

# HEALTH REFORM IMPACT

## What you need to know NOW

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

### **Go Ahead And Make An Offer: CMS Solicits Bundled Payment Proposals**

September 23, 2011

On August 23, 2011, the Centers for Medicare & Medicaid Services (“CMS”) released a notice outlining its Bundled Payments for Care Improvement (“BPCI”) Initiative and announcing a request for applications for participation.<sup>1</sup> CMS has high hopes that bundled payments will be the path to better coordinated care by aligning incentives among hospitals, physicians and non-physician practitioners that will ultimately lead to better outcomes and lower costs.

*Program Overview.* As part of the BPCI Initiative, CMS plans to link payments for multiple services that patients receive during an “episode of care.” Unlike the accountable care organization (“ACO”) model, under this program CMS will allow organizations considerable flexibility in designing their programs and defining the episode of care. After outlining the four basic models, CMS leaves it to the organization to determine the details, such as what clinical condition(s) (i.e., Medicare Severity Diagnosis Related Groups, or “MS-DRGs”) will be subject to bundled payments, which services will be bundled together, how long the episode of care will last, and whether to include gainsharing. Ultimately, awardee(s) will enter into BPCI agreements with CMS for a performance period of three years, with the possibility of being extended for two additional years.

*Model 1: Retrospective payment models centering on the acute inpatient hospital stay only.* Under this Model, Medicare will pay the hospital a discounted amount based on the payment rates established under the Inpatient Prospective Payment System (“IPPS”) and pay physicians separately for their services under the Medicare Physician Fee Schedule (“MPFS”). The discount rate minimum gradually increases from 0 percent in the first six months to 2 percent in the third year. Moreover, the discount rate will apply to all MS-DRGs (excluding MS-DRGs involved in bundling under another Model).<sup>2</sup> The coordinating hospitals and physicians will be permitted to share gains arising from better coordination of care.

*Model 2: Retrospective bundled payment models for hospitals, physicians, and post-acute providers for an episode of care consisting of an inpatient hospital stay*

<sup>1</sup> See [CMS Fact Sheet: Bundled Payments for Care Improvement Initiative](#). The request for applications was subsequently released in the federal register. See Bundled Payments for Care Improvement Initiative: Request for Applications, 76 Fed. Reg. 53,137 (Aug. 25, 2011).

<sup>2</sup> See [Bundled Payments for Care Improvement initiative Frequently Asked Questions](#) (updated Sept. 9, 2011).

*followed by a minimum of 30 or 90 days post-acute care.* The bundled payment includes physicians' services, care by a post-acute provider, related readmissions and other services proposed in the episode definition (e.g., clinical laboratory services, durable medical equipment, prosthetics, orthotics and supplies, and Part B drugs). Providers and suppliers will receive payments at the usual fee-for-service payment rates, after which the aggregate Medicare payment for the episode will be reconciled against the target price (a discounted amount based on the applicant's historical fee-for-service payments for the episode). Any reduction in expenditures beyond the discount reflected in the target price will be paid to the participants to share among the participating providers.

*Model 3: Retrospective bundled payment models for post-acute care where episode does not include the acute inpatient stay.* Rather, the episode of care begins at discharge from the inpatient stay and would end no sooner than 30 days after discharge. Other than the inpatient stay, the services included in the bundled payment and the payment methodology are the same as Model 2.

*Model 4: Prospectively administered bundled payment models for the acute inpatient stay only encompassing all services furnished during the inpatient stay by the hospital, physicians and other practitioners.* Physicians and other practitioners would be paid by the hospital and submit "no-pay" claims to Medicare.

Any proposed gainsharing in an application must be designed in accordance with specific guidelines established by CMS to ensure that care is not inappropriately reduced, that quality of care remains constant or is improved, that there are not inappropriate changes in utilization or referral patterns, and to guard against fraud and abuse.<sup>3</sup> One concern is the potential for bundled payment proposals to run afoul of existing fraud and abuse laws. To address this concern, CMS has indicated that applicable waivers to the fraud and abuse laws, if granted, may be included in the terms and conditions of the agreement between CMS and the awardee(s) and/or providers.<sup>4</sup>

Moreover, as a condition of participating, applicants will be required to plan and implement quality assurance and improvement activities and to participate in CMS quality monitoring by reporting appropriate quality measures. Applicants are also expected to include in their proposals strong patient protections that preserve beneficiary choice in seeking care from a provider of their choice. CMS does not, however, elaborate on what it will mean for payment when a patient opts to use a provider that is not involved in the bundled payment program. In addition, CMS does plan to monitor the program's effect on clinical quality, patient experience and outcomes of care.

