

# **SELLING AT RETAIL**

PREPARED FOR  
AAHOMECARE'S  
RETAIL WORK  
GROUP

## **RETAIL WORK GROUP**

AAHomecare recognizes that billing Medicare on an assignment basis has become very challenging for many DME suppliers. AAHomecare also understands that many DME suppliers see an opportunity in implementing an innovative retail business in which customers pay cash. For these reasons, AAHomecare has formed a Retail Work Group comprised of stakeholders in the DME industry. The Retail Work Group is developing tools for suppliers to utilize as they move into the retail market. These tools include educational “white papers” such as this paper entitled “Selling at Retail.”

This white paper was prepared for the Retail Work Group by Jeffrey S. Baird, Esq., Chairman of the Health Care Group of Brown & Fortunato, P.C. Mr. Baird can be contacted at 806-345-6320 and [jbaird@bf-law.com](mailto:jbaird@bf-law.com).

The AAHomecare staff liaison for the Retail Work Group is Ashley Plauché, Manager of Government Affairs. Ms. Plauché can be contacted at [ashleyp@aahomecare.org](mailto:ashleyp@aahomecare.org).

For further information about this white paper, contact Mr. Baird. For information about the Retail Work Group, contact Ms. Plauché.

## **SELLING AT RETAIL**

By: Jeffrey S. Baird, Esq.

### Introduction

A number of factors are making the Medicare fee-for-service (“FFS”) model almost untenable. These include, (i) competitive bidding (“CB”); (ii) applying the CB reimbursement rates to non-CBAs; (iii) aggressive audits; (iv) reimbursement cuts; and (v) stringent documentation requirements.

Some DME suppliers will implement “economies of scale” that will allow them to succeed in the Medicare FFS arena. However, these suppliers will be the exception. Most DME suppliers can no longer base their business model on Medicare FFS. Suppliers need to go outside their comfort zone and look for new sources of income. One such source is the retail market.

There are 78 million “Baby Boomers” who are retiring at the rate of 10,000 per day. Boomers understand that they will be required to pay out-of-pocket for a portion of their health care expenses ... including DME. From a Boomer’s standpoint, the most important asset he has is time. Many 75 year old Boomers will not want to wait around for Medicare approval. Rather, the Boomers will simply pay cash and move on with their lives. As the DME supplier moves into the retail market, it needs to (i) consider setting up a separate legal entity and (ii) adhere to certain legal guidelines.

### Separate Legal Entity for Retail Business

Assume that ABC Medical Equipment, Inc. has a PTAN and is located on Main Street. Assume that John Smith is the sole stockholder of ABC Medical. It is wise for Smith to set up a new legal entity (e.g., corporation or limited liability company) with its own Tax ID # (e.g., “ABC Retail Sales, Inc.”)

ABC Retail will not have a PTAN. ABC Retail will be located on Elm Street. Or it can be located on Main Street next to ABC Medical, with ABC Medical being in Suite A and ABC Retail being in Suite B. The bottom line is that ABC Medical and ABC Retail will be physically separated from each other. Each legal entity will have its own employees, own bank account, etc. In short, each entity will be operated as a distinct business. When a customer wants the “Cadillac” product, then he can pay cash for the product at ABC Retail. If a customer wants Medicare to pay for the product, then he can obtain the product from ABC Medical. ABC Retail will stock only "Cadillac" products. ABC Medical will stock a variety of products, including "Cavalier" products.

If a customer walks into ABC Retail and says that he wants Medicare to pay for the product, then ABC Retail can refer the customer to ABC Medical. Conversely, if a customer walks into ABC Medical, does not like the product selection, and is willing to pay cash for a higher end product, then ABC Medical can refer the customer to ABC Retail. Even though the two companies will have the same owner (John Smith), the companies are nevertheless separate legal entities

(each with its own Tax ID #). And so the relationship between the two companies needs to be the same as if they were not owned by the same person. Therefore, there can be no money going back and forth between the two companies that is tied to referrals.

It will be important for ABC Medical and ABC Retail to truly operate as separate legal entities (e.g., no commingling of money). This way, someone suing one of the companies will not be able to "pierce the corporate veil" and sue the other company as well.

