

CMS Releases Proposed Rules Implementing Section 603

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On July 6, CMS released its long-awaited [proposed rules](#) implementing Section 603 of the Bipartisan Balanced Budget Act of 2015 (Proposed Rules). As we've discussed [previously](#), Section 603 effectively reduces Medicare compensation paid to certain off-campus hospital outpatient departments (HOPDs) beginning January 2017 by eliminating eligibility for compensation under Medicare's Hospital Outpatient Prospective Payment System (HOPPS). Under Section 603, HOPDs that were billing Medicare under the HOPPS as of November 2, 2015 (Grandfathered HOPDs) are excepted, and may generally continue to bill under the HOPPS for service lines provided as of that date.

Contained within CMS's proposed annual update of its HOPPS and ASC compensation payment systems, the Proposed Rules address many of the open issues concerning Section 603's implementation. Some of the key proposals are as follows:

Relocation of Grandfathered HOPDs – Relocating a Grandfathered HOPD will result in the loss of excepted status for the Grandfathered HOPD, precluding it from continuing to bill under the HOPPS after the relocation. CMS is soliciting comments for certain narrow exceptions (such as relocation due to natural disaster).

Expansion of Services at a Grandfathered HOPD – A Grandfathered HOPD will continue to be reimbursed under the HOPPS only for those service lines it provided as of Nov. 2, 2015. Any service lines introduced thereafter will be reimbursed under another payment system. To implement this, CMS has proposed a table establishing "clinical families." If the Grandfathered HOPD provided any services within a particular clinical family as of November 2, 2015, any services it provides within that clinical family will still be reimbursed under the HOPPS. However, if the Grandfathered HOPD initiates services in a new clinical family, those new services are reimbursed under another payment system.

Change of Ownership of a Grandfathered HOPD – In a sale/merger transaction, a Grandfathered HOPD will retain its excepted status only if (i) ownership in the main hospital location is also transferred to the new owner and (ii) the new owner accepts the hospital's existing Medicare provider agreement. A sale of just the Grandfathered HOPD would result in the loss of the HOPD's excepted status.

Payment for Non-Excepted Items and Services – For HOPDs that are not grandfathered, and

services that do not fall under the grandfathering exception (such as new services introduced at a Grandfathered HOPD), CMS has declared the Medicare Physician Fee Schedule (MPFS) to be the appropriate payment system for such items and services. However, CMS has acknowledged that it currently has no system to allow hospitals to bill directly under the MPFS. Therefore, for 2017, CMS has proposed two options for hospitals to bill for such services. First, the performing physician or practitioner may bill for the service under the MPFS (this would likely require some sort of business arrangement between the physicians/practitioners and the hospital regarding assignment and transfer of funds). Second, the hospital may enroll the HOPD separately under Medicare as a freestanding facility or supplier (such as a group practice or ASC), which would permit the HOPD to bill directly under the MPFS. CMS is soliciting comments regarding development of a mechanism to permit hospitals to bill directly for 2018.

Dedicated Emergency Departments – All services provided at a dedicated ED, whether emergency or non-emergency, would continue to be eligible for payment under the OPFS.

The proposed rules do not address the issue concerning HOPDs under development as of November 2, 2015, although, as we [discussed last month](#), Congress is currently considering a legislative response to this.

Because these are only proposed rules, the provisions may change based on comments received. Given that these rules will affect every hospital system that currently operates an off-campus HOPD, they are likely to generate a significant volume of comments. Parties interested in submitting comments to CMS will have until September 6, 2016 to submit such comments.

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