

July 21, 2008

Kerry N. Weems
Acting Administrator
Centers for Medicare & Medicaid Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W., Room 445-G
Washington, DC 20201

RE: (CMS-1493-IFC2) Medicare Program; Changes for Long-Term Care Hospitals Required by Certain Provisions of the Medicare, Medicaid, and SCHIP Extension Act of 2007: Three-Year Moratorium on the Establishment of New Long-Term Care Hospitals and Long-Term Care Hospital Satellite facilities and Increases in Beds in Existing Long-Term Care Hospitals and Long-Term Care Hospital Satellite Facilities; and Three-Year Delay in the Application of Certain Payment Adjustments.

Dear Mr. Weems:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, and our 37,000 individual members, the American Hospital Association (AHA) appreciates the opportunity to comment on the Centers for Medicare & Medicaid Services' (CMS) interim final rule pertaining to the long-term care hospital (LTCH) prospective payment system.

This interim final LTCH rule – the second of two issued by CMS in 2008 – implements two provisions authorized by Section 114 of the *Medicare, Medicaid, and SCHIP Extension Act of 2007* (MMSEA):

- temporary relief on the LTCH “25% Rule;” and
- a temporary moratorium on new LTCHs, with exceptions.

We are concerned that CMS' interpretation of these provisions is too narrow. As a result, the policies put forth in this interim final rule would create inequities for certain subsets of LTCHs. This was not intended by Congress when it drafted the MMSEA. Our specific concerns are explained below.



'25% RULE' RELIEF

The MMSEA prohibits CMS from implementing the existing 25% Rule for a three-year period beginning with cost reports that start on or after December 29, 2007. The 25% Rule reduces payment for a certain percentage of the patients transferred from general acute-care hospitals to LTCHs. Initially, the policy applied exclusively to LTCHs that are co-located in a general acute-care hospital. However, in 2007 the policy was extended to include freestanding and grandfathered LTCHs.

In general, the AHA views the 25% Rule as a flawed and arbitrary policy that should be replaced by LTCH facility and patient criteria. As we have commented in the past, this policy inappropriately reduces Medicare payments for certain LTCH patients without considering their clinical characteristics and instead relies on an unrelated facility-level percentage threshold to determine whether a payment reduction applies. As a result, the 25% Rule is triggering Medicare payment cuts for patients who were referred by a treating physician, screened by the hospital and are medically appropriate for LTCH-level care.

With the MMSEA, Congress re-iterated its commitment to the development of further LTCH patient and facility criteria to be used as the basis for assessing clinical need for LTCH care. The level of care and specialized programs provided for the very sick, long-stay population treated in LTCHs are only rarely provided in general acute-care hospitals and, as such, it is important to preserve access to this unique setting. Therefore, we are hopeful that CMS' latest study – the third since the Medicare Payment Advisory Commission's 2004 recommendation to Congress that the Department of Health and Human Services should define LTCHs by facility and patient criteria – will finally yield comprehensive criteria. At such a time, the 25% Rule policy should be withdrawn. Such criteria should apply to the full array of conditions treated in LTCHs.

We urge CMS to modify its approach for implementing the MMSEA's 25% Rule relief to bring it into line with congressional intent – three years of 25% Rule relief for all LTCHs. Through the MMSEA, Congress acknowledged the inadequacy of the 25% Rule, which was established unilaterally by CMS through the regulatory process. Congress' intent was to provide 25% Rule relief for *all* LTCHs for a three-year period; not to exempt certain sub-categories of LTCHs.

The confusing distinctions made in the interim final rule that exclude subsets of LTCHs from the MMSEA's 25% Rule relief are neither called for by Congress nor substantiated by public policy. As such, this interim final rule is inappropriate and unfair. CMS should replace its complicated framework for determining eligibility for 25% Rule relief with an equitable policy that applies a 50 percent threshold to all LTCHs for cost reports beginning on or after October 1, 2007. As the exception authorized by Congress, a 75 percent threshold should be in effect, for the same time period, for all rural LTCHs and LTCHs co-located with a Medicare statistical area-dominant or single-urban hospital.

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LTCH MORATORIUM

In the MMSEA, Congress authorized a three-year moratorium on new LTCH facilities and new LTCH beds in existing facilities, with particular exceptions for new LTCHs and different exceptions for bed expansions. Congress has indicated that it did not intend to limit the MMSEA's moratorium exceptions in this manner and, as a result, key staffers have worked with the national LTCH organizations to draft a legislative technical correction to extend both categories of moratorium exceptions to new *and* expanding facilities. The Congressional Budget Office found that the corrections would have no financial impact on Medicare spending.

CMS, its regional offices and contracted fiscal intermediaries and Medicare administrative contractors should allow new *and* expanding LTCH projects to proceed if they show ample development was underway as of December 29, 2007. Specifically, LTCHs should be approved for expansion when they meet certificate of need criteria, or have a binding agreement and can demonstrate the expenditure of 10 percent or \$2.5 million of total project costs. CMS should treat both categories of LTCH expansions equitably.

If you have any questions about our comments, please feel free to contact me or Rochelle Archuleta, senior associate director for policy, at (202) 626-2320 or rarchuleta@aha.org.

Sincerely,

Rick Pollack
Executive Vice President