



Client Alert

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CMS Proposed Rule for Hospice Wage Index Includes Changes to Hospice Cap Formula and Face-to-face Encounter

The Centers for Medicare & Medicaid Services (CMS) recently released a Proposed Rule to update the Hospice Wage Index for Fiscal Year 2012, at 76 Fed. Reg. 26,806 (May 9, 2011). Under the Proposed Rule, CMS provided for a 2.3 percent increase in Medicare reimbursement for hospice providers, but also proposed a new quality reporting system, as required by the Affordable Care Act. Starting in Fiscal Year 2014, hospice providers will be required to submit data on specified quality measures in order to avoid a reduction in their market basket update by 2 percentage points. In addition, the Proposed Rule includes changes to certain regulatory provisions that have been the source of significant controversy within the hospice industry. This article will focus on two notable proposals: (1) changes to the methodology used to calculate the annual aggregate hospice cap limit for providers and (2) modifications of the new face-to-face encounter requirements for hospices.

Hospice Cap Methodology

Beginning in cap year 2012, CMS proposes to change the manner in which hospice patients are counted for the purposes of calculating a provider's "aggregate cap" amount, meaning the limit on the total amount of Medicare reimbursement that an individual hospice provider may receive in any particular cap year. As the agency acknowledges, the current methodology for counting Medicare beneficiaries at 42 C.F.R. § 418.309 (referred to as the "streamlined methodology") has been the subject of numerous lawsuits nationwide and been deemed by several district courts and two appellate courts as inconsistent with the requirements of the Medicare statute. Subsequently, CMS has proposed to transition to the use of a patient-by-patient proportional methodology, in which CMS would count only that fraction representing the beneficiary's total days of care in hospice that was spent during the particular cap year at issue.

For cap years though cap year 2011, CMS would continue to use the streamlined methodology, but would allow a hospice provider to elect to have its aggregate cap determination calculated using the patient-by-patient proportional methodology. Any provider that appeals the use of the streamlined methodology for these cap years would be deemed to have elected use of the patient-by-patient methodology for the cap year at issue, as well as all subsequent cap years.

Beginning with cap year 2012, CMS would use the patient-by-patient methodology for calculating the aggregate cap amount for all hospice providers. CMS proposes allowing a hospice provider to elect continued use of the streamlined methodology, by making an election within 60 days of receiving its 2012 cap determination. However, those hospices that had chosen to use the patient-by-patient proportional method prior to cap year 2012 would not be eligible to elect use of the streamlined methodology. A hospice's election for use of the streamlined methodology for cap year 2012 would remain in effect until the hospice submits a written request to change the methodology or the hospice appeals use of the streamlined methodology in determining its aggregate cap amount in subsequent years.

Face-to-face Encounter

In the Final Rule for the Home Health Prospective Payment System Rate Update for Calendar Year 2011, published in the Federal Register on November 17, 2010, CMS implemented a new requirement for hospice providers to provide each hospice beneficiary with a face-to-face encounter with a physician or nurse practitioner prior to the third recertification period in order to assess the beneficiary's continued eligibility for hospice. In response to comments, CMS had stated that the physician performing the face-to-face encounter must be the same physician to recertify the beneficiary's terminal illness and compose the recertification narrative. In response to stakeholder concerns over this limitation, the Proposed Rule would allow any hospice physician to perform the face-to-face encounter, regardless of whether he or she is the same physician to recertify the patient or compose the recertification narrative.

CMS is accepting comments on the Proposed Rule until June 27, 2011.

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