American Hospital Association™
Advancing Health in America

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November 26, 2024

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

RE: CMS-1808-IFC, Changes to the Fiscal Year 2025 Hospital Inpatient Prospective Payment System (IPPS) Rates Due to Court Decision, (Vol. 89, No. 192), Oct. 3, 2024.

Dear Administrator Brooks-LaSure:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, 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) appreciates the opportunity to comment on the Centers for Medicare & Medicaid Services' (CMS) hospital inpatient prospective payment system (PPS) interim final action with comment period revising the Medicare wage index values for fiscal year (FY) 2025.

In FY 2020, CMS implemented a policy to increase the wage indices for certain hospitals with low wage index values. This was done in a budget-neutral manner through an adjustment applied to the standardized amounts for all hospitals. Specifically, the agency increased the wage index for hospitals with a wage index value below the 25th percentile by half the difference between their otherwise applicable wage index value and the 25th percentile wage index value across all hospitals for that year. The agency stated at the time that it intended to implement the policy for at least four years. The agency subsequently extended this low wage index policy and its related budget neutrality adjustment through FY 2024 and 2025.

However, when extending the policy in the FY 2025 final rule, CMS noted that the policy has been the subject of pending litigation. On July 23, 2024, the Court of Appeals for the D.C. Circuit held that the secretary lacked authority to adopt the policy for FY 2020 and that the policy and related budget neutrality adjustment must be vacated. As a result of this court decision, in this interim final action with comment period, the agency is removing the low wage index policy for FY 2025 and its related budget neutrality factor. However, the agency did not indicate if and how it would address the policy for FYs 2020-2024.

The AHA has long stated that while we appreciated CMS' recognition of the wage index's shortcomings, the agency should not have implemented this policy by penalizing all hospitals, especially when Medicare already pays far less than the cost of providing care. **As such, if CMS does address payments under this policy in FYs 2020-2024, it should *not* seek a clawback of funds that hospitals received because of the agency's mistakes and have long since spent on patient care.** These funds supported low-wage hospitals during the COVID-19 pandemic and increased payments by roughly $300 million for the first year of policy.[1] This included helping nearly 800 rural hospitals when rural hospital closures hit an all-time high, with 19 hospitals closing in 2020 and two additional closures in 2021.[2,3] To help ensure the financial viability of hospitals, including rural hospitals, the agency should not seek a clawback of these funds.

At oral argument in the D.C. Circuit, the Department of Health and Human Services (HHS) counsel was asked whether there was a "scenario where the low budget hospitals that have gotten money would get to keep the money." Counsel did not state that a clawback is legally required. Instead, counsel answered that the secretary had not yet determined that a clawback is required and that it is "not clear why the Secretary would need to go out" and make such a clawback. Based on its regulations, we presume that CMS will adhere to the position it stated in court. *See* 42 CFR § 412.64(l) ("If a judicial decision reverses a CMS denial of a hospital's wage data revision request, CMS pays the hospital by applying a revised wage index that reflects the revised wage data as if CMS's decision had been favorable rather than unfavorable."); 42 CFR § 412.64(k) ("Except as provided in paragraph (k)(2)(ii) of this section, a midyear correction to the wage index is effective prospectively from the date the change is made to the wage index."). After all, the inpatient PPS process is, as its name suggests, a "prospective" payment program, and nothing in the text of 42 U.S.C. § 1395ww(d)(3)(E) gives CMS the authority to claw back funds following an adverse judicial decision.[4]

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[1] FY 2020 Final Rule
[2] FY 2020 Final Rule
[3] https://www.shepscenter.unc.edu/programs-projects/rural-health/rural-hospital-closures/
[4] *See generally Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 758 (D.C. Cir. 1987) ("In amending the statute, both Houses of Congress made it abundantly clear that this authority was to be exercised on a prospective basis only: '[The authority] to set limits on costs . . . would be exercised on a prospective, rather than retrospective, basis so that the provider would know in advance the limits to Government recognition of incurred costs and have the opportunity to act to avoid having costs that are not reimbursable.' Senate Report at 188; House Report at 83"); *Washington Hosp. Ctr. v. Bowen*, 795 F.2d 139, 142 n.2 (D.C. Cir. 1986) (explaining that a prospective payment system is "not subject to retroactive adjustment"); *Louisiana Dep't of Health & Hosps. v. U.S. Dep't of Health &*

We appreciate your consideration of these issues. Please contact me if you have questions or feel free to have a member of your team contact Shannon Wu, AHA's director for payment policy, at (202) 626-2963 or swu@aha.org.

Sincerely,

/s/

Ashley Thompson
Senior Vice President
Public Policy Analysis and Development

Human Servs., 566 F. App'x 384, 387 (5th Cir. 2014) (discussing the differences between prospective and retrospective payment systems); *Alexander County Hosp. v. Bowen*, 692 F.Supp. 606, 609 (W.D.N.C. 1988) ("Thus, under both the APA and the Medicare Act, the Secretary's authority for rulemaking is prospective, not retrospective. To hold otherwise would give the Secretary unfettered discretion in enacting regulations that give retroactive effect to any or every change that is made in formulas for determining reimbursable costs."); *cf. Paladin Community Mental Health Center v. Sebelius*, 684 F.3d 527, 531 n.3 (5th Cir. 2012) ("[F]orcing the Secretary to retroactively alter payment rates for various covered services—e.g., payment rates that are adjusted annually and are required to remain budget neutral—would likely wreak havoc on the already complex administration of Medicare Part B's outpatient prospective payment system.").