

HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

The “Very Near Future” Is Closer Than You Think: CMS Publishes Interim Final Rule Implementing The 3-Day Payment Window Legislation

August 6, 2010

In our *Health Law Update* published last week,¹ we discussed the Centers for Medicare & Medicaid Services' (CMS) recent one-page memorandum addressing statutory changes to Medicare's policy for payment of hospital services within the so-called "3-day payment window." As you may recall, the statutory changes effectively create a presumption that all non-diagnostic outpatient services provided on the date of an inpatient admission or in the 3-day window preceding an inpatient admission are "related to" the admission (and therefore must be bundled into the payment for the inpatient stay) unless the hospital demonstrates otherwise. The one-page memorandum issued by CMS stated that CMS would provide instructions "in the very near future" for how hospitals are to bill for non-diagnostic services provided within the 3-day payment window, presumably including how to demonstrate sufficiently that hospital outpatient services are "unrelated" to an inpatient diagnosis.

The "very near future" arrived almost immediately after last week's *Health Law Update* went to press. In the late afternoon of July 30, 2010, CMS posted to its Web site the Final Inpatient Prospective Payment System (IPPS) Rule for Fiscal Year 2011. Buried within the almost two-thousand page document is the interim final rule (the "Rule") implementing the 3-day payment window amendments.² This week's *Health Law Update* will summarize this additional rulemaking, which will be published in the Federal Register on August 16, 2010.

Non-Diagnostic Outpatient Services

The Rule explains that outpatient services are considered "related" to the admission if they are "clinically associated with the reason for a patient's inpatient admission."³ Unfortunately, the Rule does not provide as much detail on how to establish the "unrelated" nature of pre-admission non-diagnostic services as some hospitals might have hoped. Rather, CMS states merely that it intends to "establish a process" by which hospitals can "attest" to non-diagnostic services being unrelated to the hospital claim. The only specific part of this attestation process

¹ See "Battening Down the 3-Day Window Payment Hatch: CMS Addresses New Statutory Provision," July 30, 2010, available at <http://www.bassberry.com/communicationscenter/newsletters/>

² F.R. Doc. 2010-19092, available at http://www.ofr.gov/OFRUpload/OFRData/2010-19092_PI.pdf.

³ CMS-1498-F/F2/IFC at 954.

that the Rule reveals is that it will involve the use of a condition code, modifier or some other indicator. The full text of CMS' commentary in the Rule on this topic is set forth below:⁴

We intend to establish a process for hospitals to attest to nondiagnostic [sic] services as being unrelated to the hospital claim when a hospital submits an outpatient claim. As part of the process, hospitals would be required to maintain documentation in the beneficiary's medical record to support their claim that the outpatient nondiagnostic [sic] services are unrelated to the beneficiary's inpatient admission. We note that hospitals have experience with making similar attestations on the outpatient or inpatient claim. For example, under Medicare's current policy, when a patient is discharged or transferred from an acute care prospective payment system (PPS) hospital, and is readmitted to the same acute care PPS hospital on the same day for symptoms related to the prior stay, the second stay is bundled into payment for the first stay and not separately paid. However, when a patient is discharged or transferred from an acute care PPS hospital and is readmitted to the same acute care PPS hospital on the same day for symptoms unrelated to the prior stay, hospitals can place condition code (CC) B4 on the inpatient claim that contains an admission date equal to the prior admissions discharge date that would allow the second stay to be paid separately. If the condition code is not included on the claim for a same day readmission, edits will bundle the claim for the second admission into the first one and Medicare will only pay for one inpatient discharge. ... We plan to develop a similar process using a condition code, modifier, or some other indicator for the 3-day (1-day) payment window.

The Rule provides little additional guidance for how hospitals should attest to the "unrelatedness" of a claim. CMS notes once again that "[i]n the near future" it expects to release additional guidance. In this case, the additional guidance will be in the form of updating the instructions in the Medicare Claims Processing Manual, Chapter 3, section 40.3, in order to conform to the requirements of section 102 of Pub. L. 111-192.⁵

Diagnostic Services

The Rule confirms that the recent statutory changes do not affect billing for diagnostic services. Hospitals should continue to bundle all diagnostic services provided on or during the three days prior to the date of the inpatient admission.