ABC Retail needs to be aware of 42 U.S.C. 1395m(j)(4)(A), which states that if a supplier furnishes DME to a Medicare beneficiary, for which no payment may be made because the supplier does not have a Medicare supplier number, then any expenses incurred for the DME will be the responsibility of the supplier. This means that the ABC Retail customer will have no financial responsibility for the product, and ABC Retail will be required to refund the customer, unless before the product is furnished, (i) the customer is informed that Medicare will not reimburse the customer for the product and (ii) the customer agrees to pay cash knowing that he will not be reimbursed. In order to meet this requirement, when a customer walks into ABC Retail and the ABC employee suspects that the customer is covered by Medicare, then the employee may want the customer to sign an ABN. Alternatively, ABC Retail may make the calculated decision that having suspected Medicare customers sign an ABN will have a "chilling" effect on the retail experience for the customers. Therefore, ABC Retail might decide not to require a suspected Medicare customer to sign an ABN; and then in those instances when a Medicare customer subsequently complains that he was unaware that Medicare would not reimburse him, ABC Retail will issue a full refund to the customer. This likely will not occur very often. ABC Retail should also post signs that are conspicuous to the public, that say that ABC Retail is not a Medicare supplier and that Medicare will not pay for items purchased from ABC Retail. Now let us assume that ABC Retail desires to sell items for cash over the internet. ABC Retail's web page should have the following in large bold type appear as soon as the customer clicks on a link to view DME, as well as immediately prior to check-out: "**Notice to Medicare Beneficiaries.** Medicare will pay for medical equipment and supplies only if a supplier has a Medicare supplier number. We do not have a Medicare supplier number. Medicare will not pay for any medical equipment and supplies we sell or rent to you. You will be personally and fully responsible for payment."

There are two fundamental reasons behind setting up ABC Retail as a separate legal entity:

- **Exposure to Audits** – ABC Medical is at risk for recoupment liability in the event of an aggressive audit. If ABC Retail is only a "division" or "DBA" of ABC Medical, and if ABC Medical does get hit with a large recoupment, then it will also adversely affect the financial condition of the retail "division." On the other hand, if ABC Retail is a separate legal entity, then generally speaking, any recoupment liability imposed against ABC Medical will not spill over to ABC Retail.
- **Future Sale of Retail Business** – If ABC Retail is a "division" of ABC Medical, and if John Smith desires in the future to sell his retail business, but retain his Part B Business, then Smith has no choice but to have ABC Medical enter into an *asset* sale of its retail business. On the other hand, if ABC Retail is a separate legal entity, and if Smith decides

in the future to sell the retail business, then he has the option of engaging in either an *asset* sale or a *stock* sale. Additionally, if ABC Retail is a separate legal entity, then it can bring in additional investors.

### Cash Prices That Retail Supplier Can Charge

**Retail Supplier Does Not Have a PTAN** – There are no restrictions on the prices the supplier sets for Medicare-covered items and for non-covered items.

**Retail Supplier Has a PTAN** – There are no restrictions on the prices that the supplier sets for items not covered by Medicare. If the supplier is non-participating and sells/rents a covered item on a nonassigned basis, then the supplier can, without limitation, charge more than the Medicare allowable. Now let's assume that the supplier is non-participating, sells/rents a covered item on a nonassigned basis, and desires to charge less than the Medicare allowable. The supplier needs to be aware of a federal statute that says that a DME supplier is prohibited from charging Medicare substantially in excess of the supplier's usual charges, unless there is good cause. The current regulations do not give any guidance on what constitutes "substantially in excess," "usual charges," or "good cause." The clearest guidance comes from a 2003 proposed rule that was not subsequently implemented. The proposed rule contemplates the "usual charge" to be either the average or median of the supplier's charges to payors other than Medicare (and some others). Under the proposed rule, a DME supplier's usual charge should not be less than 83% of the Medicare fee schedule amount (i.e., up to a 17% discount from the Medicare fee schedule). There would be an exception for good cause, which would allow a supplier's usual charges to be less than 83% of the Medicare fee schedule, if the supplier can prove unusual circumstances requiring additional time, effort or expense, or increased costs of serving Medicare beneficiaries. The proposed rule would include charges of affiliate companies into the calculation of a supplier's usual charges.

### Sales Tax

When a DME supplier ships products into another state, the question is whether the supplier must collect sales tax in that state. The general rule is that a state cannot require a DME supplier to collect sales tax if the supplier (1) does not have a physical presence in the state and (2) does not have sufficient connections with the state to create a "substantial nexus." Quill vs. N. Dakota, 504 U.S. 298, 311 (1992). Because of the general rule, many states have strengthened their efforts to establish that DME suppliers (shipping into those states) have a "substantial nexus" in those states.

### Sharing Space With a Non-Provider/Supplier

A DME supplier may desire to lease some of its retail showroom space to a "lifestyle" company, that is not a health care provider/supplier, in which the lifestyle company offers products and services that will help the aging Baby Boomer enjoy the active lifestyle that he is accustomed to having.

