American Hospital Association™
Advancing Health in America

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July 14, 2021

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Room 445-G
Washington, DC 20201

Dear Administrator Brooks-LaSure:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, and our clinician partners – including more than 270,000 affiliated physicians, 2 million nurses and other caregivers – and the 43,000 health care leaders who belong to our professional membership groups, the American Hospital Association (AHA) writes to express our continued concerns about the January denials of our members' requests for a "mid-build exception." These denials could result in inappropriately reduced payment rates for items and services furnished by certain off-campus provider-based departments (PBDs) that first billed Medicare for services furnished on or after Nov. 2, 2015.

We first expressed our concerns to the Centers for Medicare & Medicaid Services (CMS) in February and followed up in March with a formal letter to the CMS Acting Administrator. We have not received a response from the agency, nor has CMS accepted our requests for a meeting on the issue; in fact, the agency has not taken any action to address our concerns. Our hospital and health system members are growing increasingly anxious because CMS is requiring them to identify any overpayments by July 18 (180 days after the audit denial letters were sent) and report and return any overpayments by September 16 (240 days after the audit denial letters were sent). **Therefore, we urge CMS to extend these July and September deadlines while this matter can be examined further.**

As we have previously expressed, the 21st Century Cures Act authorizes CMS to deny a mid-build exception request only if the agency completed its audit of the provider by Dec. 31, 2018. However, the audits in question were completed and hospitals were notified of the results *more than two years after this statutory deadline.* As such, they should be rescinded. Specifically, providers that submitted mid-build exception requests

must be excluded from the definition of “off-campus outpatient department of a provider” in all instances where CMS has failed to timely render a contrary determination as part of a mid-build audit completed on or before Dec. 31, 2018.

If CMS declines to rescind the denials, we ask that it mitigate the harm to hospitals by following past precedent to establish an informal review process to correct errors in the audit determinations. Indeed, in addition to the denials being time-barred, many are simply incorrect because they were based on administrative mistakes, misunderstandings or unreasonable interpretations of what the statute requires. For example, a common scenario was a “lease/landlord denial,” where Cahaba Safeguard Administrators denied applications for hospitals that leased space in a building that was under construction as of Nov. 2, 2015, if the hospital itself did not contract directly for the construction. These exception applications were denied even when the provider submitted its binding lease agreement that specified that the lease was contingent upon the landlord’s completion of specific construction or renovation changes. Another type of inappropriate denial involves legally binding contracts that were fully executed within the required timeframes, but which had clerical errors, such as missing dates or signatures. As another example, the AHA heard from hospitals that failed their audits because their chief executive officer or chief operating officer did not sign the mid-build attestation – because those titles did not exist at their facility. This occurred despite the fact that the equivalent titles are explicitly permitted in CMS’ preliminary guidance. Finally, we know of one hospital that when it was able to open a dialogue with its Medicare Administrative Contractor (MAC) about its denial, they were able to clearly identify the MAC’s mistake, resulting in the denial being overturned.

These issues clearly require further examination. While this is occurring, we urge CMS to allow hospitals at least an additional 180 days beyond the current deadlines of July 18 and September 16 to identify and return any overpayments.

Thank you for your consideration of our comments. Please contact me if you have questions or feel free to have a member of your team contact Roslyne Schulman, director of policy, at rschulman@aha.org or 202-626-2273.

Sincerely,

/s/

Stacey Hughes
Executive Vice President