Non-IPPS Hospitals

For non-subsection (d) hospitals,⁶ the payment window is one day. Accordingly, the Rule codifies the statutory requirements by providing that all non-diagnostic services provided on or after June 25, 2010 (other than ambulance and maintenance renal dialysis services) that are provided during the one calendar day immediately preceding the date of admission by a non-subsection (d) hospital (or by an entity wholly owned or operated by the non-subsection (d) hospital) are deemed related to and, thus, part of the beneficiary's inpatient stay unless the

⁴ CMS-1498-F/F2/IFC at 955-956.

⁵ CMS-1498-F/F2/IFC at 959.

⁶ A hospital is generally a "non-subsection (d)" hospital if it is excluded from IPPS.

hospital “attests” that specific non-diagnostic services are clinically unrelated to the inpatient admission when the hospital submits an outpatient claim.

Additionally, the Rule creates new sections in the Code of Federal Regulations in order to codify the same 1-day payment window for Inpatient Psychiatric Facilities (“IPFs”), Long Term Care Hospitals (“LTCHs”), and Inpatient Rehabilitation Facilities (“IRFs”). In other words, IPFs, LTCHs, and IRFs (or entities wholly owned or operated by them) must bundle into the inpatient claim all non-diagnostic services provided on or after June 25, 2010 (other than ambulance and maintenance renal dialysis services) that are provided during the one calendar day immediately preceding the date of admission, unless the IPF, LTCH, or IRF, as applicable, “attests” that specific non-diagnostic services are clinically unrelated to the inpatient admission when the hospital submits an outpatient claim.⁷

If you have any questions about this *Health Law Update*, please contact any of the attorneys in our Healthcare Practice Group listed below.

⁷ Note that non-subsection (d) hospitals and IPFs, LTCHs, and IRFs apparently do not have the same opportunity as subsection (d) hospitals (i.e., acute care IPPS hospitals) to “attest” to the unrelated nature of services that are provided on the actual date of admission. The non-diagnostic services provided on the date of admission are conclusively presumed to be related to the admission, and no opportunity to demonstrate otherwise through an attestation is available (as it is for services provided during the one day *preceding* admission). By contrast, acute care hospitals that are paid under IPPS and that are subject to the normal 3-day payment window can apparently attest to the unrelated nature of non-diagnostic services provided both during the 3-day window preceding the admission and on the date of admission.

Bass, Berry & Sims Healthcare Attorneys

H. Lee Barfield, II
(615) 742-6202
lbarfield@bassberry.com

Philip F. Berg
(615) 742-7908
pberg@bassberry.com

Krista Thornton Cooper
(615) 742-7734
kcooper@bassberry.com

Meredith Edwards
(615) 742-7823
medwards@bassberry.com

Mary Beth Fortugno
(615) 742-7739
mfortugno@bassberry.com

Valere Fulwider
(615) 742-7822
vfulwider@bassberry.com

Lauren Gaffney
(615) 742-7824
lgaffney@bassberry.com

Pooneh Ghiassi
(615) 742-7782
pghiassi@bassberry.com

Anna Grizzle
(615) 742-7732
agrizzle@bassberry.com

Elisa E. Harris
(615) 742-6553
eharris@bassberry.com

Angela Humphreys
(615) 742-7852
ahumphreys@bassberry.com

J. James Jenkins, Jr.
(615) 742-6236
jjenkins@bassberry.com

Seth A. Killingbeck
(615) 742-7707
skillingbeck@bassberry.com

David King
(615) 742-7890
dking@bassberry.com

Claire F. Miley
(615) 742-7847
cmiley@bassberry.com

T. Scott Noonan, Co-Chair
(615) 742-6273
snoonan@bassberry.com

Shannon Pinkston
(615) 742-7727
spinkston@bassberry.com

Cynthia Y. Reisz
(615) 742-6283
creisz@bassberry.com

Brian D. Roark
(615) 742-7753
broark@bassberry.com

Catherine J.B. Sloan
(615) 742-7789
csloan@bassberry.com

Danielle M. Sloane
(615) 742-7763
dsloane@bassberry.com

Nesrin Garan Tift
(615) 742-7903
ntift@bassberry.com

Leigh Walton, Co-Chair
(615) 742-6201
lwalton@bassberry.com

Elizabeth S. Warren
(615) 742-7719
ewarren@bassberry.com

Douglas M. Wolford
(615) 742-7917
dwolford@bassberry.com

The materials contained herein have been abridged from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.

To ensure compliance with requirements imposed by the IRS, we inform you that this message is not intended to be used, and cannot be used, by the addressee or any other person for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.