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CLIENT ADVISORY

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CMS Encourages PSO Proliferation with Delayed PSES Requirement: Green Light for PSOs, Yellow Light for PSES Requirement

On December 2, 2013, the Centers for Medicare & Medicaid Services (CMS) released proposed rule CMS-9954-P titled HHS Notice of Benefit and Payment Parameters for 2015 (Proposed Rule). The Proposed Rule addresses Qualified Health Plans (QHPs) sold in state health insurance marketplaces (Exchanges) under the Patient Protection and Affordable Care Act (ACA). Beginning on page 72369, the Proposed Rule implements ACA section 1311(h), which requires hospitals with more than 50 beds to meet certain patient safety standards in order to contract with insurers that sell QHPs in Exchanges (QHP Insurers). Included in these standards is a requirement for a comprehensive hospital discharge program and use of a Patient Safety Evaluation System (PSES), which means the collection, management, or analysis of information for reporting to or by a Patient Safety Organization (PSO).[1]

Proposed Rule

With its Proposed Rule, CMS delays the implementation of the requirement that hospitals with more than 50 beds must develop a PSES and report to a PSO in order to contract with QHP Insurers. Initially, this requirement was set to be in effect by January 1, 2015, but the Proposed Rule provides for a delay in implementation while PSO resources increase and additional PSOs are developed, thereby presumably providing more participation options for hospitals. The Proposed Rule states that:

> To effectively balance the priorities for making quality health care accessible and safe in the Exchanges, we propose to implement these patient safety standards for QHP issuers over time, under the Secretary's authority in section 1311(h)(2) of the Affordable Care Act. We believe that implementing all of the requirements described in section 1311(h) by January 1, 2015 could result in a shortage of qualified hospitals and providers available for contracting with QHPs. [2]

CMS is concerned that strictly enforcing the deadline could result in a shortage of qualified hospitals that are eligible for contracting with QHP Insurers. CMS will therefore implement the safety standards of ACA section 1311(h) in two-phases:

Phase 1 – QHP Insurers may contract with hospitals of greater than 50 beds that are either Medicare-certified or have been issued a Medicaid-only CMS Certification Number (CCN). CMS explains that these hospitals are subject to the Medicare Hospital Conditions of Participation, and must therefore be in compliance with the quality assessment and performance improvement (QAPI) program and meet certain discharge planning requirements. The Proposed Rule is therefore a balance that would immediately qualify more hospitals to contract with QHP Insurers, while upholding some quality and safety standards of ACA section 1311(h)(1)(A). CMS indicates that Phase 1 will begin January 1, 2015, and continue for two years, or until CMS issues further regulations.

Phase 2 – CMS is "considering requiring QHP [Insurers] to ensure that their contracted hospitals have agreements with PSOs and comprehensive hospital discharge programs, and that their providers implement healthcare quality activities."[3] In discussing its rationale, CMS noted the limited number of listed PSOs, as well as the significant administrative burdens surrounding QHP Insurers. Under ACA section 1311(h), QHP Insurers must ensure that each of

[1] See http://www.gpo.gov/fdsys/pkg/FR-2013-12-02/pdf/2013-28610.pdf, at 72369, referencing http://www.pso.ahrq.gov/regulations/fnlrule01.pdf.
[2] http://www.gpo.gov/fdsys/pkg/FR-2013-12-02/pdf/2013-28610.pdf, at 72369.
[3] http://www.gpo.gov/fdsys/pkg/FR-2013-12-02/pdf/2013-28610.pdf, at 72370.

its contracting hospitals is operating under an appropriate PSO agreement and adequate discharge planning activities. Under Phase 1, QHP Insurers are merely required to collect and maintain CCNs of contracting hospitals.

What This Means for Hospitals

Only a Proposal – The Proposed Rule provides a welcome alternative for hospitals that wish to contract with QHP Insurers but have not yet joined or formed a PSO. However, it is important to note that the Proposed Rule is merely a proposal, and the January 1, 2015 deadline remains in effect until CMS upholds the delay in its final rule. CMS has not indicated when to expect the Final Rule, but it will likely be into 2014 given that the comment period runs through December 26, 2013.

PSOs Here to Stay – CMS has confirmed its commitment to PSOs. The Proposed Rule delays the immediate requirement for PSO participation in order to allow more rapid development of PSOs, but it is clear that hospitals will eventually need to report to PSOs if they wish to contract with QHP Insurers. As a result, it is likely that more PSOs will be developed to accommodate the anticipated demand of hospitals wishing to enter into PSO contracts before CMS transitions to Phase 2. Hospitals should therefore continue efforts to contract with or form a PSO, but with a reduced sense of urgency.

Other Providers – The Proposed Rule does not indicate the requirements that non-hospital providers and suppliers (*e.g.*, physicians) must meet to contract with QHP Insurers pursuant to ACA section 1311(h)(1)(B). CMS will likely provide these requirements in subsequent regulations.

Comments Requested

CMS will accept comments on the Proposed Rule through December 26, 2013. If you would like assistance in commenting on the Proposed Rule, or if you have other questions relating to PSOs and contracting with QHP Insurers, please contact Page Gravely (pgravely@hdjn.com), Molly Huffman (mhuffman@hdjn.com), or Andrew Schutte (aschutte@hdjn.com). Page, Molly, and Andrew are also available by phone at (866) 967-9604. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at www.hdjn.com.