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## **Coalition Vows to Continue Working with CMS in Spite of Setback**

Washington DC - A nationwide association of manufacturers and suppliers of motorized scooters and power wheelchairs today announced that it will continue trying to work with the Centers for Medicare and Medicaid Services (CMS) to ensure the new rule, *Conditions for Payment of Power Mobility Devices*, does not curtail access for needy beneficiaries.

The Power Mobility Coalition (PMC) sought a preliminary injunction to stop CMS from implementing the new rule. Promulgated without proper notice and comment, the rule will restrict beneficiary access to power mobility devices and put suppliers out of business. Implementation of the rule will cause irreparable harm to PMC supplier members.

"Unfortunately, CMS repeatedly ignored concerns voiced by beneficiaries, suppliers, manufacturers, and critical Members of Congress, leaving us little option but to seek redress from the Court," stated PMC Director Eric Sokol. "Jurisdictional hurdles made winning this injunction very difficult, but we had no choice but to pursue this option. We remain committed to working with CMS and other stakeholders to modify the new rule."

The Coalition is concerned that the new rule illegally eliminates the Congressionally-mandated, Certificate of Medical Necessity (CMN), increasing the discretionary authority of government contractors to second-guess the medical judgment of physicians. In addition, comments on the rule are not due to CMS until November 25<sup>th</sup>, one month after the implementation of the rule.

"The rule creates a new level of uncertainty in the claims approval process that will drive lawful suppliers out of the program and curtail access to needy beneficiaries," said PMC Counsel Steve Azia. "We will work with CMS and Congress to ensure that an efficient system is developed, focused on the beneficiaries."

While the judge did not rule from the bench, indications are that he had concerns over various jurisdictional issues. A written opinion will be released in the near future. The PMC is currently weighing its options concerning appeal rights and is exploring all feasible options available to delay and modify the new rule.

In their argument, government attorneys stated unequivocally that determination of medical necessity is up to the physician and CMS, not suppliers. The only additional burden for suppliers under the new rule is to "purchase more filing cabinets."

### Background:

On August 26, 2005 CMS published a new interim final rule (IFR) governing the conditions of payment for power mobility devices, a category of durable medical equipment that includes power wheelchairs and power-operated vehicles. The IFR eliminates the Certificate of Medical Necessity ("CMN"), a form used by physicians to certify the medical necessity of power

mobility equipment. The IFR replaces the CMN with a lengthy, essay-like "prescription" and a requirement that physicians collect and provide a patient's medical records to the equipment supplier. The IFR become effective today, even though comments on it are not due until November 25, 2005. Implementation of the IFR will cause irreparable harm to the power mobility community, so the Power Mobility Coalition sought injunctive relief in federal district court.

The Power Mobility Coalition (PMC) set out three causes of action under which it should receive injunctive relief:

- Violation of the Administrative Procedures Act (APA) and the Medicare Act: APA and Medicare Act expressly require notice and comment process. The IFR was promulgated without notice and comment.
- Violation of the Medicare Act: Medicare Act gives suppliers a statutory right to use a CMN. The IFR eliminates the CMN as evidence of medical necessity.
- Violation of the APA: The IFR requirements are arbitrary and capricious and not in accordance with the law.

PMC also set out the relief sought:

- Declare that the IFR violates the APA and Medicare Act for the above delineated grounds
- Vacate the IFR
- Enjoin HHS from administering or enforcing the IFR
- Award PMC its costs and attorneys' fees
- Grant any other relief the Court deems necessary.

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