

## CMS'S UNFOUNDED "THEORY OF RELATIVITY" - MAJOR PAYMENT DECREASE PROPOSED FOR NON-GRANDFATHERED PROVIDER-BASED CLINICS

On July 13, 2017, the Centers for Medicare & Medicaid Services ("CMS") released its **proposed rule** for the Calendar Year ("CY") 2018 Medicare Physician Fee Schedule ("Proposed Rule"). Among many other changes, CMS proposed to reduce the payment rate, again, for certain non-excepted (non-grandfathered) off-campus provider-based hospital departments ("PBDs") by changing its so-called MPFS Relativity Adjuster (defined below) from 50 percent to 25 percent of the Outpatient Prospective Payment amount for CY 2018. By CMS's own admission, this major reduction is proposed with no "more precise data" than last year and with a bare minimum of analysis. This proposed policy change significantly impacts payment for services furnished at non-excepted locations and undercuts CMS's goal of achieving site neutrality. Hospital providers should strongly consider submitting comments on the Proposed Rule to ensure adequate and appropriate payment to hospitals – CMS expressly requested comments from stakeholders and even suggested a "middle ground" Relativity Adjuster of 40 percent.

### BACKGROUND

As discussed in a previous **health law news article** from November 3, 2016, CMS implemented Section 603 of the Bipartisan Budget Act of 2015 ("Section 603") in its CY 2017 Outpatient Prospective Payment System ("OPPS") Final Rule issued on November 1, 2016, which established that services at non-excepted (non-grandfathered) off-campus PBDs will be paid under the Medicare Physician Fee Schedule ("MPFS") as the "applicable payment system" beginning January 1, 2017 rather than the OPPS APC payment amount.

Simultaneously, CMS issued an interim final rule with comment period ("IFC") to establish new payment rates under the MPFS for items and services provided by non-excepted (non-grandfathered) off-campus provider-based locations. For CY 2017, CMS scaled the OPPS payment rate by 50 percent in an effort to strike a balance between payment for services furnished in a non-excepted off-campus PBD and services furnished in other settings for which payment is made under the MPFS. CMS arrived at this percentage by comparing the payment under the OPPS to the payment under the MPFS for the 25 most frequently billed HCPCS codes at off-campus PBDs that contained the "PO" modifier between January 1 and August 26, 2016. This adjustment is known as the "MPFS Relativity Adjuster," which refers to the percentage of the OPPS payment amount paid under the MPFS for a non-excepted item or service to the non-excepted off-campus PBD. In the IFC, CMS stated that it considered this payment reduction to be a transitional policy until it has more precise data to value services provided by non-excepted off-campus PBDs.

### CMS PROPOSED MPFS RELATIVITY ADJUSTER FOR CY 2018

In the CY 2018 Proposed Rule, CMS acknowledged that it does not have more precise data than what was available when CMS established the MPFS Relativity Adjuster in the CY 2017 IFC, and it does not believe that it will have such data until the end of CY 2017, at the earliest. Nonetheless, CMS proposed to revise the MPFS Relativity Adjuster for CY 2018 from 50 percent to 25 percent by making a code level comparison of HCPCS Code G0463 as this service is the most commonly billed service in the off-campus PBD setting under OPPS. Specifically, CMS compared the CY 2017 OPPS national payment rate for HCPCS Code G0463 to the difference between the non-facility and facility MPFS payment amounts under the MPFS using the CY 2017 rates for the weighted average of outpatient visits (CPT codes 99201-99205 and CPT codes 99211-99215).

CMS did not consider or review other services that are provided in off-campus hospital locations. In fact, CMS acknowledged that its calculation of the MPFS Relativity Adjuster was based solely on a comparison of outpatient clinic visit services and that the comparison between the OPPS and MPFS rates for other services vary greatly. Additionally, CMS noted that "there are other factors, including the specific mix of services furnished by non-excepted off-campus PBDs, policies related to the bundling and packaging of codes under OPPS and payment adjustments/bundling under MPFS that rely on information about whether or not codes are billed on the same day, that contribute to differences in aggregate payment amounts for a broader range of services."

Accordingly, payment for other non-excepted services (non-outpatient clinic visits) at non-excepted locations may be less than the MPFS rate or ASC fee schedule rate after application of the 25 percent MPFS Relativity Adjuster. CMS's proposal is based on incomplete and very

limited analysis and information and could result in hospitals receiving less than what they would be paid for true site-neutral payment.

## **ADDITIONAL PAYMENT ADJUSTMENTS**

For CY 2018, CMS will continue to apply the same hospital wage index for non-excepted services that would otherwise apply to the hospital's payments under the OPFS. In addition, CMS will also continue to apply OPFS packaging policies for non-excepted services paid under the MPFS. That means, for example, that CMS will use the claims processing logic that is used for payments under the OPFS for comprehensive APCs and packaging of clinical diagnostic laboratory tests, which will be incorporated into the newly established MPFS rates. CMS indicated that it will continue to monitor claims data and may revise the MPFS Relativity Adjuster in future years.

## **PRACTICAL TAKEAWAYS**

- CMS's proposed 25 percent MPFS Relativity Adjuster for CY 2018 may result in a number of services furnished in non-excepted PBDs to be paid significantly less than if the item or service were furnished in the non-hospital setting contrary to CMS's goal of achieving site neutrality.
- CMS has indicated that it may change the MPFS Relativity Adjuster from year to year, which will make it very difficult for hospitals to budget Medicare revenues for their non-excepted PBDs.
- Stakeholders are strongly encouraged to submit comments to CMS, especially if they have performed payment analyses comparing payments under the MPFS and the adjusted payment for non-excepted services. Comments are due no later than 5:00 PM EDT on September 11, 2017.

If you have questions or would like additional information about this topic, please contact:

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