

October 4, 2010

Dr. Donald Berwick, Administrator  
Centers for Medicare and Medicaid Services  
U.S. Department of Health and Human Services  
Attention: CMS-1510-P  
Mail Stop C4-26-05  
7500 Security Boulevard  
Baltimore, MD 21244-1850

**Re: Medicare Program: Home Health Prospective Payment System Rate Update for Calendar Year 2011; Changes in Certification Requirements for Home Health Agencies and Hospices (RIN: 0938-AP88)**

Dear Administrator Berwick:

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA) also requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.<sup>1</sup>

My office filed comments on the above-captioned proposed rule on September 14, 2010. Advocacy's comments addressed our concerns with CMS' regulatory certification of no impact under the RFA and the resulting decision by CMS not to prepare an Initial Regulatory Flexibility Analysis (IRFA). The comment letter also provided CMS with the home health industry's concerns with many provisions contained in the proposed rule (the majority of which are small businesses based on U.S. Small Business Administration size standards). Initially, the industry representatives that approached Advocacy were particularly concerned with the rule's "36-month" provisions which home health care representatives suggested would have a significant negative economic impact on their small businesses and would result in a marked reduction in the access to capital necessary to run their businesses.<sup>2</sup>

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<sup>1</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat.857 (1996). 5 U.S.C. §612(a).

<sup>2</sup> The industry representatives that contacted Advocacy included: AccentCare, Encompass Home Health Care, Guardian Home Care, Harden Healthcare, Loving Care Agency, Professional HealthCare at Home, and Senior Home Care.

Following the submission of our September 14, 2010 comments, Advocacy was contacted by the National Association for Home Care and Hospice (NAHC), the largest trade association representing home health agencies in the United States. They too argued that CMS failed to adequately analyze how the provisions of the proposed rule would impact the home health care industry. The NAHC asked that Advocacy supplement its comments with the concerns they had with the rule.

While I appreciate that the comment deadline has passed with respect to the public input on this rule, I am writing to provide you with a few additional concerns with the rulemaking as outlined for me by the NAHC. I think their concerns will help increase the transparency associated with the rule, and I hope it will buttress our opinion that CMS should do a better job analyzing the impact of this regulation as is required under the RFA.

### **NAHC Concerns with the Proposed Rule**

1) NAHC's position is consistent with Advocacy's in that CMS should revisit its decision not to perform a RFA analysis in this rule, and that the analysis should be published prior to the final rule being submitted for public comment. NAHC complains that the rule proposes rate reductions while increasing costs on the industry and that CMS failed to adequately analyze this detrimental economic outcome. NAHC believes that if this iteration of the rule is finalized, it will result in a diminution in patient access and care, a reduction in the number of viable home health care agencies and an increase in the cost of patient care.

NAHC believes that CMS has underestimated the costs associated with the rule beyond the cost of some of the proposed administrative form revisions. NAHC indicates that CMS' regulatory analysis: 1) only quantified the percentage cuts in rates based on a geographic basis; 2) failed to appreciate the viability and costs associated with the physician face-to-face requirement, 3) underestimated the cost of revisions to therapy assessment, coverage and documentation standards, coding change proposals and CMS patient satisfaction survey requirements; and 4) that CMS' analysis chose to analyze the regulatory impacts for one year, but the proposed rule extends rate cuts into a second year. Most importantly, NAHC believes that the Market Basket Index as proposed in the rule looks at general cost changes, e.g. caregivers, transportation, insurance and office space, but fails to include the direct cost increases the regulation may have on the delivery of care.<sup>3</sup> NAHC submits that this methodology does not provide CMS with the necessary information to justify an adjustment in payment rates in relation to regulatory cost increases. NAHC suggests that CMS should include an element in the Market Basket Index that accounts for the new administrative requirements/direct costs and adjust base payments accordingly.

2) The proposed rule also makes a change to the case mix weight CMS uses to determine payment to home health care agencies. NAHC stated to Advocacy that CMS has implemented three case mix weight change adjustments to date – 2.75% rate reductions in 2008, 2009 and 2010. NAHC indicated that CMS planned on an additional reduction of 2.71% in 2011. The rule that is the subject of these comments proposes to increase the deduction in 2011 to 3.79% and add a further reduction in 2012 of 3.79%.

