

**Rescind the CMS Interim Final Rule on the Durable Medical Equipment  
Competitive Bidding Program**

**Deadline: COB April 9, 2009**

April 3, 2009

Dear Colleague:

I am writing to encourage you to join with me in sending the attached letter to the Acting Secretary of Health and Human Services Charles Johnson, the Acting Administrator of CMS Charlene Frizzera and the Director of White House Office of Health Reform Nancy-Ann DeParle regarding the CMS interim final rule on the durable medical equipment (DME) competitive bidding program.

The Medicare Modernization Act of 2003 established the competitive bidding program for durable medical equipment. However, initial implementation of the program was poorly executed by CMS. The process shut out many DME providers, thus limiting access to durable medical equipment for beneficiaries. This is why Congress mandated an 18-24 month delay to the competitive bidding program in the Medicare Improvement for Patients and Providers Act that was enacted on July 15, 2008.

On January 16, 2009, CMS issued an interim final rule which would establish a durable medical equipment competitive bidding program on April 18, 2009. The agency's rush to implementation provides no opportunity for public comment and subverts the will of Congress. The interim rule will have a detrimental effect on the quality and access to care for beneficiaries of durable medical equipment.

This is why it is important for CMS to rescind this interim rule. At a minimum, the agency should pursue traditional notice and comment rulemaking to ensure participation of interested parties prior to issuing a final rule.

I hope you will consider joining with me in urging the Administration to rescind this final interim rule. If you have questions or would like to sign the letter, please contact Carla McNeill in my office at [Carla.McNeill@mail.house.gov](mailto:Carla.McNeill@mail.house.gov) or 5-3401.

Sincerely,

Betty Sutton  
Member of Congress

April 3, 2009

Mr. Charles Johnson, Acting Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, DC 20201

Ms. Charlene Frizzera, Acting Administrator  
Centers for Medicare & Medicaid Services  
U.S. Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, DC 20201

Ms. Nancy-Ann DeParle, Director  
White House Office of Health Reform  
The White House  
Washington, D.C.

Dear Acting Secretary Johnson, Acting Administrator Frizzera and Ms. DeParle:

On January 16, 2009, the Centers for Medicare and Medicaid Services (CMS) published an interim final rule on the durable medical equipment (DME) competitive bidding program effective April 18, 2009. We are deeply concerned that CMS has rushed implementation of this rule counter to Congress' intent when it delayed the competitive bidding program as part of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA). As such, we urge you to rescind the rule so that all affected parties will have an opportunity to comment on it as a proposed regulation.

In the initial implementation of the durable medical equipment competitive bidding program, many questions were raised as to the immediate impact of the program on quality and access to care for patients. Of particular concern was the immediate elimination of thousands of eligible providers throughout the country from the Medicare program. Of the more than 4,000 providers in the initial bidding areas, only 376 were deemed to have met the bidding program requirements, which were not clearly defined by CMS and its contractor. As growing numbers of seniors enter the Medicare program, it is important that we take care to maintain an adequate number of qualified and capable providers to address demand for care in the home, especially in rural areas.

The agency's stated rationale in its interim final rule for not electing to pursue the traditional notice and comment rulemaking was that "statutory language was highly prescriptive and it would be redundant to propose a rule to incorporate the words of a provision already contained in statute." In fact, we remain concerned that many of the recommended changes designed to prevent future access problems and confusion in the competitive bid process were not

incorporated or even raised for public comment. Any final rulemaking on this program should at a minimum provide assurances that the alleged discrepancies between information submitted by bidders and received by CMS will not again result in the unfair disqualification, without appeal, of longstanding companies in our states who have offered quality homecare services for decades. CMS also needs to ensure that its contractor is consistently and properly applying the standards established to qualify suppliers for participation in the program, notably a supplier's demonstrated capacity to serve a given area and patient population.

We agree that MIPPA addressed near-term concerns with the program, but thoughtful and deliberate rulemaking by CMS was clearly anticipated by Congress. Under the circumstances, it would be much more appropriate for CMS to utilize traditional notice and comment rulemaking ensuring a collaborative and transparent process, and program success.

Thank you for your consideration and we look forward to your response.

Sincerely,