, parties must include a check or money order in this amount, unless CMS has revised the amount of the initial fee in a program issuance, in which case, the requestor must include the revised amount. This initial payment is nonrefundable.

(b) *How costs are calculated.* Before issuing the advisory opinion, CMS calculates the costs the Department has incurred in responding to the request. The calculation includes the costs of

salaries, benefits, and overhead for analysts, attorneys, and others who have worked on the request, as well as administrative and supervisory support for these individuals.

(c) *Agreement to pay all costs.* (1) By submitting the request for an advisory opinion, the requestor agrees, except as indicated in paragraph (c)(3) of this section, to pay all costs the Department incurs in responding to the request for an advisory opinion.

(2) In its request for an advisory opinion, the requestor may designate a triggering dollar amount. If CMS estimates that the costs of processing the advisory opinion request have reached or are likely to exceed the designated triggering dollar amount, CMS notifies the requestor.

(3) If CMS notifies the requestor that the actual or estimated cost of processing the request has reached or is likely to exceed the triggering dollar amount, CMS stops processing the request until the requestor makes a written request for CMS to continue. If CMS is delayed in processing the request for an advisory opinion because of this procedure, the time within which CMS must issue an advisory opinion is suspended until the requestor asks CMS to continue working on the request.

(4) If the requestor chooses not to pay for CMS to complete an advisory opinion, or withdraws the request, the requestor is still obligated to pay for all costs CMS has identified as costs it incurred in processing the request for an advisory opinion, up to that point.

(5) If the costs CMS has incurred in responding to the request are greater than the amount the requestor has paid, CMS, before issuing the advisory opinion, notifies the requestor of any additional amount that is due. CMS does not issue an advisory opinion until the requestor has paid the full amount that is owed. Once the requestor has paid CMS the total amount due for the costs of processing the request, CMS issues the advisory opinion. The time period CMS has for issuing advisory opinions is suspended from the time CMS notifies the requestor of the amount owed until the time CMS receives full payment.