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MEMORANDUM

November 10, 2015

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

Re: *CMS Announces Final Rule on 2016 Hospital Outpatient and Ambulatory Surgical Center Policy, Including Changes to Two-Midnight Rule and IHS Hospital Quality Reporting Requirements*

On October 30, 2015, the Centers for Medicare & Medicaid Services (CMS) announced its final rule on the Calendar Year (CY) 2016 Hospital Outpatient and Ambulatory Surgical Center Policy and Payment Changes. *See* CMS-1633-FC. The final rule updates Medicare outpatient payment policies and rates and address changes in quality reporting programs. Of particular significance, CMS's final rule made changes to the Two-Midnight Rule and exempted Indian Health Service (IHS) hospitals from the Ambulatory Surgical Center Quality Reporting (ASCQR) Program. The final rule will be published in the Federal Register on November 13, 2015 and may be downloaded at http://www.ofr.gov/inspection.aspx?AspxAutoDetectCookieSupport=1.

CMS Adds Flexibility to Two-Midnight Rule

CMS pays different Medicare rates for inpatient and outpatient hospital services. Qualifying inpatient stays are paid under the Medicare Part A Inpatient Prospective Payment System (IPPS) while outpatient stays are generally paid under the Medicare Part B Outpatient Prospective Payment System (OPPS). Under CMS's Two-Midnight Rule, which became effective on October 1, 2013, Medicare Part A payment is only available if the admitting practitioner expected a patient to require a hospital stay extending at least two midnights. The Two-Midnight Rule is designed to ensure that minor surgical procedures or other issues that only require a hospital stay of a few hours are billed at outpatient rates.

Under the Two-Midnight Rule, therefore, Medicare Part A payment is generally not available when hospital stays are expected to last less than two midnights. Previously established exceptions to this rule only included services designated by CMS as inpatient-only or services that were identified by CMS as meeting a "rare and unusual" exception to the rule.

In the CY 2016 final rule, CMS has added further flexibility by creating an additional regulatory exception to the Two-Midnight Rule. Under this new exception, payment under Medicare Part A for a stay expected to last less than two midnights may be appropriate on a case-by-case basis based on the clinical judgment of the admitting physician and medical record support for that determination. *See* 42 C.F.R. § 4412.3(d)(3). The new regulations state that the physician's determination should be based on "such complex factors as patient history and comorbidities, the severity of signs and symptoms, current medical needs, and the risk of an adverse event." *Id.* CMS noted, however, that stays that do not span at least overnight are unlikely to be appropriate for this exception to the Two-Midnight Rule.

CMS also revised its medical review strategy for the Two-Midnight Rule. CMS previously issued medical review policies that created both a two-midnight "benchmark" and a two-midnight "presumption." The two-midnight benchmark was guidance to reviewers that inpatient admission is generally appropriate for Medicare Part A payment if the provider expected a patient to stay more than two midnights. The two-midnight presumption was guidance to reviewers that inpatient stays of greater than two midnights are presumed appropriate for Medicare Part A payment and are not the subject of medical review efforts unless there is evidence of systemic gaming, abuse, or delays in order to attempt to qualify for the presumption.

In the CY 2016 final rule, CMS revised the way that reviews are conducted. CMS stated that Quality Improvement Organization (QIO) contractors will conduct reviews of short inpatient stays rather than Medicare administrative contractors (MACs). CMS stated that it began having QIOs assume responsibility for the review of short inpatient stays on October 1, 2015. CMS indicated that QIOs are better suited to this function for reasons including their expedited appeal ability and their quality of care review expertise.

CMS Exempts IHS Hospitals from ASCQR Program

CMS's final rule also exempts IHS hospitals from the Ambulatory Surgical Center Quality Reporting Program. *See* 42 C.F.R. § 416.305(d). The preamble to the final rule notes that IHS hospital outpatient departments can bill Medicare for Ambulatory Surgical Center (ASC) services and receive payment under ASC rates and that therefore CMS has previously considered IHS hospitals to be ASCs for purposes of the ASCQR Program. CMS's final rule, however, provides that beginning with the CY 2017 payment determination, it will no longer consider IHS hospitals to be ASCs for the purposes of the ASCQR Program. CMS reasoned that IHS outpatient departments are required to meet the Medicare conditions of participation for hospitals and therefore will be included in ongoing, hospital-wide quality assessment and improvement programs. This exclusion from the ASCQR Program should help reduce the reporting burden for IHS hospitals.

If you have questions or would like additional information, please contact Elliott Milhollin (emilhollin@hobbsstraus.com or 202-822-8282), Geoff Strommer

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