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The Bipartisan Budget Act of 2015 and HOPD Payment Reforms: What Payers and Providers Need to Know

1. Background

On November 2, 2015, President Obama signed the Bipartisan Budget Act of 2015 (BBA) into law, which averts a potential government shutdown by generating US$80 billion in new revenue over two years. While the BBA contains only a handful of provisions that affect the healthcare industry, the Act's reduced reimbursement scheme for hospital outpatient departments (HOPDs) is important to payers and providers alike. This client alert aims to assist you in understanding the BBA's impact on your current and forthcoming hospital-based outpatient ventures.

2. The BBA's Treatment of HOPDs

Structurally, BBA Section 603 amends Section 1833(t) of the Social Security Act – 42 USC 1395l(t) – which addresses the system by which most hospitals are reimbursed for services performed in an HOPD. In doing so, Section 603 makes clear that, beginning January 1, 2017, most services furnished at HOPDs will be reimbursed under the Medicare Physician Fee Schedule (MPFS) or Ambulatory Surgical Center Fee Schedule (ASCFS), both of which are less generous payment models than the current Hospital Outpatient Prospective Payment System (OPPS) by which most HOPD services are currently reimbursed. While Section 603 will – beginning January 1, 2017 – reach most items and services provided by most HOPDs, the amendment contains a few noteworthy exceptions.

3. Exceptions

a. *Grandfathered HOPDs* – The most notable exception to the BBA's HOPD payment reforms is the one available to existing HOPDs. More specifically, while new HOPDs billing non-emergency services will receive lower reimbursements beginning January 1, 2017, 42 USC 1395l(t)(21)(B)(ii) exempts HOPDs that were already billing these services under OPPS as of November 2, 2015. While this provision could discourage HOPD plans hospitals may have in their pipelines, it is less burdensome than other versions considered in 2015, which would have lowered reimbursement for both current and future HOPDs.

b. *HOPDs Performing ED Services* – Additionally, 21(A) makes clear that the BBA's site-neutral payment reforms apply only to items and services "other than emergency department services," which are currently identified by HCPCS codes 99281-99285. Accordingly, emergency services will continue to be reimbursed under the current billing system for both existing and future HOPDs.

c. *On-Campus and Remote Locations* – The BBA makes clear that its HOPD reforms do not extend to a department of a provider that is in or within 250 yards of (1) a main provider hospital or (2) a remote location of a hospital. So long as they are otherwise eligible, these "on-campus" HOPDs will be able to continue billing under OPPS after January 1, 2017.

4. Effect of BBA Reforms

a. *On Hospitals* – Medicare's pre-BBA reimbursement scheme encouraged hospitals to buy physician practices at a breakneck pace. Similarly, the ACA's focus on clinical integration has made physician practice acquisitions a lucrative option for increasingly cost-conscious hospitals. However, the financial implications of the BBA's HOPD reforms may slow the explosion of hospitals acquiring physician practices, at least for HOPD development purposes.

b. *On Physician Practices* – Section 603 makes it more difficult for physician groups to increase their billing potential by selling their practices to hospitals. Currently, independent physician practices performing outpatient services can extract higher rents from hospitals by emphasizing the OPPS rates they can generate for the hospital post-affiliation. However, since Section 603 eliminates this method of obtaining OPPS payments for most outpatient services delivered in the HOPD setting, physicians will be relegated to billing under MPFS or ASCFS, potentially decreasing their value in the eyes of suitor hospitals.

c. *On Payers* – Among the biggest advocates of site-neutral payment reform in general (and Section 603 in particular) are those who pay for outpatient services, especially health insurers and patients. These groups have long argued that site-neutral payment reforms decrease commercial spending on healthcare services, ensure patients receive the right care in the right setting, lower taxpayer and beneficiary costs and increase patient access to treatment. While payers would have preferred the broader site-neutral payment reforms contained in other versions of the BBA, they are enthusiastic that Section 603's modest reforms are an important first step in achieving reimbursement parity across site of service.

5. What Is On the Horizon?

a. *Broader Site-Neutral Payment Reforms* – Over the last few years, several important and ideologically diverse policymakers (President Obama, The House Ways and Means Committee, MedPAC[1], The Alliance for Site Neutral Payment Reform[2], Congressional Democrats and Republicans, and others) have advocated for broader site-neutral payment reforms than those contained in the BBA. If they are to avoid painful cuts in their already thin margins, hospital groups and their allies will need to redouble their efforts in emphasizing the basis for the fee difference between hospital-affiliated and "free-standing" outpatient facilities, especially the higher overhead costs that hospitals must absorb.

b. *Revisions to Hospitals' Reimbursements?* – Perhaps the strongest justification for site-specific payments is the fact that hospitals often use the increased revenue to subsidize other patient care services that are inadequately funded by Medicare and private payers. The Alliance for Site-Neutral Payment Reform has admitted as much, telling Congress that, once site-neutral payment reforms are implemented, "alternative funding sources may be required to secure access to this [currently subsidized] care." As Congress continues to consider eliminating the creative reimbursement strategies hospitals have been pursuing, it will be interesting to see whether Congress addresses the true elephant in the room: Medicare's increasingly inadequate reimbursement scheme for hospitals.

[1] MedPAC refers to the Medicare Payment Advisory Commission, an independent congressional agency established to advise the US Congress on payments, access to care, quality of care and other issues affecting Medicare.

[2] The Alliance for Site-Neutral Payment Reform – whose members include interest groups representing large health plans, physicians, and others – was created to address disparities in payments between the same clinical patient services provided in different healthcare settings.

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