



Client Alert



Contact Attorneys Regarding
This Matter:

Robert T. Strang III
404.873.8582 - direct
404.873.8583 - fax
robert.strang@agg.com

W. Jerad Rissler
404.873.8780 - direct
404.873.8781 - fax
jerad.rissler@agg.com

Arnall Golden Gregory LLP
Attorneys at Law
171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031
404.873.8500
www.agg.com

CMS Issues Ruling and Proposed Rule on Hospice Cap Calculations

On April 14, 2011, the Centers for Medicare & Medicaid Services (CMS) issued CMS Ruling No. CMS-1355-R, which sets forth a temporary fix for the embattled Hospice Cap Regulation (42 C.F.R. § 418.309(b)(1)) detailed in an earlier [Client Alert](#).¹ Subsequently, on April 28, 2011, CMS issued the Hospice Wage Index for fiscal year (FY) 2012 (CMS-1355-P), which includes proposed changes to hospice cap calculations for FY 2012 and beyond.

The CMS Ruling

The CMS Ruling instructs that any timely-filed administrative challenge based on the invalidity of the methodology set forth in the Hospice Cap Regulation and relating to a fiscal year ending on or before October 31, 2011, shall be remanded to the Medicare contractor to recalculate the hospice cap obligation under a proportional method. Accordingly, through FY 2011, Medicare contractors will continue to calculate hospice caps in accordance with the Hospice Cap Regulation, but aggrieved providers can obtain a recalculation under the proportional method through a timely administrative appeal. The patient-by-patient proportional method of calculating the "number of Medicare beneficiaries" is described in the CMS Ruling as follows:

Under the proportional methodology, each Medicare beneficiary who received hospice care in a cap year will be allocated to that hospice provider's cap year on the basis of a fraction. The numerator of the fraction will be the number of patient days for that beneficiary in that hospice for that cap year (which will be determined after the end of the cap year and is therefore generally a fixed number) and the denominator will be the total number of all patient days for that beneficiary in all cap years in which the beneficiary received hospice services (using the best available data at the time of the calculation). The individual beneficiary counts for a given cap year will then be summed to compute the hospice's total aggregate beneficiary count (number of Medicare beneficiaries) for that cap year. A new payment cap will be calculated and a notice of overpayment determination will be issued for that cap year to the hospice provider.

CMS Ruling at 8-9

¹ <http://www.agg.com/media/interior/publications/Strang-Rissler-Fifth-and-Ninth-Circuit-Courts-of-Appeals-Hospice-Cap-Regulation.pdf>

For any fiscal year, if at the time of the calculation any beneficiary is still receiving hospice care, the calculation will be based on the best information at the time (i.e., the denominator will be the total number of days that beneficiary has received hospice care as of the date of the calculation). In such situations, the calculation could be subject to reopening at a later date when more complete and accurate data is available.

The Proposed Rule

The Proposed Rule generally would require Medicare contractors to use the patient-by-patient proportional method of calculating the “number of Medicare beneficiaries” (described in the CMS Ruling) for all fiscal years on and after FY 2012, except that providers can elect to utilize the existing regulatory method (which the Proposed Rule calls the “streamlined method”). However, “the option to elect the continued use of the streamlined methodology for cap years 2012 and beyond would be available only to hospices that have had their cap determinations calculated using the streamlined methodology for all years prior to cap year 2012” (CMS-1355-P at 43-44). Therefore, hospice providers who have had their hospice caps calculated by the proportional method (either through judicial action or through the CMS Ruling) are not eligible to elect the “streamlined method” for FY 2012 and beyond. Explaining this limitation, the Proposed Rule states:

[W]e believe that if we allowed hospices to switch back and forth between methodologies, it would greatly complicate the cap determination calculation, would be difficult to administer, and might lead to inappropriate switching by hospices seeking merely to maximize Medicare payments. Additionally, in the year of a change in the calculation methodology, there is a potential for over-counting some beneficiaries. Allowing hospices to switch back and forth between methodologies would perpetuate the risk of over-counting beneficiaries.

(CMS-1355-P at 44-45)

For a copy of the CMS Ruling (CMS-1355-R), please click [here](#).² For a copy of the Hospice Wage Index for FY 2012 (CMS-1355-P), please click [here](#).³

² <http://www.agg.com/media/interior/publications/Strang-Rissler-CMS-Issues-Ruling-LINK-CMS-1355-R.pdf>

³ <http://www.agg.com/media/interior/publications/Strang-Rissler-CMS-Issues-Ruling-LINK-CMS-1355-P.pdf>

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