

ALLINA HEALTH DSH CASE IMPLICATIONS: DSH PAYMENTS AND 340B ELIGIBILITY

EXECUTIVE SUMMARY

On November 15, 2012, the Federal District Court of the District of Columbia issued a decision favorably impacting disproportionate share hospital ("DSH") patient percentage ("DPP") calculations. If this decision is upheld on appeal, Medicare Advantage days may be removed from the SSI/Medicare Fraction (defined below) of the DPP calculation, thereby typically increasing the DSH patient percentage. In addition to the direct benefit of increased DSH payments for acute care hospitals, increased DSH patient percentages increase the likelihood that a hospital will qualify for participation in the 340B drug discount program ("340B Program") or be able to maintain their 340B Program eligibility.

However, this determination is subject to further review due to an appeal filed by the Centers for Medicare and Medicaid Services ("CMS") to the D.C. Court of Appeals. As long as the appeal is pending, Medicare Advantage days will continue to be included in the Medicare Fraction of the DPP calculation. To protect their ability to exclude Medicare Advantage days from the Medicare Fraction of the DPP calculation in the future if the *Allina* decision is upheld, hospitals must continue to file cost report appeals within 180 days of receipt of their NPRs.

ALLINA HEALTH SERVICES V. SEBELIUS - BACKGROUND AND PROCEDURAL HISTORY

The regulation governing the DPP calculation sets forth the payment formula:

SSI Ratio/Medicare Fraction		Medicaid Fraction		
Medicare (incl. MA Days) SSI Days	+	Medicaid Days	=	DPP
Total Medicare Days (incl. MA Days)		Total Patient Days		

Prior to 2004, the DPP did not include Medicare Advantage days in the Medicare Fraction. Then, in its Proposed Inpatient PPS Rule for FFY 2004, CMS proposed to clarify that the Medicare Advantage days would not be included in the Medicare Fraction denominator and would be included in the Medicaid Fraction numerator if the patient was Medicaid eligible. These days would continue to be included in the Medicaid Fraction denominator as part of Total Patient Days.

In the Final Rule for FFY 2005, CMS reversed course, stating that, based on "long standing policy," it was changing its position and instead indicated Medicare Advantage days would be included only in the Medicare Fraction rather than in the Medicaid Fraction. This position was a clear departure from the language contained in the Proposed Rule that negatively impacted DPP calculations since typically far fewer Medicare Advantage days end up in the numerator than in the denominator of the Medicare Fraction. That is, including Medicare Advantage days in the Medicare Fraction serves to lower the DPP for most hospitals. Although hospitals were not allowed to comment on this policy, it adversely impacted DSH add-on payments as well as the ability of many hospitals to maintain or obtain 340B Program eligibility.

A group of hospitals challenged this new policy, arguing that CMS violated rules in the Administrative Procedures Act ("APA"), mandating an opportunity to comment on proposed regulations impacting providers prior to implementation. These hospitals received a favorable decision from the federal district court in *Allina Health Svcs v. Sebelius*, 2012 WL 5565453 (D.D.C. 2012). The court sided with the hospitals' assertion that CMS engaged in impermissible retroactive rulemaking and invalidated the regulatory change for lack of compliance with the APA. CMS appealed the decision to the Court of Appeals for the District of Columbia on January 14, 2013, where the case is pending.

WHAT ALLINA MEANS FOR DSH PAYMENTS/ELIGIBILITY

As noted above, removing Medicare Advantage days from the Medicare Fraction of the DSH formula generally increases the resulting DPP and (if applicable) the associated DSH reimbursement. Following the publication of the *Allina* decision, CMS issued a temporary moratorium

on issuing cost report settlements as the agency presumably weighed whether to rerun the Medicare Fraction, excluding the Medicare Advantage days for all hospitals. However, that moratorium has been lifted, and CMS is continuing to include Medicare Advantage days in the Medicare Fraction while appealing the *Allina* decision. As a result, hospitals will have to file appeals within 180 days of the applicable Notice of Program Reimbursement ("NPR") in order to preserve appeal rights related to this issue. We are available to assist hospitals with this evaluation and appeals filing process.

WHAT *ALLINA* MEANS FOR 340B ELIGIBILITY

In addition to certain other entities, the 340B Program provides discounts on covered outpatient drugs for hospitals maintaining a DPP of at least 11.75 percent (for acute care hospitals) or at least 8 percent (for sole community hospitals and rural referral centers). CMS's policy to add Medicare Advantage days to the Medicare Fraction has caused some hospitals to lose 340B eligibility. Because CMS continues to include Medicare Advantage days even after the *Allina* decision, hospitals that did not meet the 340B eligibility threshold for their most recently filed Medicare cost report should evaluate whether excluding Medicare Advantage days would give them a DPP of 11.75 percent or 8 percent. If excluding Medicare Advantage days would allow hospitals to qualify for 340B eligibility, those hospitals should take appropriate action to amend those cost reports and/or preserve their appeal rights. We can also help with this evaluation and appeals filing process.

PRACTICAL TAKEAWAYS

- The *Allina* decision invalidated the CMS regulation adding Medicare Advantage days to the Medicare Fraction of the DSH computation.
- *Allina* may yield additional DSH reimbursement, as well as cost savings on outpatient drugs through 340B Program eligibility when those Medicare Advantage days are removed from the DSH calculation.
- Hospitals must act to preserve their rights to additional DSH reimbursement and with respect to 340B eligibility as CMS appeals the *Allina* decision.

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

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