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<sup>3</sup> The CMS market baskets are used to update payments and cost limits in the various CMS payment systems. The CMS market baskets reflect input price inflation facing providers in the provision of medical services.

NAHC believes that the mix weight analysis performed by CMS in the proposed rule used to justify the increased rate deduction is flawed. NAHC suggests that the data used by CMS is hospital based, whereas over half of all Medicare home health care patients are admitted to care from a setting other than a hospital. Also, industry data shows that home health care patients have increased functional limitations and more complex clinical conditions than in years past explaining in part the increase in the case mix weight. Lastly, much of the increased case mix weight changes are due to home health care agencies' increased compliance with Medicare instructions regarding patient coding under the 2008 version of Home Health Prospective Payment System.<sup>4</sup>

NAHC suggests that payment rate reductions due to case mix weight are not warranted because Medicare expenditures for home health services are within budgeted levels, negating CMS' authority to adjust payment rates. NAHC recommends that CMS should do a better job analyzing the case mix weight calculation based on some of the aforementioned reasoning and data. The industry believes that CMS should suspend its regulatory proposal to increase the average case mix weights and rate deductions until a reliable model for assessing case mix weight changes can be developed and tested.

3) CMS published the requirements for implementing §6407 of the Affordable Care Act of 2010 in the proposed rule that mandates that home health patients have a physician face-to-face encounter prior to the physician's certification of the need for home health services. Section 6407 requires that prior to certification, the physician (or certain non-physician practitioners) must document that he or she had a face-to-face encounter with the patient within a reasonable timeframe as determined by the Secretary. The statutory language refers to certification only, and does not refer to recertification. The statute allows for the encounter to occur within 6 months prior to certification.

In the proposed rule CMS identifies much narrower timeframes and proposes additional requirements and limitations not required by the statute. NAHC is concerned about the rule's proposal for expanded face-to-face requirements regarding: 1) certification timing; 2) documentation requirements and the requirement that the encounter explicitly be tied to the home health care services; 3) standards for allowing face-to-face encounter by telehealth; 4) restrictions on non-physician practitioner employment status; and 5) physician signature and dating requirements. NAHC acknowledges that CMS is limiting the face-to-face encounter requirements to initial certifications in accordance with the statutory language. Nevertheless, NAHC strongly recommends that CMS postpone implementation of the physician face-to-face encounter requirements until CMS and other stakeholders can determine that the policy implementation will not negatively impact access to care, that physicians are informed and educated regarding their responsibilities, that Medicare beneficiaries are fully informed of their obligations, and that the necessary certification statements and documentation forms are developed, tested, and determined to be appropriate. According to NAHC's experience with previous regulations involving certifying physicians, they believe that physicians will not be prepared for these new responsibilities by the proposed effective date of January 1, 2011. As such, NAHC recommends that January 1, 2012 be set as the target date for full implementation.

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<sup>4</sup> The Medicare program provides payment for home health services under a model known as the Home Health Prospective Payment System (HHPPS). A prospective payment model replaced a per visit, cost reimbursement model in October 2000, consistent with the mandate under the Balanced Budget Act of 1997.

## **Conclusion**

Advocacy's September 14, 2010, comments encouraged CMS to revisit its certification of no impact under the RFA. Advocacy suggested that CMS perform an IRFA pursuant to §603 of the RFA prior to the publication of the final rule. Section 603 of the RFA provides that the IRFA shall contain, among other things, many of the analyses requested by the affected stakeholders that approached Advocacy with concerns about this proposed rule. Section 603 also requires the promulgating agency to describe and analyze any significant alternatives that would accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact on small entities. Many of the recommendations made by the stakeholders in our September 14 comment letter and contained herein should be discussed and analyzed by CMS in accordance with section 603 of the RFA.

Advocacy requests that CMS take Advocacy's RFA comments and the concerns identified by the affected industry into consideration as the agency finalizes this rule. Thank you for your attention to the above matter. If you have any questions or concerns, please do not hesitate to contact me or Linwood Rayford at (202) 205-6533, or [linwood.rayford@sba.gov](mailto:linwood.rayford@sba.gov).

Sincerely yours,

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Cc: Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs