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CMS to Rescind Final "Clarification" of Medicaid Outpatient Hospital Services Definition

In this Issue

CMS Proposes Changes to DSH Patient Day Count and IME Bed Count Calculations

CMS's Proposed Rule on Hospitals' "New" GME Programs Would Restrict Reimbursement for Such Programs

CMS to Rescind Final "Clarification" of Medicaid Outpatient Hospital Services Definition

Payment Group

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We previously described CMS's final "clarification" of the definition of Medicaid Outpatient Hospital Services (OHS) published November 7, 2008 (effective December 8, 2008). See "**Final "Clarification" of Medicaid Outpatient Hospital Services Definition Issued; Will be Challenged by AHA,**" *Payment Matters*, January 8, 2009. That final definition substantially changed the definition of Medicaid OHS and faced substantial opposition from, among others, the American Hospital Association (AHA). Congress, in response to the strong opposition to the "clarification," blocked CMS from implementing that final rule. Section 5003(c) of the American Recovery and Reinvestment Act (ARRA) precluded CMS from taking any action to implement the final clarification.

On May 6, 2009, CMS published a proposed rule in the Federal Register that would completely rescind the November 2008 "clarification," along with several other final rule provisions. 74 Fed. Reg. 21232 (May 6, 2008). The proposed rule may be reviewed at gpo.gov/fdsys/pkg/FR-2009-05-06/pdf/E9-10494.pdf. In this proposed rule, CMS explained that the prior final rule had been issued based on certain "inaccurate assumptions" including, specifically, that "to the extent that covered services were no longer within the outpatient hospital benefit category, those services could be easily shifted to other benefit categories." *Id.* at 21234. CMS has since received information indicating that this is not the case, and that the final rule could, as a result "have an adverse impact on the availability of covered services for beneficiaries" — a fact noted by the AHA, among others, as soon as the "clarification" was published. CMS also noted that the congressional actions to block implementation of the rule "indicate strong concern in Congress about the effects of these regulations." *Id.* at 21233.

CMS has requested public comments on their proposal to rescind the rules. It has asked for information, including specific examples, regarding:

- Problems that would result from rescission of these final rules, and

- Paul W. Kim potential approaches to resolve those problems if the final rules were rescinded;
- Robert E. Mazer
- Christine M. Morse
- Laurence B. Russell
- Donna J. Senft
- Susan A. Turner
- Associates**
- The scope and nature of problems that would result if the final rules were implemented and not rescinded;
 - Whether implementation of these final rules would limit beneficiary access to covered health care services;
 - Whether the final rules provide sufficient clarity; and
 - Whether the objective of the final rules might be accomplished through alternative approaches, such as program guidance and technical support.

Kristin C. Cilento Comments are due by June 1, 2009.

Joshua J. Freemire

Ober|Kaler's Comments: Providers should note that CMS's rescission is, at this stage, only a proposal. Providers in a position to foresee the problems that would have been caused by the regulations and that are discussed in this proposed rule should detail their concerns to CMS.

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