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HHSC Adopts RUG Review Waiver Rule

By **Brandy Mann**

Effective April 10, 2011, nursing facilities that undergo Resource Utilization Group ("RUG") reviews may request that the Health and Human Services Commission Office of Inspector General ("HHSC-OIG") waive the use of extrapolation in the calculation of Medicaid overpayments. The waiver rule was formally issued in the April 1, 2011, edition of the *Texas Register*, and will be codified at 1 Texas Administrative Code § 371.216.

HHSC-OIG conducts periodic utilization reviews of nursing facilities' level of care assessments of Medicaid residents to ensure that payments for Medicaid-covered services are appropriate. In 2008, HHSC converted from the Texas Index for Level of Effort ("TILE") to the federal RUG classification system and provider payment methodology. One aspect of the RUG methodology allows HHSC-OIG, in calculating overpayments to a facility, to extrapolate error rates for the sample population to the entire population of RUG classification groups found to be in error.

In 2008, when the original RUG review rules were promulgated, HHSC-OIG conceding that neither it nor providers were experienced in the use of extrapolation methodology. In consideration of this fact, HHSC-OIG adopted rules allowing for—in HHSC-OIG's own words—a "phased, multi-year, graduated approach for implementing extrapolation." This approach, according to HHSC-OIG, was "designed to allow nurse reviewers and providers to acquaint themselves with the effects of the extrapolation methodology." Under this "graduated approach," during the first year of RUG reviews (September 1, 2008, to August 31, 2009), HHSC-OIG would extrapolate to the population only when the error rate exceeded 25 percent. For reviews conducted between September 1, 2009, and February 28, 2010, extrapolation would apply when the error rate exceeded 20 percent. For reviews conducted between March 1, 2010, and August 31, 2010, extrapolation would apply when the error rate exceeded 15 percent.

Although HHSC-OIG scheduled RUG reviews to begin in September 2008, it did not actually begin reviews until more than two years later—in November 2010. Due to this delay, the intended "phased, multi-year, graduated approach" for extrapolation expired before RUG reviews ever began.

Instead of amending the rules to move the dates for phased-in extrapolation back in time to account for its delay, HHSC-OIG has adopted § 371.216 to allow nursing facilities to apply to HHSC-OIG for a waiver of extrapolation by demonstrating "good cause" why extrapolation should not be applied. "Good cause" is not defined in the rule, but HHSC-OIG has indicated that it may include scenarios in which extrapolation would lead to results "that would threaten the financial stability of the provider." The rule vests the OIG with "sole discretion to evaluate the provider's showing of good cause and to determine whether waiver of extrapolation is warranted," and the OIG's decision to grant, deny, or modify a request for waiver is not

subject to administrative or judicial review.

Unfortunately, the preamble to the rule published on April 1 does not provide much clarification as to how the waiver process will actually work. HHSC-OIG dismissed all but one comment it received to the proposed rule as “beyond the scope of the proposal.” The single comment to which HHSC-OIG provided a substantive response suggested that the rule be modified to “allow providers that are reviewed prior to the effective date of this rule to request a waiver of extrapolation prior to adoption of this rule.” HHSC responded that, although it acknowledged the concern, it was “unaware of any way to draft rule language that would circumvent the Administrative Procedure Act by creating a retroactive effective date.” Under the Act, rules generally take effect twenty days after the date on which they are filed with the Secretary of State, which in this case was March 21, 2011.

Although HHSC-OIG is correct with regard to the official effective date of the rule, which is April 10, 2011, this does not mean that facilities that underwent RUG reviews prior to this date should be denied a waiver. Indeed, after the proposed waiver rule was published in January, many providers who received notices of overpayments based on extrapolation requested waivers within the proposed fifteen day timeframe regardless of the fact that the waiver rule was not final. The rule states that HHSC-OIG “may waive the calculation of an overpayment by extrapolation . . . to any or all of the Resource Utilization Group (RUG) classifications found in error” and that a provider “must request a waiver of extrapolation in writing on or before the 15th calendar day after receipt of the final notice of overpayment.” The rule does not specify the time frame under which HHSC-OIG may grant a waiver. Therefore, regardless of when the RUG review was conducted, as long as the facility has met the 15-day deadline for requesting a waiver, there is no obvious reason why a waiver could not be granted.

It remains to be seen how HHSC-OIG will implement the waiver rule. In the meantime, facilities facing substantial overpayments calculated by extrapolation should consider requesting a waiver along with a formal appeal. The appeal stops any recoupment efforts based on identified overpayments, and, even if its formal waiver request is unsuccessful, facilities may use the existence of the new waiver rule in settlement negotiations with HHSC.

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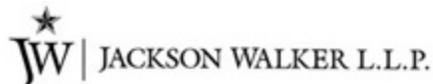
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