*Non-binding Letters of Intent and Application Deadlines.* Organizations interested in participating in one or more of the initial four models must submit a nonbinding letter(s) of intent by October 6, 2011<sup>5</sup> for Model 1 and by November 4, 2011 for Models 2 - 4. For Model 1, applications must be received by CMS on or before November 18, 2011. For Models 2-4, applications must be received by March 15, 2012. Sample letters of intent and application forms, as well as additional information, are available on the CMS Innovation website.<sup>6</sup> For organizations that would like to receive historical

<sup>3</sup>See [Bundled Payments for Care Improvement initiative Request for Application](#).

<sup>4</sup>See [Bundled Payments for Care Improvement initiative Frequently Asked Questions](#) (updated Sept. 9, 2011).

<sup>5</sup> On September 15, 2011, CMS extended the original deadlines pertaining to Model 1 of September 22, 2011 for submitting Letters of Intent to and October 21, 2011 for submitting applications.

<sup>6</sup>See [Bundled Payments for Care Improvement Application](#). The letters of intent and applications must be submitted via encrypted email in searchable pdf format to: [BundledPayments@cms.hhs.gov](mailto:BundledPayments@cms.hhs.gov).

Medicare claims data in preparation for Models 2-4, a separate research request packet and data use agreement must be submitted in conjunction with the letter of intent.

If you have any questions about this issue of *Health Reform IMPACT*, please contact any of the attorneys in our Healthcare Practice Group listed below. Also, please visit our special [website](#) for Health Reform IMPACT.

**Bass, Berry & Sims Healthcare Attorneys**

**Philip F. Berg**

(615) 742-7908

[pberg@bassberry.com](mailto:pberg@bassberry.com)

**Krista T. Cooper**

(615) 742-7734

[kcooper@bassberry.com](mailto:kcooper@bassberry.com)

**Meredith Edwards**

(615) 742-7823

[medwards@bassberry.com](mailto:medwards@bassberry.com)

**Mary Beth Fortugno**

(615) 742-7739

[mfortugno@bassberry.com](mailto:mfortugno@bassberry.com)

**Lauren Gaffney**

(615) 742-7824

[lgaffney@bassberry.com](mailto:lgaffney@bassberry.com)

**Pooneh Ghiassi**

(615) 742-7782

[pghiassi@bassberry.com](mailto:pghiassi@bassberry.com)

**Anna Grizzle**

(615) 742-7732

[agrizzle@bassberry.com](mailto:agrizzle@bassberry.com)

**Elisa E. Harris**

(615) 742-6553

[eharris@bassberry.com](mailto:eharris@bassberry.com)

**Angela Humphreys**

(615) 742-7852

[ahumphreys@bassberry.com](mailto:ahumphreys@bassberry.com)

**J. James Jenkins, Jr.,  
Chair**

(615) 742-6236

[jjenkins@bassberry.com](mailto:jjenkins@bassberry.com)

**Seth A. Killingbeck**

(615) 742-7707

[skillingbeck@bassberry.com](mailto:skillingbeck@bassberry.com)

**Daniel R. Kuninsky**

(615) 742-7837

[dkuninsky@bassberry.com](mailto:dkuninsky@bassberry.com)

**Claire F. Miley**

(615) 742-7847

[cmiley@bassberry.com](mailto:cmiley@bassberry.com)

**T. Scott Noonan**

(615) 742-6273

[snoonan@bassberry.com](mailto:snoonan@bassberry.com)

**Shannon Pinkston**

(615) 742-7727

[spinkston@bassberry.com](mailto:spinkston@bassberry.com)

**Cynthia Y. Reisz**

(615) 742-6283

[creisz@bassberry.com](mailto:creisz@bassberry.com)

**Brian D. Roark**

(615) 742-7753

[broark@bassberry.com](mailto:broark@bassberry.com)

**Catherine J.B. Sloan**

(615) 742-7789

[csloan@bassberry.com](mailto:csloan@bassberry.com)

**Danielle M. Sloane**

(615) 742-7763

[dsloane@bassberry.com](mailto:dsloane@bassberry.com)

**Nesrin Garan Tift**

(615) 742-7903

[ntift@bassberry.com](mailto:ntift@bassberry.com)

**Leigh Walton**

(615) 742-6201

[lwalton@bassberry.com](mailto:lwalton@bassberry.com)

**Elizabeth S. Warren**

(615) 742-7719

[ewarren@bassberry.com](mailto:ewarren@bassberry.com)

**Douglas M. Wolford**

(615) 742-7917

[dwolford@bassberry.com](mailto: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.*

150 Third Avenue South, Suite 2800 • Nashville, TN 37201 • (615) 742-6200

The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103 • (901) 543-5900

1700 Riverview Tower • 900 South Gay Street • Knoxville, TN 37902 • (865) 521-6200