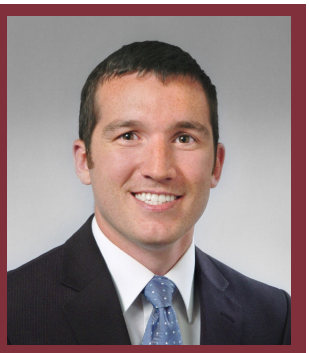
FOULSTON SIEFKIN LLP
ATTORNEYS AT LAW

Foulston Siefkin Health Care Issue Alert

CMS Clarifies Off-Campus Provider-Based Billing Prohibition

Brooke Bennett Aziere
Foulston Siefkin Attorney
baziere@foulston.com
316.291.9768



Justan R. Shinkle
Foulston Siefkin Attorney
jshinkle@foulston.com
316.291.9794

November 15, 2016

by Brooke Bennett Aziere & Justan R. Shinkle

Late last year, Congress enacted Section 603 of the Bipartisan Budget Act of 2015, which prohibits provider-based billing at ***new*** off-campus outpatient departments created *after* November 1, 2015. By enacting this provision, Congress intended to eliminate payment differentials between freestanding facilities and off-campus outpatient departments. In the Final Rule published on November 14, 2016, CMS addresses implementation of Section 603 and its chilling impact on the provider-based billing rules.

Provider-Based Reimbursement Incentive

Hospitals may capture increased Medicare reimbursement if they structure their physician clinics as provider-based departments as opposed to freestanding clinics. For services furnished in a qualifying provider-based department ("PBD"), Medicare pays for the billed outpatient hospital services under the Outpatient Prospective Payment System ("OPPS"). However, services furnished in a freestanding physician's office are paid under the Medicare Physician Fee Schedule ("MPFS") or Ambulatory Surgery Center Prospective Payment System ("ASC PPS"). Generally, rates paid under these fee schedules are lower than under the OPPS. For off-campus outpatient departments created after November 1, 2015, hospitals can no longer capture increased reimbursement under the OPPS. Instead, those services provided in off-campus outpatient departments will be paid at the lower MPFS or ASC PPS rates.

Relocation

The provider-based billing prohibition applies only to new off-campus PBDs – it does not impact reimbursement for outpatient services provided in on-campus PBDs. Outpatient services provided in on-campus PBDs will continue to be paid under the OPPS. Additionally, off-campus PBDs that billed Medicare as off-campus PBDs on or before November 1, 2015, are excepted, or grandfathered, and may continue to bill Medicare under the OPPS. However, CMS believes that Congress intended to grandfather PBDs as they existed at the time the law was enacted, so the Final Rule generally prohibits PBDs from relocating to another space after November 1, 2015.

An off-campus PBD will lose its excepted status if it relocates from the physical address listed on the provider's Medicare enrollment as of November 1, 2015. Likewise, an on-campus PBD that moves off campus after November 1, 2015, will not be entitled to grandfather status. CMS adopted a limited exception to the relocation restriction that permits PBDs to relocate for extraordinary circumstances outside of the provider's control. Those circumstances include natural disasters, significant seismic building code requirements, and significant public health and public safety issues. Exceptions will be granted by CMS Regional Offices on a case-by-case basis.

Change of Ownership

A PBD may retain its grandfather status if its main provider undergoes a change of ownership, as long as the new provider accepts assignment of the main provider's Medicare provider agreement. If the main provider's Medicare agreement terminates, then the PBD loses its grandfather status. A PBD will also forfeit its excepted status if the PBD itself is transferred to a new provider.

Continued on page 2

Service-Line Expansion

The Final Rule included a bit of good news for providers. CMS originally proposed to limit service-line expansion for grandfathered PBDs, but ultimately concluded that such a limitation would pose an unnecessary administrative burden on hospitals, CMS, and the MACs. Therefore, a grandfathered PBD will not forfeit its grandfather status if it furnishes items or services that it had not furnished on or before November 1, 2015.

OPPS

The new provider-based billing rules apply to services billed under the OPPS, including services furnished by a provider-based federally qualified health center ("FQHC"). Services furnished in a rural health clinic ("RHC") are generally billed under the RHC fee schedule and, as such, will not be subject to the off-campus PBD rules. On the other hand, services furnished in a provider-based RHC that do not qualify for the RHC fee schedule will be subject to the provider-based billing prohibition. CMS expressly excluded dedicated emergency departments from the provider-based billing prohibition.

Enrollment and Billing

Providers have the option to enroll their non-excepted PBDs as the applicable freestanding provider/supplier type, such as an ambulatory surgery center or a group practice. Otherwise, services furnished at non-excepted PBDs will be reimbursed under the MPFS, at least for calendar year 2017. Providers may continue to submit claims for such services on the institutional claim, but must identify such claims as non-excepted by using modifier "PN." Services furnished at non-excepted PBDs will continue to be reported on the provider's cost report. CMS is considering a new fee schedule for non-excepted PBD services in future years.

For more information regarding the off-campus provider-based billing prohibition, see https://www.federalregister.gov/documents/2016/11/14/2016-26515/medicare-program-hospital-outpatient-prospective-payment-and-ambulatory-surgical-center-payment, 42 C.F.R. 419.22, and 42 C.F.R. 419.48.

For More Information

Foulston Siefkin's health care lawyers maintain a high level of expertise regarding federal and state regulations affecting the health care industry. The firm devotes significant resources to ensure our attorneys remain up-to-date on daily developments. At the same time, the relationship of our health care law practice group with Foulston Siefkin's other practice groups, including the taxation, general business, labor and employment, and commercial litigation groups, enhances our ability to consider all of the legal ramifications of any situation or strategy. For additional information regarding the implementation of Section 603, contact **Brooke Bennett Aziere** at 316.291.9768 or **baziere@foulston.com**, or **Justan Shinkle** at 316.291.9794 or **jshinkle@foulston.com**. If you are looking for general health care counsel, you may contact **Scott Palecki** at 913.253.2128, or **spalecki@foulston.com**. For more information on the firm, please visit our website at **www.foulston.com**.