CMS Conditions of Participation: Try, try again

April 5, 2013

On February 7, 2013, the Centers for Medicare & Medicaid Services (CMS) issued a proposed rule to make revisions to the Medicare Conditions of Participation (CoPs).

This proposed rule (2013 Proposed Rule) follows up on and would make additional revisions related to an earlier final rule issued by CMS on May 16, 2012 (2012 Rule). Many of the changes in the 2013 Proposed Rule are in response to concerns raised with the changes to the CoPs in the 2012 Rule. See our previously issued Client Bulletin on the 2012 Rule for more background.

The key provisions of the 2013 Proposed Rule are:

Hospital governing body. CMS is proposing to remove the change in the 2012 Rule that required a medical staff member to be on a hospital's governing body. Instead, in the 2013 Proposed Rule, CMS is now proposing that a hospital's governing body be required to consult directly with the individual responsible for the organized medical staff (*i.e.* medical staff president/chief of staff or his/her designee) periodically (*i.e.* at least twice a year) throughout the calendar/fiscal year.

Hospital medical staff: structure. CMS is standing firm on its position that each hospital must have an organized and individual medical staff distinct to that individual hospital. That is, in the 2013 Proposed Rule, CMS continues to take the position that a system with several distinct hospitals is not permitted to combine the medical staff into a single entity.

Hospital medical staff: composition. CMS attempts to clarify the requirement for composition of a hospital's medical staff, but in doing so has created a potential problem for hospitals. The 2012 Rule changed the language in 42 CFR 482.22(a) to state that a medical staff **must** be composed of "doctors of medicine or osteopathy" and **may** also be composed of "non-physician practitioners" (prior to that it had used the term "other practitioners"). It was pointed out to CMS that this leaves out certain types of "physicians" such as doctors of dental surgery, doctors of optometry, and chiropractors, who previously fell under "other practitioners" but may not fall under the category "non-physician practitioners" given that CMS's definition of "physician" includes dentists, podiatrists, optometrists, and chiropractors in addition to M.D.s and D.O.s.

The 2013 Proposed Rule attempts to correct this by changing "doctors of medicine or osteopathy" to "physicians." But that would mean that all "physicians" (including chiropractors, for example) are in the category of practitioners that **must** be included on the medical staff. Bricker & Eckler has submitted a comment to CMS concerning this proposed revision to recommend clarification that the language does not mandate that all types of "physicians" have a right to apply for appointment given that many medical staffs do not include some of these specialties (such as optometrists and chiropractors).

Practitioners permitted to order hospital outpatient services. CMS is proposing to codify in the CoPs the changes previously made and that already exist in the interpretive guideline regarding who may order outpatient services. The revisions would allow practitioners who are not on a hospital's medical staff to order hospital outpatient services for their patients when authorized by the medical staff and allowed by state law. More information on CMS's position can be found in our previous E-Alert on the prior changes to the interpretive guidelines regarding this issue.

Hospital registered dietitian privileges. CMS is proposing to include "qualified" dietitians as practitioners who may be privileged to

order patient diets.

Hospital supervision of radiopharmaceutical preparation. CMS is agreeing to remove the word "direct" from the in-house preparation supervision requirement of radiopharmaceuticals. Supervision by a pharmacist, M.D., or D.O. is still required for appropriately trained staff to prepare in-house radiopharmaceuticals but the physical presence of the supervisor would no longer be required at all times, particularly during off-hours.

Hospital reclassification of swing-bed services. The 2013 Proposed Rule would allow a hospital's compliance with swing-bed requirements to be evaluated during routine accrediting organization surveys rather than requiring an additional survey specifically for swing-bed approval.

Radiology services in ambulatory surgical centers (ASC). The 2013 Proposed Rule would reduce the requirements ASCs must meet in order to provide radiologic services to match the services the ASC actually performs. ASCs are currently subject to the full hospital requirements for radiology services. CMS has agreed that the hospital requirement to have a radiologist supervise the provision of radiologic services is unduly burdensome for ASCs. Under the 2013 Proposed Rule, the supervision of radiologic services at an ASC may be provided by an M.D. or D.O. on the ASC's medical staff with appropriate education and training in radiologic services.

Long-term care (LTC) sprinkler waiver. The 2013 Proposed Rule would allow LTC facilities that meet certain conditions to apply for an extension of time in which to comply with the requirement that all buildings containing LTC facilities have automatic sprinkler systems installed by August 13, 2013.

Critical access hospital (CAH) provision of services. CMS is proposing to eliminate the requirement that a CAH must develop its patient care policies with the advice of "at least one member who is not a member of the CAH staff."

CAH and Rural Health Clinics (RHC)/Federally Qualified Health Centers (FQHC) physician responsibilities. CMS is proposing to revise the CAH and RHC/FQHC regulations to eliminate the requirement that a physician must be on-site at least once in every two-week period.

RHC/FQHC definition of physician. In order to eliminate possible confusion, CMS is proposing to revise the definition of physician in the RHC/FQHC regulations to conform to the definition of physician in the payment regulations.

Authors