

CMS Releases Final Rule Implementing Site Neutral Payment Rule for Hospital Outpatient Departments

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On November 1, CMS released final rules implementing Section 603 of the Bipartisan Balanced Budget Act of 2015 (the Final Rule). Section 603 effectively reduces Medicare compensation paid to certain off-campus hospital outpatient departments (HOPDs) beginning January 1, 2017 by eliminating their eligibility for compensation under Medicare's Hospital Outpatient Prospective Payment System (OPPS). The Final Rule generally adopts most of the provisions contained in the [proposed](#) rule released earlier this year, with a few significant exceptions. The Final Rule also includes an Interim Final Rule establishing a mechanism for HOPDs to continue to bill directly for services.

Some of the Final Rule's significant provisions are as follows:

Grandfathered HOPDs – Under the Final Rule, HOPDs that *furnished and billed for* covered services prior to November 2, 2015 (Grandfathered HOPDs) remain eligible for compensation under the OPPS after January 1, 2017 and are excepted from the "site neutral" payment limits implemented by Section 603. The Final Rule clarifies that a HOPD which first provided covered services before November 2, 2015, but did not bill for such services until on or after November 2, 2015, will be considered a Grandfathered HOPD provided that the bills were submitted in accordance with timely filing limits.

Relocation of Grandfathered HOPDs – Relocating a Grandfathered HOPD will generally result in the loss of excepted status for the Grandfathered HOPD, precluding it from continuing to bill under the OPPS after the relocation. However, the Final Rule provides for limited exceptions to the prohibition for reasons such as natural disasters, seismic building code requirements, and safety issues. Rather than provide clearly defined exceptions, the Final Rule provides that each claim for a relocation exception is to be evaluated on a case-by-case basis by the relevant CMS Regional Office.

Expansion of Services at Grandfathered HOPDs – CMS will not implement its proposed restriction on service line expansion at Grandfathered HOPDs, at least for the time being. In the Proposed Rule, CMS discussed implementing a system of "clinical families" to determine whether new services

provided at a Grandfathered HOPD would be eligible for reimbursement under the OPSS. In the Final Rule, CMS did not finalize this provision, but cautioned that it will monitor service line growth at Grandfathered HOPDs, and may propose a limitation in the future, including limitations on increases in service volume.

Change of Ownership of a Grandfathered HOPD – The Final Rule adopts the Proposed Rule’s provisions regarding change of ownership (CHOW) transactions. Specifically, a Grandfathered HOPD will retain its excepted status in a CHOW transaction 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 under which the Grandfathered HOPD is paid. A sale of the Grandfathered HOPD alone will result in the loss of the Grandfathered HOPD’s excepted status.

Payment for non-excepted items and services – Under the Proposed Rule, CMS suggested that it would not have a system in place by 2017 for HOPDs to bill under the Medicare Physician Fee Schedule. The Final Rule (through an Interim Final Rule) address this issue by implementing a payment system for HOPDs that will permit them to continue billing Medicare directly in 2017. Under the Final Rule, non-excepted HOPDs will be able to bill for services directly, receiving payments at Medicare Physician Fee Schedule rates that are roughly half of the current OPSS rates for 2017. CMS anticipates updating the rates for 2018, and will explore other payment methods for implementation in 2019. Under this payment system, services provided at non-excepted HOPDs will continue to be reported on the hospital’s cost report, which should mitigate concerns regarding whether non-excepted HOPDs would still be considered “child sites” for 340B purposes.

Dedicated Emergency Departments – The Final Rule provides dedicated emergency departments a categorical exception from the site neutral payment limits implemented by Section 603. All services provided at a dedicated emergency department, whether emergency or non-emergency, will continue to be eligible for payment under the OPSS.

HOPDs Under Development – The Final Rule does not contain any provision providing exceptions for HOPDs that were mid-build or under development (and thus not furnishing services) as of November 2, 2015. Absent a legislative remedy, these HOPDs will not be eligible for reimbursement under the OPSS.

CMS is soliciting comments regarding the Final Rule concerning the payment system, limitations on increases service volume among Grandfathered HOPDs and other issues. Parties interested in submitting comments to CMS regarding the Final Rule and Interim Final Rule provisions have until December 31, 2016 to submit such comments for consideration.

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