

# HEALTH LAW UPDATE

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

## **Coming Soon To More and More Medicare Providers Near You: Patient Notification of Quality Improvement Organization (“QIO”) Rights**

March 4, 2011

On February 2, 2011, the [Centers for Medicare & Medicaid Services](#) (“CMS”) issued a proposed rule (the “Proposed Rule”)<sup>1</sup> that would extend to most types of Medicare-certified providers the requirement to notify patients of their rights to contact their state QIO regarding quality of care issues. Currently, only hospitals and critical access hospitals are required to provide this type of notice to Medicare beneficiaries (and only to those beneficiaries admitted as inpatients).<sup>2</sup>

The Proposed Rule would, in addition, require all affected providers and suppliers (including hospitals and critical access hospitals) to document that the requisite notice of QIO rights has been provided to the patient. Also, for certain providers and suppliers, the disclosure would have to include contact information for the applicable Medicare state survey agency.

### **Policy Underpinnings of the Proposed Rule**

CMS believes that the QIO notice requirement should apply to a variety of care settings in addition to the inpatient hospital setting as a method to engage Medicare beneficiaries in providing feedback on the quality of care that they receive. According to CMS Administrator Donald M. Berwick, the Proposed Rule is intended to ensure that Medicare beneficiaries know they have a voice in the care they receive under the Medicare program. While QIOs do not have jurisdiction to address complaints from non-Medicare beneficiaries, CMS believes that if Medicare beneficiaries are informed how to report their dissatisfaction with the healthcare services that they receive, then all patients will see the quality of care improve.

### **Affected Providers**

The Proposed Rule, as written, would affect the following 10 types of Medicare providers and suppliers: (1) clinics, rehabilitation agencies and public health agencies that provide outpatient physical therapy and speech-language-pathology services; (2) comprehensive outpatient rehabilitation facilities; (3) critical access hospitals; (4) home health agencies (HHAs); (5) hospices; (6) hospitals (including those in connection with outpatient treatment); (7) long-term care facilities; (8) ambulatory surgical centers (ASCs); (9) portable x-ray services; and (10) rural health clinics and Federally Qualified Health Centers. CMS anticipates that tens of thousands of Medicare-certified facilities will be subject to the QIO notice

<sup>1</sup> 76 Fed. Reg. 5755 et seq. (February 2, 2011).

<sup>2</sup> In fact, CMS reports that QIO utilization rates are higher among hospitalized beneficiaries than among those who receive care in other settings.

requirement for the first time under the Proposed Rule (e.g., 5,174 ASCs and 9,787 HHAs), resulting in millions of new QIO notices being provided. The estimated cost to each type of provider or supplier is between \$18,000 and \$18 million per year, depending on the extent to which the Proposed Rule modifies existing regulations applicable to the particular provider or supplier.

### **Requirements of the Proposed Rule**

In the Proposed Rule, CMS explains that Medicare beneficiaries would receive the notice about their QIO rights at the start of their care, at the time of inpatient admission, or at an initial assessment visit, as applicable. The written notice must (1) inform Medicare beneficiaries of their right to file written complaints about the quality of care with a QIO, (2) provide contact information for the QIO in the state where the services are being or were provided (i.e., the name of the QIO, its mailing address, its electronic address, and its telephone number), and (3) for certain Medicare providers and suppliers, provide all patients with the contact information of the applicable Medicare state survey agency.<sup>3</sup> CMS is proposing to give healthcare facilities the flexibility to design their own notice and documentation process within these parameters. The Proposed Rule revises the applicable Conditions of Participation or Conditions for Coverage for each provider and supplier type to reflect these new requirements.

### **Other Recent Developments Concerning QIOs**

In addition to the Proposed Rule, the [Government Accountability Office](#) (the “GAO”) and the [Medicare Payment Advisory Commission](#) (“MedPAC”) have recently weighed in on QIOs. In a report issued in December 2010, the GAO recommended that CMS improve its methods for gathering cost information about reviews conducted by QIOs so that CMS can budget properly for QIO activities.<sup>4</sup>

Additionally, at a February 23-24, 2011 meeting, MedPAC discussed draft recommendations that would change the role of QIOs and how they are funded.<sup>5</sup> MedPAC commissioners are expected to vote on final recommendations at the April meeting and to include them in MedPAC’s June 2011 Report to Congress.

Finally, on February 25, 2011, CMS issued a draft version of the QIO 10th Statement of Work (the “Statement of Work”) contract.<sup>6</sup> CMS is accepting industry comments/questions on the draft Statement of Work through Tuesday, March 15, 2011.

### **Conclusion**

Comments in response to the Proposed Rule are due April 4, 2011. CMS has specifically asked for input regarding whether the QIO notice should be given not only at the start of care but also at the end of a Medicare beneficiary’s treatment, service or hospitalization (or, alternatively, whether a second notification should be given at the end of a Medicare beneficiary’s care only if the Medicare beneficiary has experienced an adverse event).

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<sup>3</sup> The requirement to provide contact information for state survey agencies to beneficiaries is applicable to all provider types other than ASCs, long-term care facilities, and home health agencies, because these three types of healthcare facilities already are required by federal regulation to provide this information.

<sup>4</sup> See Government Accountability Office, “Medicare: CMS Needs to Collect Consistent Information from Quality Improvement Organizations to Strengthen Its Establishment of Budgets for Quality of Care Reviews,” (dated June 6, 2010), available at <http://www.gao.gov/products/GAO-11-116R>.

<sup>5</sup> The draft MedPAC recommendations, if adopted, are expected to fundamentally change QIOs by redirecting funds for the QIO program to low-performing providers and communities, by redefining what can constitute a QIO in a way that would remove many barriers to competition, and by changing the rewards and penalties for high and low performing providers.

<sup>6</sup> The draft version of the QIO 10th Statement of Work is available on the [FedBizOpps.gov website](#).

CMS continues to post additional information to its website on QIOs. This information is available at <http://www.cms.gov/QualityImprovementOrgs/>. If you have any questions, or would like to discuss the implications of the Proposed Rule, please do not hesitate to contact any of the attorneys in our Healthcare Practice Group shown below.

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