

## **CY 2017 Outpatient Prospective Payment System: Implementation of Section 603 of the Balanced Budget Act of 2015**

### **Final Rule Highlights November 2016**

The calendar year (CY) 2017 Outpatient Prospective Payment System (OPPS) final rule implements [Section 603 of the Bipartisan Budget Act of 2015](#), which requires that — with the exception of dedicated emergency departments — services furnished in off-campus provider-based departments (PBDs) that began billing under the OPPS on or after November 2, 2015, would no longer be paid under the OPPS; instead, these services would be paid under other applicable Part B payment systems beginning January 1, 2017. CHA’s comment letter to CMS is available at [www.calhospital.org/sites/main/files/file-attachments/slavitt\\_603\\_060716\\_final\\_to\\_cms\\_w\\_attachment.pdf](http://www.calhospital.org/sites/main/files/file-attachments/slavitt_603_060716_final_to_cms_w_attachment.pdf).

While CHA is currently analyzing the details of the final rule, key highlights of this provision are detailed below; additional information is forthcoming. Contact Alyssa Keefe, vice president, federal regulatory affairs at [akeefe@calhospital.org](mailto:akeefe@calhospital.org) or (202) 488-4688; or Anne O’Rourke, senior vice president, federal relations at [aorourke@calhospital.org](mailto:aorourke@calhospital.org) or (202) 488-4494 with questions.

CMS finalizes several policies defining whether certain items and services furnished by a given off-campus PBD may be considered excepted and, thus, continue to be paid under the OPPS; establishing the requirements for off-campus PBDs to maintain excepted status, both for the excepted off-campus PBD and for the items and services it furnishes; and finalizing the Medicare Physician Fee Schedule (MPFS) — the applicable payment system for nonexcepted items and services for CY 2017 and beyond. In addition, CMS has issued an interim final rule on its proposal to pay non-excepted PBDs under a modified MPFS in CY 2017. CMS solicits comments on this interim final rule, due December 31, 2016.

#### *Excepted Items and Services*

As prescribed by statute, CMS finalizes, with some positive modifications, its proposals that that certain off-campus PBDs would be permitted to continue to bill for excepted items and services under the OPPS.

Excepted items and services are:

- *Items and services that were furnished and billed by an off-campus PBD prior to November 2, 2015.* The final rule responds to CHA’s comments that called to the agency’s attention examples of hospitals that had opened and were providing services to Medicare beneficiaries but had not billed for services by November 2. CHA provided legal analysis to support its claim that the provision of services to beneficiaries prior to November 2 sufficiently met the criteria for an excepted PBD. **In response to comments, CMS has modified the regulatory text to account for PBDs that had opened and furnished services prior to November 2, and had billed within the timely filing rules as excepted PBDs.**
- *Items and services furnished in a hospital department within 250 yards of a remote location of the hospital.* CMS finalizes this proposal and reinforces that these determinations are made at the discretion of the CMS regional office.
- *All items and services furnished in a dedicated emergency department as defined in 42 C.F.R. 489.24 (b).* Notably, in California, dedicated emergency departments are not permitted under state law;

therefore, this provision does not apply to California hospitals. In responding to comments, CMS further clarifies that *all* items and services (emergency and non-emergency) furnished in an ED are exempt from Section 603, as long as the department maintains its status under the regulations at 42 C.F.R. 489.24(b).

#### *Service Expansion in an Excepted Off-Campus PBD*

While excepted off-campus PBDs will be paid at OPSS rates for services furnished and billed as of November 2, 2015, CMS had proposed that any expansion of services beyond the clinical families of services furnished and billed by the PBD prior to that date will not be excepted services and will be paid according to the site-neutral payment policy. **After consideration of the public comments received, CMS has chosen not to finalize this policy, which would have limited service line expansion. An excepted off-campus PBD will receive payments under the OPSS for all billed items and services, regardless of whether it furnished such items and services prior to November 2, as long as the excepted off-campus PBD remains excepted — that is, it meets the relocation and change of ownership requirements adopted in this final rule.** CMS received many comments on how best to limit service line expansion and makes clear in the final rule that it intends to monitor this expansion. CMS seeks stakeholder feedback on how data could be collected to limit increases in volume or service lines in excepted PBDs. CHA will continue to oppose such proposals.

