Publications

Health Care Alert: The Cures Act Brings Some Relief to Site-Neutral Payment Changes, but Hospitals Must Act Now

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Over one year after the biggest statutory change in Medicare provider-based billing, Congress enacted the 21st Century Cures Act (the Cures Act) on December 13, 2016, providing relief to certain hospitals impacted by the Bipartisan Budget Act of 2015 (the BBA). Under the BBA, most items and services furnished in off-campus, provider-based hospital outpatient departments (HOPDs) that begin billing on or after Nov 2, 2015 will no longer be reimbursed under the Outpatient Prospective Payment System (OPPS). Instead, those items and services will be reimbursed under the lower paying Medicare Physician Fee Schedule. Although the BBA grandfathered HOPDs that were billing under the OPPS prior to Nov 2, 2015, it did not include any such exception for HOPDs that were under development, but not yet billing at that time.

Because the BBA was passed quickly, without much publicity, and Congress gave little warning of the immediate and significant payment implications, hospitals have since pushed hard for legislative amendments extending grandfathered protection to projects that were undertaken with the expectation of higher OPPS payment. The Cures Act provides some of the relief that hospitals sought, extending grandfathered protection in certain circumstances, but only if hospitals act quickly.

Under the Cures Act, an HOPD will be eligible for OPPS payments in 2017 if the Secretary received from the hospital a voluntary, provider-based attestation pursuant to 42 C.F.R. 413.65 before December 2, 2015. Because a provider cannot submit an attestation until an HOPD is up and running, this provision only benefits hospitals with HOPD projects that fell just short of the Nov 2, 2015 deadline. To protect other HOPDs, the Cures Act provides a more expansive mid-build exception.

Under the mid-build exception, before Nov 2, 2015, a hospital must have had a "binding written agreement with an outside, unrelated party for the actual construction" of the new HOPD. By February 13, 2017, the Secretary must also receive from the hospital: (1) a provider-based attestation for the new HOPD; and (2) a written certification signed by

the CEO or COO of the main provider that the HOPD met the "mid-build" binding written agreement requirement. Finally, the hospital must also add the new HOPD to its CMS 855A Medicare enrollment form in accordance with the enrollment process. Hospitals should submit these materials to their Medicare Administrative Contractor. This mid-build exception applies to items and services furnished during 2018 onward, meaning that OPPS payment would not be available for items and services furnished in 2017, even where the exception applies.

The Cures Act also provides an exemption for HOPDs of certain cancer hospitals. For the exemption to apply, the Secretary must receive a provider-based attestation from the cancer hospital within 60 days of either: (1) Dec 13, 2016 (for HOPDs meeting provider-based requirements between Nov 2, 2015 and Dec 13, 2016); or (2) the date of meeting provider-based requirements (for HOPDs meeting such requirements after Dec 13, 2016).

Hospitals should be mindful of these new exceptions, their substantive requirements, and rapidly approaching attestation/certification deadlines, especially given the time typically needed to put together the necessary documentation and evidence supporting provider-based status. Although the Cures Act provides some relief to certain hospitals with recently constructed HOPDs, questions remain as to the breadth and scope of the BBA. CMS plans to publish subregulatory guidance on various aspects of the BBA and we will closely monitor any new developments.

If you have any questions on the Cures Act and its impact on HOPD billing, or would like assistance in preparing any provider-based documentation, please contact your Vorys health care attorney.