Final CMS Rules Draw Praise and Contempt from Hospitals

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As usual, this year CMS did not disappoint, having just issued several final rules for the Physician Fee Schedule (PFS), as well as the Outpatient Prospective Payment System (OPPS) and Ambulatory Surgical Center (ASC) Payment System and Outpatient Quality Reporting (OQR) Programs, all of which contain a number of new rules and initiatives affecting hospitals. (For information on new CMS rules affecting physicians, please see Top Takeaways for Medicare Physician Payments in 2018.)

One component of the OPPS Rule that was quickly attacked was the reduction in 340B drug payments to certain hospitals, including critical access hospitals and public and nonprofit disproportionate share hospitals. Under this policy, CMS will pay for separately-payable, "nonpass-through" drugs and biologicals (other than vaccines) purchased through the 340B program at the average sales price (ASP) minus 22.5%, rather than the prior payment rate of ASP plus 6%.

CMS indicated its motivation for this change is to "address recent trends of increasing drug prices, for which some of the cost burden falls to Medicare beneficiaries." CMS indicated it will implement this policy in a budget-neutral manner "by offsetting the projected decrease in drug payments of $1.6 billion by redistributing an equal amount for non-drug items and services across the OPPS."

Regardless of CMS' plan for "redistributing" these costs, the dramatic 28.5% reduction was all but certain to be denounced by providers. In fact, the response from the three major hospital associations was rather swift. Within an hour after the Rule was released, they jointly indicated their intention to file a lawsuit claiming CMS has overstepped its statutory authority by making such a change. They also stated that the change will put safety-net hospitals at particular risk, as 340B hospitals provide 60% of uncompensated care, even though the make up only 36% of U.S. hospitals.

Other items of interest for hospitals in the new Rules:

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- This year, items and services furnished by off-campus hospital outpatient departments (other than dedicated emergency departments) ceased to be paid under the OPPS, and instead were moved to the PFS. For 2018, the rates for those items and services (which is based on a percentage of the OPPS) will be reduced by another 20%, as "CMS believe this adjustment will provide a more level playing field for competition between hospitals and physician practices."
- CMS continues to develop payments for telehealth services. In the PFS, it finalized the addition of several codes to the list of telehealth services that focus on remote patient monitoring.
- Removal from the Inpatient-Only List (procedures typically provided only in the inpatient setting and therefore not paid under the OPPS) for total knee arthroplasty, along with five other procedures. Also, Recovery Audit Contractors are precluded from conducting site-of-service reviews for total knee arthroplasty procedures for two years.
- Re-instatement of the non-enforcement of direct supervision for outpatient therapeutic services for Critical Access Hospitals and small rural hospitals with 100 or fewer beds.
- Adding three procedures to the ASC covered procedures list (two discectomy procedures and a laparoscopic procedure), and soliciting comments about adding arthroplasty procedures to the list.
- For the OQR Program, CMS is removing six quality data measures under the guise that the hospitals' efforts to report on them outweighed the value of the data. They will be removed with respect to the calendar year 2020 payment determination.

For more information on CMS final rules, contact James Dietz or any health care attorney at Frost Brown Todd.

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