Assume that ABC Medical Equipment, Inc. desires to lease a portion of its showroom to XYZ Senior Lifestyle, Inc. XYZ is not a Part B supplier; it sells items for cash. It will be important for ABC to retain at least 200 square feet and continue its Medicare Part B business operations in accordance with the Supplier Standards. When the NSC inspector comes on-site to inspect ABC, it will be important that ABC's and XYZ's spaces be configured so as to avoid any confusion on the inspector's part. For example, the two stores can be separated by seven foot high grid walls, and each store can have its own cash register, telephone line, and sales representatives. On the front of the building, the logo and hours of operation for each store will be displayed. The logo of each store will be displayed in the area of the showroom that is occupied by the applicable store.

### Charging Cash Customers Less Than What is Billed to State Medicaid

Billing and collecting from state Medicaid programs is more expensive and time consuming for a DME supplier than collecting from a cash-paying customer. It is logical for suppliers to desire to charge a cash-paying customer less than what the supplier bills Medicaid. The question thus arises: Is it permissible for the supplier to do so? Most state Medicaid programs require the supplier to bill the Medicaid program its usual price.

### Qualification as a "Foreign" Corporation

If the DME supplier decides to sell products for cash to residents of other states, then the supplier may need to qualify as an out-of-state or "foreign" corporation in those states. The requirement to register or "qualify" as a foreign corporation in a state generally hinges on whether an entity is "doing business" in that state according to that state's foreign corporation statute. Most states do not statutorily define what constitutes "doing business" in the state; instead, the statute sets forth a non-exhaustive list of activities that do not constitute "doing business" in the state and "interstate commerce" is frequently listed as one of the exceptions. In most states, solely (1) obtaining a DME license, and (2) shipping products into the state will not result in the supplier being required to qualify as a foreign corporation in the state.

### State "Brick and Mortar" Laws

If the DME supplier decides to sell products for cash to residents of other states, then the supplier must determine if it needs to obtain an out-of-state DME license in those states. The supplier needs to be aware that a few states (e.g., Tennessee, Colorado) require the DME supplier to have a "brick and mortar" presence in the state before a license will be issued to the supplier. The latest state to impose such a "brick and mortar" requirement is Georgia.

It is likely that other states will adopt "brick and mortar" requirements as a precondition to receive a DME license. If the supplier intends to sell products to residents of one of these states, it is important that the supplier carefully read the statutory language. Each state "brick and mortar" statute will have nuances that will likely not be found in other state "brick and mortar" statutes. For example:

- Does the statute define how large the facility must be? Must the facility be 1000 square feet? 500 square feet? 200 square feet? 50 square feet?
- Can the facility be as simple as subleasing e.g., 200 square feet from a pharmacy or grocery store?
- Can the facility be a self-storage unit?
- Is the facility required to be accredited as a DME supplier? Must the facility have a PTAN?
- Can an out-of-state supplier lease e.g., 200 square feet in the state requiring the “brick and mortar” facility ... but then ship products from out-of-state directly to the residents (i.e., products do not physically come into ... or go out of ... the facility)?
- Is the facility required to be open to the public for “X” hours per week?
- Must there be a person in the facility for “X” hours per week? If so, must the person be a W2 employee of the supplier or can the person be a 1099 independent contractor?
- Must the facility have an address that is recognized by the post office?
- Must the facility have a telephone with a working telephone number?

### Use of Social Media

The future of the DME industry is the servicing of the 78 million “Baby Boomers.” Boomers are comfortable using social media. The forward-thinking DME supplier will utilize social media to (i) advertise to prospective customers, (ii) stay in touch with existing customers, and (iii) monitor patient outcomes.

### Internet Leads

Assume that (i) a DME supplier decides to sign a lead generation agreement with a lead generation company (“LGC”), and (ii) the leads include Medicare beneficiaries. Assume that (i) the supplier intends to sell Medicare-covered items to the Medicare beneficiaries on a nonassigned basis, and (ii) the supplier will submit claims to Medicare for reimbursement directly to the Medicare beneficiaries. There are two main legal issues that must be addressed. The first one involves the federal anti-kickback statute (“AKS”). It is acceptable to purchase a lead; however, it is a violation of the AKS to pay for a referral of patients (or for items or services) covered by a federally-funded health care program (“FHCP”). The line between the two can be blurry. It is acceptable for a LGC to obtain basic information from a lead (name, address and telephone number) and sell this “raw” lead to a DME supplier. The supplier can, in turn, pay the LGC on a per lead basis. If, however, the LGC obtains “qualifying” information on the lead (Medicare number, other insurance information, medical condition, physician’s name, products currently being used, etc.) and sells the qualified lead to the supplier which, in turn, pays for the lead on a

per lead basis, then it is likely that the government will take the position that the supplier is not buying a lead, but is paying for a referral ... which violates the AKS if the lead is a FHCP patient. Many states have similar anti-kickback statutes, some of which apply to any patient, not just FHCP patients.

