

EXHIBIT E



Kandi K. Hidde
Member
317.237.3843 (t)
317.237.3900 (f)
khidde@fbtlaw.com

May 21, 2018

VIA EMAIL FOIA_Request@cms.hhs.gov and VIA OVERNIGHT DELIVERY USPS

FOIA Officer
Centers for Medicare & Medicaid Services
Mailstop N2-20-16
7500 Security Boulevard
Baltimore, MD 21244

Re: Freedom of Information Act Request

Dear Sir or Madam:

Under the Freedom of Information Act, 5 U.S.C. § 552, I am requesting that the Centers for Medicare & Medicaid Services (“CMS”), for the timeframe of January 1, 2007 (unless noted otherwise), through the date of its response, provide the following:

Overpayments / Overpayment Rule

1. All documents¹ in CMS’s possession related to the following statement: “For example, a risk adjustment diagnosis that has been submitted for payment but is found to be invalid because it does not have supporting medical record documentation would result in an overpayment.” 79 Fed. Reg. 29,843, 29,921 (May 23, 2014).
2. All documents in CMS’s possession related to the following regulation: “Funds means any payment that an MA organization has received that is based on data submitted by the MA organization to CMS for payment purposes, including §422.308(f) and §422.310.” 42 C.F.R. § 422.326(a).

¹ The terms “document” or “documents” mean all records and writings of whatever type and description, including but not limited to electronically stored information, research, studies, investigations, electronic mail or e-mail, text messages, correspondence, memorandums, rulings, guidance, policies, manuals, internal or external comments, computations, facsimiles, letters, contracts, agreements, and all other written, graphic, or electronic materials of any nature whatsoever.

3. All documents in CMS's possession related to proposed regulation 42 C.F.R. § 422.326 in 79 Fed. Reg. 1918 (Jan. 10, 2014) and final regulation 42 C.F.R. § 422.326 in 79 Fed. Reg. 29,843 (May 23, 2014).
4. All documents created by CMS in which any policies, interpretations, or decisions regarding the final regulation 42 C.F.R. § 422.326 were discussed.
5. All documents concerning any consequences, including penalties, refusals to make risk-adjustment payments, and demands for return of alleged overpayments, that CMS has imposed on Medicare Advantage Organizations ("MAO") or providers for Medicare Advantage members due to the submission of unsupported diagnosis codes, including the dates of such consequences and whether any MAOs have paid the penalty or alleged overpayment.
6. All documents discussing, regarding, or relating to CMS's policies, procedures, rules, guidelines, and interpretations relating to overpayments or underpayments related to MAO risk adjustment activities, including any financial analysis by CMS regarding the impact of any underpayments or overpayments resulting from MAO risk adjustment activities.
7. All documents received by CMS from any entity or person regarding 42 C.F.R. § 422.326.

Actuarial Equivalence

8. All documents relating to the Social Security Act's "actuarial equivalence" requirement under 42 U.S.C. § 1395w-23(a)(1)(C)(i).
9. All documents in CMS's possession related to the applicability of the Social Security Act's requirement of "actuarial equivalence" to the statements and regulations referenced in requests [1, 2, and 3].
10. All documents CMS's possession related to the applicability of the Social Security Act's requirement of advanced notice of methodological changes to payment rates with the statements and regulations referenced in requests [1, 2, and 3].
11. All documents relating to the use of unaudited claims data from providers for traditional Medicare members in calculating the risk coefficients that are used to adjust payments to MAOs.
12. All documents that CMS has produced in response to any other FOIA request relating to the topics 1-11 set forth above.

"FOIA reflects a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Defense v. FLRA*, 510 U.S. 487, 494 (1994). To the extent that any responsive documents are withheld pursuant to any of the exemptions set forth in 5 U.S.C. § 552(b) or for any other reasons, CMS is asked to provide a

Vaughn index consistent with *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 88 (D.D.C. 2009).²

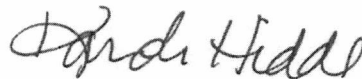
To the extent that certain of the requested records may be available before other records, please provide responsive records on a rolling basis as they become available.

I request that the information be provided in electronic format and sent to me by email or U.S. mail. In order to help you determine my status for the purpose of assessing fees, you should know that I am affiliated with a private business and am seeking information for use in the company's business. If the fees to respond to this request will exceed \$2,500, please contact me to discuss the fees.

If you have any questions about handling this request, you may contact me by email (khidde@fbtlaw.com) or telephone (317-340-0463). Thank you in advance for your assistance.

Sincerely,

FROST BROWN TODD LLC



Kandi K. Hidde

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²“Under the FOIA, an agency may withhold documents responsive to a FOIA request only if the responsive documents fall within one of nine enumerated statutory exemptions. *See* 5 U.S.C. § 552(b); *see also Dep't of Defense v. Fed. Labor Relations Auth.*, 510 U.S. 487, 494 (1994). The agency bears the burden of justifying any withholding. *See Bigwood v. United States Agency for Int'l Dev.*, 484 F.Supp.2d at 74. To enable the Court to determine whether documents properly were withheld, the agency must provide a detailed description of the information withheld through the submission of a so-called “Vaughn Index,” sufficiently detailed affidavits or declarations, or both. *Id.*; *see also Oglesby v. Dep't of the Army*, 79 F.3d 1172, 1178 (D.C.Cir.1996); *Vaughn v. Rosen*, 484 F.2d at 827–28. The Vaughn Index and/or accompanying affidavits or declarations must “provide[] a relatively detailed justification, specifically identifi[y] the reasons why a particular exemption is relevant and correlat[e] those claims with the particular part of a withheld document to which they apply.” *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 146 (D.C.Cir.2006) (*quoting Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 251 (D.C.Cir.1977)). In the Vaughn Index, the agency should “disclose as much information as possible without thwarting the exemption's purpose.” *Hall v. Dep't of Justice*, 552 F.Supp.2d 23, 27 (D.D.C.2008) (*quoting King v. Dep't of Justice*, 830 F.2d 210, 224 (D.C.Cir.1987)).