HOBBS STRAUS DEAN & WALKER

2120 L Street, NW, Suite 700
Washington, DC 20037

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

MEMORANDUM

December 5, 2014

TO: MLR Expansion Tribal Clients

FROM: Hobbs, Straus, Dean & Walker LLP

Re: Medicare-Like Rates Update

We have been working with the National Indian Health Board (NIHB) and the United South and Eastern Tribes (USET) to expand Medicare-Like Rates beyond hospital services so that they apply to all providers and suppliers. We have been pursuing legislation to achieve that goal, and in June of this year, Congresswoman Betty McCollum (D-MN) and Congressman Tom Cole (R-OK) introduced H.R. 4843, the Native Contract and Rate Expenditure Act of 2014 (the Native CARE Act).

Today, the Indian Health Service (IHS) published in the Federal Register a proposed rule that would expand Medicare-Like Rates to non-hospital Purchased and Referred Care (PRC) services (formerly Contract Health Services or CHS) by regulation. 79 Fed. Reg. 72160 (Dec. 5, 2014). The regulation lacks the enforcement mechanism that could be achieved through legislation, but the two approaches are not mutually exclusive. We report below on the IHS proposed rule, and provide a brief update on the status of the legislative efforts.

IHS Proposed Rule

This fall, IHS announced that it was working on draft regulations to expand Medicare-Like Rates. We worked with NIHB, USET and other tribal organizations to request that IHS consult with tribes before promulgating regulations. However, IHS was unwilling to share any details and the proposed rule was released without prior consultation. One question tribes and tribal organizations had about the draft regulations was how they would enforce Medicare-Like Rates (i.e., require providers to accept those lower rates) and avoid access to care issues by creating a situation whereby providers can simply refuse to treat American Indian and Alaska Native patients referred to them through PRC programs. One of the key advantages to the legislative effort is that it could require all providers to accept Medicare-Like Rates or risk being denied participation in the Medicare program.[1] However, IHS cannot impose that condition by regulation.

[1] The current Medicare-Like Rate statute for hospitals contains this mechanism, and the legislation discussed below would simply expand the existing statute to cover all providers.

The proposed rule published earlier today would "enforce" Medicare-Like Rates by capping the amount that IHS, Tribes, Tribal organizations, or urban Indian organizations (I/T/Us) can pay for PRC services at the Medicare-Like Rate, removing I/T/U discretion to negotiate higher rates with providers. Specifically, the proposed rule provides that I/T/Us will pay the *lowest* of (1) the Medicare rate under the applicable Medicare fee schedule, prospective payment system, or waiver; (2) the amount negotiated by a repricing agent, if applicable; or (3) the amount the provider or supplier bills the general public. The new rate system would apply to payments to physicians and health care professionals and all other non-hospital based entities for any care authorized under a PRC program operated by the IHS or a Tribe or Tribal organization under the Indian Self-Determination and Education Assistance Act, and to services authorized for purchase by an urban Indian organization. The proposed rule would not alter the current system for hospital-based services.

The proposed rule would provide that a payment from an I/T/U under the payment guidelines in the rule would constitute payment in full, and the provider or supplier would not be permitted to impose any additional charge on the patient. The proposed rule would also provide that, where the individual receiving services is eligible for benefits under Medicare, Medicaid, or another third-party payer, the I/T/U is the payer of last resort, and will pay the amount for which the patient is responsible "after the provider or supplier of services has coordinated benefits and all other alternate resources have been considered and paid, including applicable co-payments, deductibles, and coinsurance that are owed by the patient." These provisions are the same as the existing coordination of benefits rules for Medicare-Like Rates for hospital-based services.

Because the proposed rule would not allow I/T/Us to negotiate a higher rate at their discretion, I/T/Us would effectively be prohibited from authorizing PRC services where the provider or supplier offering those services declines to accept the Medicare-Like Rate. In the preamble to the proposed rule, IHS acknowledges that "this constraint could impact the delivery of patient care, particularly in circumstances where the I/T/U cannot find a health care provider or supplier willing to accept the payment rates established herein or the patient receives emergency services from a provider or supplier that refuses to accept the rate." The IHS notes that it is seeking comment on whether there should be exceptions "in circumstances where it may be appropriate for the I/T/U to retain more flexibility over the payment rate."

Comments on the proposed rule must be submitted on or before January 20, 2015. We will be working with tribes and tribal organizations to develop a coordinated assessment and response to the rule, and to attempt to develop a mechanism that will make the rule more flexible and allow Tribes to address access to care issues.

Please let us know if you would like us to assist you in developing comments on the proposed rule.

Legislative Effort

As previously reported, the Native CARE Act was introduced in June of this year by Congresswoman Betty McCollum (D-MN) and Congressman Tom Cole (R-OK). The bill enjoys broad bi-partisan support in the House, and now has 19 co-sponsors, which include:

- Rep. Tom Cole (R-OK)
- Rep. Ben Ray Lujan (D-NM)
- Rep. Darrel Issa (R-CA)
- Rep. Raul Grijalva (D-AZ)
- Rep. John Kline (R-MN)
- Rep. Frank Pallone (D-NJ)
- Rep. Don Young (R-AK)
- Rep. Jarred Huffman (D-CA)
- Rep. Ron Kind (D-WI)
- Rep. Ann Kirkpatrick (D-AZ)
- Rep. David Valadao (R-CA)
- Rep. Alcee Hastings (D-FL)
- Rep. Mark Pocan (D-WI)
- Rep. Rosa DeLauro (D-CT)
- Rep. Joe Courtney (D-CT)
- Rep. Derek Kilmer (D-WA)
- Rep. Michael Simpson (R-ID)
- Rep. Chellie Pingree (D-ME)
- Rep. Eni Faleomavaega (D-AS)

The bill was referred to the Committees on Energy and Commerce (subcommittee on Health), Ways and Means, and Natural Resources (subcommittee on Indian and Alaska Native affairs). The bill has not yet had a hearing, and as a result will not move in this Congress, but we are working to get it quickly reintroduced in the next Congress in the new year.

We are also continuing to work with Senators Thune (R-SD) and Heitkamp (D-ND) to get a companion bill introduced in the Senate. Senator Thune's office has expressed some concern with the mechanism in the bill that would make compliance with Medicare-Like Rates a condition of Medicare participation. We are working to see if we can make changes to the bill to address those concerns, and are also meeting with the American Medical Association to address any concern with the bill they might have. We will be meeting with both the House and Senate staffs, along with the AMA, over the next month in an effort to be ready to go with a new bill as soon as the next Congress sits early next year.

If you have questions about either the legislative or regulatory effort, please contact Elliott Milhollin at (202)822-8282 or emilhollin@hobbsstraus.com; Geoff Strommer at (503)242-1745 or gstrommer@hobbsstraus.com; or Karen Funk at (202)822-8282 or kfunk@hobbsstraus.com.