

## CMS GUIDANCE IMPACTS MICRO HOSPITALS

On September 6, 2017, the Centers for Medicare & Medicaid Services (“CMS”) issued a [Survey and Certification \(“S&C”\) Memo 17-44](#) with new guidance to State Survey Agencies pertaining to the application of the Medicare statutory definition of “hospital” and whether a hospital is “primarily engaged” in the provision of inpatient services. CMS clarified that a hospital must have two inpatients at the time of survey in order for surveyors to directly observe the actual provision of care to inpatients. Additionally, CMS clarified the use of benchmarks for average daily census (“ADC”) and average length of stay (“ALOS”) data will be two primary factors utilized to determine whether a hospital is “primarily engaged” in providing inpatient services.

This new guidance regarding the definition of “hospital” and whether a hospital is “primarily engaged” in inpatient services is not applicable to critical access hospitals (“CAHs”) or psychiatric hospitals as defined by Section 1861(f) of the Social Security Act (“SSA”). See below for further analysis.

### S&C MEMO 17-44 GUIDANCE

In order to obtain a Medicare provider agreement, a hospital must meet all the Medicare Conditions of Participation for hospitals, including the Medicare definition of a hospital found in Section 1861(e) of the SSA. This means an entity must be:

*“primarily engaged in providing, by or under the supervision of a physician, to inpatients A) diagnostic services and therapeutic services for diagnosis, treatment, and care of injured, disabled, or sick persons or B) rehabilitation services for the rehabilitation of injured, disabled or sick persons.”* (emphasis added)

The term “primarily engaged” is not legally defined in the SSA, and guidance on its application to date has been sparse. Importantly, the new S&C Memo 17-44 provides very specific benchmarks and factors that will be considered by state survey agencies and the CMS Regional Offices in the primarily engaged analysis for purposes of determining whether a facility meets the statutory definition of “hospital.”

CMS clarified that a hospital is not required to have a certain inpatient to outpatient ratio to meet the definition of primarily engaged. Rather, multiple factors will be considered to evaluate the hospital as a whole, including, but not limited to, the ADC and ALOS. The statutory and regulatory definition of a hospital includes “inpatients” (*plural*); therefore, CMS believes a hospital’s ADC should be two or more inpatients. Similarly, a patient is considered an inpatient if formally admitted by a physician who expects the patient to remain an inpatient for at least two midnights. Because of the Two-Midnight Rule, CMS stated that an ALOS of two midnights is one of the primary benchmarks considered in the certification of a hospital.

CMS made it clear that the hospital needs to have two inpatients at the time of survey or a survey will not be conducted. If the hospital has two inpatients, this does not necessarily mean that the hospital is primarily engaged in providing inpatient services. Rather, having two inpatients at the time of survey is simply the starting point to the survey and certification process. If a hospital does not have two inpatients at the time of survey, then the surveyor will remain on site to conduct an initial review of the hospital’s admission data to determine whether the hospital has an ADC of at least two inpatients and an ALOS of at least two midnights over the last 12 months.

- If the facility has an ADC and ALOS of two or greater, then the survey will be conducted at a later time.
- If the facility does not have an ADC and ALOS of two or greater, then the hospital is not likely to be primarily engaged in inpatient services, and the CMS Regional Office will look at other factors to determine whether a second survey should be conducted.

When determining whether to conduct a second survey or recommend denial of an initial applicant (or termination of a current provider agreement), the CMS Regional Office will consider additional factors to ascertain whether the hospital is primarily engaged in providing inpatient services. These factors include, but are not limited to the following.

- *The number of off-campus provider-based emergency departments.* An unusually high number of off-campus emergency departments (“EDs”) may suggest the hospital is not primarily engaged in inpatient care.
- *The number of inpatient beds in relation to the size of the facility and the services offered.* It may be a red flag if the hospital has an

extremely low number of inpatient beds but several off-campus EDs and other types of outpatient departments such as surgery departments.

- *The volume of outpatient surgical procedures to inpatient surgical procedures.*
- *The volume of outpatient procedures for a “surgical” hospital.* CMS will consider information that indicates that surgeries are routinely scheduled early in the week and admission patterns that result in all or most patients being discharged prior to the weekend.
- *Patterns and trends in the ADC by the day of the week.* CMS will consider, for example, if the ADC consistently drops to zero on Saturdays and Sundays.
- *Staffing patterns.* A review of staffing schedules should demonstrate that nurses, pharmacists, physicians, etc. are scheduled to work to support 24/7 inpatient care.
- *How the facility advertises itself to the community.* CMS will consider how the facility holds itself out, such as advertising as a “specialty” hospital or “emergency” hospital and whether the name of the facility includes terms like “clinic” or “center” as opposed to “hospital.”

## PRACTICAL TAKEAWAYS

This guidance appears to be a response to the rise in “micro hospitals,” which are generally viewed as acute care facilities with a very small number of inpatient beds treating low-acuity patients. It will likely be challenging for micro hospitals to continuously have an ADC of two or two inpatients at the time of every certification survey. Micro hospitals and other hospitals with few inpatient beds should pay particularly close attention to the list of factors CMS will consider and scrutinize during any survey. On the other hand, this guidance may be helpful for hospitals establishing remote locations, since those locations are not separately certified hospitals. The list of factors seems to clarify that CMS will be looking at the “primarily engaged” criteria with respect to the hospital’s CMS Certification Number as a whole and not solely at the individual site that is the remote location. It is important for all hospitals that are not CAHs and psychiatric hospitals to review the list of published factors and be prepared to address these questions at the hospital’s initial or recertification survey. It is important to note that CMS has the final authority to make the determination whether or not a facility has met the statutory definition of a hospital. State license approval and Medicare contractor approval of an enrollment application do not mean that CMS will automatically consider the facility to be a “hospital” for federal survey and certification purposes. CMS will make this determination after considering the facility’s entire situation and the recommendations of the state agency surveyors, as well as the evidence submitted by the state agencies and accreditation organizations. Non-compliance will not be based on a single factor, such as failure to have two inpatients at the time of survey.

If you have any questions regarding this new guidance, please contact:

- **Brian Jent** at 317-977-1402 or [bjent@hallrender.com](mailto:bjent@hallrender.com);
- **Regan Tankersley** at 317-977-1455 or [rtankersley@hallrender.com](mailto:rtankersley@hallrender.com);
- **Lauren Hulls** at 317-977-1467 or [lhulls@hallrender.com](mailto:lhulls@hallrender.com); or
- Your regular Hall Render attorney.