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## Medicare Set-Aside Drug Pricing Clarification Good News for Employers: Immediate Action Recommended

The Centers for Medicare and Medicaid Services (CMS) issued guidance in 2009 for the pricing of prescription drugs in setting up workers' compensation Medicare set-asides (WCMSA). Unfortunately the language of the 2009 guidance had the effect of including in WCMSA settlements funding for the payment of certain drug treatments not covered by Medicare. Since then self-insured employers, insurers and providers of Medicare compliance services have argued that the flawed instructions were adding unnecessary and improper costs to WCMSA settlements. CMS has now issued a clarifying memorandum dated May 14, 2010 that corrects its earlier instructions and eliminates the improper costs from WCMSAs settled on or after June 1, 2010. ([Click here](#) for the full CMS memorandum, or copy the address provided below into your browser.)

The purpose of WCMSA settlements is to compel the reserving of money that protects the Medicare System from paying future workers' compensation medical expenses that are rightly the obligation of an insurer, self-insured employer or other private payer. The CMS memoranda of April 3, 2009 and follow-up note on June 1, 2009 (see reference links below) were intended to improve the methodology for pricing prescription drugs in these settlements. As applied, however, the revised methodology had the effect of including certain drugs even when they were used for purposes not approved by the FDA. Medicare will not pay for such "off-label and/or unlabeled usage," and coverage is routinely denied when claims for such usage are submitted to Medicare. Despite this, CMS's prescription pricing methodology had the practical result of including the cost of such non-covered drugs in WCMSA settlements.

The memorandum of May 14, 2010 corrects the pricing methodology by clarifying that beginning June 1, WCMSA settlements should reflect the projected future costs of only those prescription medications that are eligible for payment by Medicare. The memorandum also provides a retroactive remedy for prior settlements by permitting payments for off-label and/or unlabeled usage from WCMSA settlements that were computed based on the flawed pharmacy pricing methodology.

### **What should employers do immediately to realize the greatest benefit from the new CMS directive on WCMSA pharmacy pricing?** Consider these scenarios:

- *WCMSAs that have been priced but not yet approved by CMS:* Instruct your Medicare compliance service provider to re-price based on the May 14 memorandum and target June 1 or later for CMS approval. If the WCMSA is already in use for an active settlement negotiation, consider suspending the negotiation until re-pricing can be completed.
- *WCMSAs in "leaving medical open" status:* If the medical portion of a recent WCMSA was so high that you or your provider recommended not settling that portion of the case, known as "leaving medical open," have the WCMSA re-price using the new methodology. If this indicates an

amount that may be conducive to settlement, consider having the WCMSA approved by CMS and then settling the underlying case.

- *WCMSAs that have been approved but not settled:* If re-pricing indicates significant potential savings, discuss with your Medicare compliance service provider the possibility of re-submitting to CMS with a request for a reduction.

**Sedgwick CMS's internal Medicare compliance unit has already instituted procedures to identify and adjust inflated pricing in the open WCMSA cases that we are handling for our clients. We are also pricing all newly received cases in accordance with the corrected methodology.**

**Conclusion:** Sedgwick CMS applauds CMS for the improvements communicated in the May 14 memorandum. We congratulate the employers, industry groups and providers whose advocacy preceded this necessary and proper action. We recognize, however, that the May 14 correction does nothing to cure other underlying difficulties that are driving increases in the pricing of WCMSA settlements, such as CMS's practice of requiring funding for lifetime supplies of virtually every Medicare-eligible pharmaceutical prescribed during the course of treatment for a workers' compensation injury. For more background see the Sedgwick CMS *Information E-Bulletin* of June 10, 2009, "New Drug Pricing Policy for Medicare Set-Asides: Higher Costs for Payers Anticipated," available on the [Sedgwick CMS website](#).

**Sedgwick CMS will continue to support measures it believes will help contain our clients' Medicare compliance costs and other Medicare-related expenses.** Sedgwick CMS clients are encouraged to contact their program manager to discuss the implications for their program of the new CMS drug pricing protocols. Clients and other *E-Bulletin* recipients interested in discussing this and other Medicare-related issues are also invited to contact Sedgwick CMS Director of Medicare Compliance Michael R. Merlino (678-628-1336, [michael.merlino@sedgwickcms.com](mailto:michael.merlino@sedgwickcms.com)) or Sedgwick CMS Workers' Compensation Practice Lead Darrell Brown (562-981-1708, [darrell.brown@sedgwickcms.com](mailto:darrell.brown@sedgwickcms.com)).

**References:**

The full web address of the CMS memorandum of May 14, 2010 on WCMSA pharmacy pricing is <http://www.cms.gov/WorkersCompAgencyServices/Downloads/May142010MemoPartDCoveredDrug.pdf>.

For the April 3, 2009 memorandum with an effective date of June 1, 2009 see <http://www.cms.gov/WorkersCompAgencyServices/Downloads/April2009WCMSARXProcedureMemorandum.pdf>.

For the June 1, 2009 follow-up note see <http://www.cms.gov/WorkersCompAgencyServices/Downloads/WCMSARXGuidance6109.pdf>.

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