

## IRS PROPOSED REGULATIONS ON NEW REQUIREMENTS FOR CHARITABLE HOSPITALS: PART III - LIMITATIONS ON CHARGES

*This Health Care Tax News article is Part III in a series discussing the Proposed Regulations under Code Section 501(r). The **first installment** provided an overview of the Proposed Regulations, and the **second installment** addressed the requirements for maintaining written financial assistance policies and written emergency medical care policies.*

Under the Patient Protection and Affordable Care Act ("ACA") and as codified in Section 501(r)(5) of the Internal Revenue Code of 1986, as amended (the "Code"), Hospital Facilities are required to limit charges for emergency and other medically necessary care provided to individuals eligible for financial assistance to amounts generally billed to insured individuals. Additionally, the ACA prohibits Hospital Facilities from billing such individuals based on "gross charges." Since enactment, Hospital Organizations and their Hospital Facilities have been concerned with how to interpret and comply with these requirements. The recent release of Proposed Regulation Section 1.501(r)-5 expands on the codified requirements and provides specific guidance regarding permissible charge calculation methods applicable to such individuals.

### PROPOSED REGULATIONS - LIMITATIONS ON CHARGES PROVISIONS

#### *Permissible Charges*

As discussed in Part II of this Series, each Hospital Organization is required to adopt and implement a written financial assistance policy ("FAP") that establishes the eligibility criteria for free and discounted financial assistance. While Hospital Organizations have retained flexibility in establishing the eligibility criteria in connection with the FAP under the proposed regulations, Hospital Facilities now have even less flexibility with respect to what the Hospital Facility charges individuals who qualify for financial assistance under the FAP ("Eligible Individuals"). Proposed Regulation Section 1.501(r)-5 prohibits Hospital Facilities from charging Eligible Individuals more for emergency or other medically necessary care than the amounts generally billed to individuals who have insurance covering such care ("AGB").

#### *Methods of Determining Charges*

Proposed Regulation Section 1.501(r)-5 requires that Hospital Facilities use one of two calculation methods in determining the AGB for a particular service. Once a calculation method is adopted, a Hospital Facility may not switch to the other calculation method.

The first (and simpler) calculation method is to treat the patient as if he or she were a Medicare fee-for-service beneficiary. Using typical Hospital Facility billing and coding procedures, the Hospital Facility would identify the amount Medicare and the Medicare beneficiary would together be expected to pay for the care, which is the AGB under this calculation.

Under the second (and more complicated) calculation method, Hospital Facilities may multiply the gross charges for a particular service by an "AGB Percentage." In the AGB Percentage approach, the Hospital Facility uses its gross charges as a starting point for its billing calculations (despite the ACA's prohibition against basing charges for Eligible Individuals on gross charges). The AGB Percentage is reached by dividing the gross charges for emergency and other medically necessary care that were submitted to certain payers over the prior 12 months and that the Hospital Facility considers paid in full, by the amounts the Hospital Facility received in full payment of such claims. The amounts received by the Hospital Facility in full payment of the claims include copayments, coinsurance and deductibles. In calculating the AGB Percentage, the Hospital Facility can include either those fee-for-service claims paid by Medicare Part A or B, or by a combination of fee-for-service claims paid by Medicare Part A or B and claims paid by private health insurers. The Hospital Facility may calculate one AGB Percentage, separate percentages for different categories of services or separate percentages for individual items and services, as long as an AGB Percentage exists for each emergent and medically necessary service.

Proposed Regulation Section 1.501(r)-5, as currently written, does not allow a Hospital Facility to use only private health insurance data in the calculation. The AGB Percentage must be calculated annually and must be implemented within 45 days of the end of the 12-month period used for the calculation.

## *Safe Harbor for Charges in Excess of AGB*

The IRS has included a safe harbor in Proposed Regulation Section 1.501(r)-5(d) for situations in which the Hospital Facility has billed an individual that has not submitted an application for financial assistance as of the date of the charge and the Hospital Facility is making reasonable efforts to determine the patient's eligibility for financial assistance. If the patient is later determined to be an Eligible Individual, the Hospital Facility is required to correct the amounts charged and issue a refund to the patient, if necessary.

## *Non-Emergent or Medically Unnecessary Care and Non-Eligible Individuals*

Under the Proposed Regulations, a Hospital Facility may charge Eligible Individuals more than the AGB amount, but in all cases, the charge must be less than the Hospital Facility's gross charges. The Proposed Regulations do not affect a Hospital Facility's use of gross charges for patients other than Eligible Individuals.

## **CONCLUSION**

After the enactment of the ACA, many Hospital Facilities reevaluated their procedures for billing individuals that qualified for financial assistance in order to comply with the ACA's statutory requirements. The detailed nature of the requirements contained in the Proposed Regulations will make it very important for Hospital Facilities to evaluate and adjust the current charge determination process for Eligible Individuals.

Should your organization require assistance in evaluating the Proposed Regulations, please contact Megan L. Snow at 414.721.0457 or [msnow@hallrender.com](mailto:msnow@hallrender.com), Jeffrey L. Carmichael at 317.977.1443 or [jcarmichael@hallrender.com](mailto:jcarmichael@hallrender.com), Calvin R. Chambers at 317.977.1459 or [cchambers@hallrender.com](mailto:cchambers@hallrender.com) or your regular Hall Render attorney.