#### *Relocation of Excepted Off-Campus PBDs*

CMS finalized its proposal that items and services must continue to be furnished and billed at the same physical address of the off-campus PBD as of November 2, 2015, in order for the off-campus PBD to keep its excepted status and continue to be paid at the OPSS rates. An excepted off-campus PBD that changes its location will lose its excepted status and be subject to the site-neutral payment policy. In the final rule, CMS states:

*We believe that section 603 applies to off-campus PBDs as they existed at the time the law was enacted. To allow excepted off-campus PBDs to relocate under every circumstance and continue to be paid OPSS rates would allow hospitals to continue the practices CMS believes section 603 was intended to curb. Allowing unlimited relocation of an off-campus PBD would potentially result in relocation to larger facilities, with different equipment and staff and unbridled expansion of service lines.*

CMS does adopt an exceptions process to the relocation proposal, limited to extraordinary circumstances outside a hospital's control — such as natural disasters, significant seismic building code requirements or significant public health and public safety issues — that necessitate moving to a new building, either temporarily or permanently, without losing its excepted status. Exceptions to the relocation policy will be evaluated on a case-by-case basis by the appropriate CMS regional office. CMS states that such exceptions will be both limited and rare because it does not wish to allow this extraordinary circumstances exception to undermine the goal of limiting the growth and expansion of excepted off-campus PBDs. CMS intends to issue subregulatory guidance on the extraordinary circumstances process, which will address technical details; no release date has been provided. CHA is very concerned about the potential limitation of this process and will take steps to advocate needed changes, specifically to address the significant number of relocations due to state law requirements related to seismic compliance.

CHA's comments raised the question of whether an *on-campus* PBD that was billing under the OPSS prior to November 2, 2015, would maintain excepted status if the PBD moved off-campus after that date, and maintained that Section 603 should not be applicable to these PBDs. CMS disagreed, responding that in this scenario, an on-campus PBD that relocates off-campus would be subject site-neutral payments in CY 2017 and subsequent years. CMS believes that Section 603 applies to off-campus PBDs as they existed at the time the law was enacted. **Therefore, while an on-campus PBD as of November 2, 2015, would be excepted, any subsequent off-campus relocation would cause it to no longer be paid under the OPSS.**

*Changes of Ownership of Excepted Off-Campus PBDs*

CMS finalized its proposal about change of ownership to state that, if a hospital changes owners, and the new owners accept the prior owner's existing Medicare provider agreement, the off-campus PBD may maintain its excepted status. Individual excepted off-campus PBDs may not be transferred from one hospital to another and maintain their excepted status.

*Interim Final Rule with Comment: Establishment of Payment Rates under the MPFS for Nonexcepted Services Furnished by Nonexcepted Off-Campus Hospital PBDs for CY 2017*

CMS adopts the MPFS as the applicable payment system for the majority of services furnished in new off-campus PBDs in CY 2017. However, in response to comments, CMS significantly modifies its proposal and has issued an interim final rule with comment period to establish payment policies under the MPFS for nonexcepted items and services furnished on or after January 1, 2017.

In responding to comments from stakeholders, including CHA, CMS has determined it is necessary to establish MPFS rates for the technical component of nonexcepted items and services furnished by nonexcepted off-campus PBDs rather than not pay those hospitals directly, as proposed. In doing so, CMS avoids significant negative consequences, such as implications under the physician self-referral and anti-kickback laws and existing "incident to" regulations, which would have rendered the physician or the hospital unable to bill for certain nonexcepted items and services. Highlights of the interim final rule are outlined below.

- CMS established site-specific rates under the MPFS for the technical component of the broad range of nonexcepted items and services furnished by nonexcepted off-campus PBDs to be paid under the MPFS that will be based on the OPPTS payment amount for these same services, scaled downward by 50 percent. CMS details how it arrived at this adjustment in the interim final rule.
- CMS will utilize the hospital area wage index, rather than geographic pricing cost index, to adjust payments.
- Nonexcepted off-campus PBDs will continue to bill on the institutional claim that will pass through the Outpatient Code Editor and into the OPPTS PRICER for calculation of payment under the MPFS. In order to process these claims correctly, CMS has adopted a new modifier — "PN" — for hospitals' use when billing for nonexcepted items and services provided in off-campus PBDs.
- CMS adopts the packaging payment rates and multiple procedure payment reduction (MPPR) percentage that apply under the OPPTS to establish the MPFS payment rates for nonexcepted items and services furnished by nonexcepted off-campus PBDs and billed by hospitals. That is, the claims processing logic used for payments under the OPPTS for comprehensive APCs(C-APCs), conditionally and unconditionally packaged items and services and major procedures will be incorporated into the newly established MPFS rates.
- CMS will not apply additional adjustments — such as outliers, the rural sole community hospital adjustment and others — as these payments are traditionally paid under OPPTS.
- Partial hospitalization services will be paid at the community mental health center rate for three services or more.
- CMS notes several exceptions to this payment policy, detailed in the final rule.
- Notably, because CMS will pay nonexcepted PBD on the institutional claim, CHA believes that qualification for the 340B program remains unchanged.

CMS also discusses its next steps as it looks ahead to payment for services in CYs 2018, 2019 and beyond. It is very likely that CMS will modify these payment proposals in future years. Additional information will be detailed in CHA's OPPTS final rule summary, which will be issued in the coming weeks.