

CLIENT ADVISORY

**DEADLINE FOR TAMPER-PROOF PRESCRIPTION PADS
EXTENDED TO APRIL 1, 2008**

On Saturday, September 29, 2007, President Bush signed into law legislation passed by the United States Congress¹ delaying the required use of tamper-proof prescription pads for Medicaid patients by six months, from October 1, 2007, until **April 1, 2008**. The legislation came in response to strong concerns expressed by the health care industry, contending that Congress had not allowed providers enough time to obtain the new prescription pads. Manufacturers of tamper-proof pads also complained that they received so many orders that they could not keep up with the demand. On April 1, 2008, all Medicaid prescriptions must be written on pads that contain at least one industry-recognized feature to prevent copying, erasing, or counterfeiting. By October 1, 2008, all such pads must prevent all three forms of tampering.

The Act

In May of 2007, Congress passed legislation² (the “Act”) requiring the use of tamper-resistant prescription pads under the Medicaid program. In order for non-electronic written prescriptions for Medicaid outpatient drugs to be reimbursable, the Act requires that prescriptions must be written on tamper-resistant pads.³ The Act was designed to make it more difficult for patients to obtain controlled substances through forged prescriptions. The tamper resistant pad requirement of the Act applies to all outpatient drugs, including over-the-counter drugs in states that reimburse for prescriptions for such items. The Act provides exceptions for drugs provided in nursing facilities, intermediate care facilities for the mentally retarded, and other specified institutional and clinical settings. The requirement is applicable regardless of whether Medicaid is the primary or secondary payor of the prescription being filled.

Tamper Resistance

To be considered tamper resistant on April 1, 2008, a prescription pad must contain at least one of the following three characteristics:

- 1) one or more industry-recognized features designed to prevent unauthorized copying of a completed or blank prescription form;

¹ H.R. 3668, TMA, Abstinence Education, and QI Programs Extension Act of 2007.

² P.L. 110-28, the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007, § 7002(b). In it, Title 19 of the Social Security Act (42 USC 1936b(i)) was amended. Specifically, § 1903b(i), para. (23) now states “(1) ... with respect to amounts expended for medical assistance for covered outpatient drugs for which the prescription was executed in written (and non-electronic) form unless the prescription was executed on a tamper-resistant pad.”

³ Outpatient drugs are defined at § 1927(k)(2) of the Social Security Act (42 USC 1396r-8).

- 2) one or more industry-recognized features designed to prevent the erasure or modification of information written on the prescription by the prescriber; or
- 3) one or more industry-recognized features designed to prevent the use of counterfeit prescription forms.

In order to be considered tamper resistant, a prescription pad must contain all of the foregoing three characteristics by October 1, 2008. Failure of a state to enforce the tamper-resistant pad requirement of the Act may result in the loss of federal financial participation. States are free to exceed the above baseline standards as to what constitutes a tamper-resistant prescription pad.

Exceptions

The tamper-resistant pad requirement does not apply to refills of written prescriptions presented at a pharmacy before April 1, 2008. In addition, the payment limitation does not apply to e-prescriptions transmitted to a pharmacy, prescriptions faxed to a pharmacy, or prescriptions communicated to a pharmacy by telephone by a prescriber. The Centers for Medicare & Medicaid Services (CMS) issued guidance on August 17, 2007, stating that it particularly encouraged the use of e-prescriptions as an effective and efficient method of communicating prescriptions to pharmacists. It should be noted, however, that Drug Enforcement Administration (DEA) regulations regarding controlled substances may require a written prescription.

The requirement for the use of a tamper-resistant prescription pad does not apply when a managed care entity pays for the prescription. Also, to the extent permissible under state and federal law and regulation, the Act does not restrict emergency prescriptions of non-controlled or controlled dangerous substances for which a prescriber provides the pharmacy with a verbal, faxed, electronic, or compliant written prescription within 72 hours after the date on which the prescription was filled.

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If you have any questions regarding compliance with the Act, please do not hesitate to contact any of the attorneys at The Rogers Law Firm.

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