The second issue involves the Medicare telephone solicitation statute which states that if a Medicare-enrolled DME supplier has never provided a Medicare-covered item in the past to the beneficiary, then the supplier cannot call the beneficiary unless the beneficiary has first given his written consent to the supplier. And so even if the supplier properly purchases a raw lead, the supplier must be careful with how it communicates with the lead.

### HIPAA Restrictions on Marketing

The Health Insurance Portability and Accountability Act (“HIPAA”) requires “covered entities” (such as DME suppliers) to obtain a valid authorization from individuals before using or disclosing protected health information (“PHI”) to market a product or service to them. HIPAA broadly defines “use” of PHI to include the sharing, employment, application, utilization, examination, or analysis of such information. The HIPAA definition of marketing states what is not marketing:

- Marketing does not include a communication made: ... [f]or the following treatment and health care operations purposes, except where the covered entity receives financial remuneration in exchange for making the communication[,] ...
- to describe a health-related product or service (or payment for such product or service) that is provided by, or included in a plan of benefits of, the covered entity making the communication.

### Approaching Physicians and Other Referral Sources

It is acceptable for the DME supplier to call on physicians, hospital discharge planners, home health agencies, and other referral sources in order to market the supplier’s products and services. The DME supplier cannot directly or indirectly give something of value to the referral source to induce the referral source to refer FHCP patients to the supplier. Notwithstanding the foregoing, the federal Stark physician self-referral law allows a DME supplier to furnish non-cash items (such as meals) to a physician so long as the cost of the items, in the aggregate, does not exceed \$398 (for calendar year 2017). There is not a similar exception to the AKS. However, if this \$398 Stark exception is followed, it is unlikely that the government will allege that the non-cash items furnished to a physician violate the AKS.

### Promotional Items to Customers and Potential Customers

The DME supplier can offer an item of nominal value (i.e., retail value of not more than \$15) to customers/prospective customers covered by Medicare or Medicaid. Over a 12-month

period, the DME supplier may not give items to any one customer (covered by Medicare or Medicaid) that have a combined retail value greater than \$75.

- The \$15/\$75 limitation applies even if the customer (covered by Medicare or Medicaid) purchases items, not covered by Medicare or Medicaid, from the supplier. The reasoning is that a gift to a Medicare or Medicaid beneficiary, who purchases non-covered items from the supplier, may nevertheless induce the beneficiary to obtain Medicare or Medicaid covered items from the supplier.
- The \$15/\$75 limitation does not apply to gifts provided to customers not covered by Medicare or Medicaid. However, before offering gifts to customers not covered by Medicare or Medicaid, the supplier should determine if there are any state laws that would prohibit or restrict such gifts.
- It is permissible for a supplier to periodically (e.g., twice a year) conduct a drawing for the winner to receive a product such as a seat lift chair. There should be a sufficient number of entrants such that the retail value of the product, divided by the number of entrants, equals \$15 or less.
- It is permissible for a supplier to conduct a periodic contest (e.g., four times a year) for the winner to receive a used power chair. Each contestant will submit an essay explaining why he/she needs the used power chair. The supplier, or a panel convened by the supplier, will select the winner. Such a contest falls into the “charitable giveaway” category.

#### Health Fairs, Luncheons, Kiosks and Open Houses

The DME supplier can participate in local health fairs. Similarly, the supplier can put on a short program during lunch at a senior citizens’ center, at which time the supplier can distribute promotional literature. The DME supplier can place a kiosk in a mall that promotes the supplier’s products and services.

---

THIS ARTICLE DOES NOT CONSTITUTE LEGAL ADVICE. THIS ARTICLE WAS PREPARED ON A SPECIFIC DATE. THE LAW MAY HAVE CHANGED SINCE THIS ARTICLE WAS WRITTEN. BEFORE ACTING ON THE ISSUES DISCUSSED IN THIS ARTICLE, IT IS IMPORTANT THAT THE READER OBTAIN ADVICE FROM A HEALTH CARE ATTORNEY.

F:\DOCS\6001\001\OTHER\2AS371703.DOCX