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## IN THIS ISSUE

[CMS Capitulates, Issues Ruling Granting Relief in Hospice Cap Challenges](#)

[CMS Releases Proposed FFY 2012 IPPS Rule](#)

[Federal Health IT Strategic Plan Available for Comment](#)

[CMS Sign-Off - No Enforcement of Physician Signature Requirement on Lab Requisitions](#)

[Primary Care Providers and General Surgeons Benefit from Increased Medicare Reimbursement](#)

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## CMS Capitulates, Issues Ruling Granting Relief in Hospice Cap Challenges

By: [Carel T. Hedlund](#) and [Lisa D. Stevenson](#)

In the face of losing multiple court challenges to the validity of the beneficiary counting methodology in the hospice cap regulation (42 C.F.R. § 418.309(b)), CMS has now acquiesced by issuing [Ruling CMS-1355-R \[PDF\]](#) on April 14, 2011. Under the Ruling, CMS will grant relief to any hospice provider that has a properly pending administrative appeal on this issue. The relief involves recalculating the hospice cap by prorating beneficiaries among the years in which they received hospice care, instead of counting them only in one year. CMS will also presumably seek to remand pending court cases for a similar recalculation.

### Background

As discussed in a previous Payment Matters article "[Two More Courts Invalidate CMS's Regulations for Calculating Hospice Cap](#)", a number of United States district courts have held that CMS's counting methodology, which counts a beneficiary only in a single year, is invalid because it is contrary to the express direction in the enabling statute to allocate a patient's stay across multiple fiscal years "to reflect the proportion of hospice care that each such individual was provided in a previous or subsequent accounting year" (42 U.S.C. § 1395f(i)(2)(C)).

In March, two courts of appeals weighed in, similarly invalidating the regulation. On March 11, 2011, the Fifth Circuit in [Lion Health Servs. v. Sebelius, No. 10-10414 \[PDF\]](#), and four days later, the Ninth Circuit in [Los Angeles Haven Hospice, Inc. v. Sebelius, No. 09-56391 \[PDF\]](#) both ruled that the hospice cap regulation is unlawful and must be set aside because it impermissibly conflicts with the statute requiring a proportional versus a single-year allocation method for the hospice cap. The Courts enjoined the Secretary's use of the hospice cap regulations as to the hospice providers filing suit.

Having failed to convince a single court that its regulation is consistent with the statute, CMS has now thrown in the towel.

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## The Ruling

Under the Ruling, for hospitals with jurisdictionally proper appeals pending before the Provider Reimbursement Review Board (PRRB) or CMS Administrator will have their cases remanded to the appropriate Medicare contractor to have the cap recalculated under the proportional counting methodology. It is up to the Medicare contractor to identify such appeals, notify the administrative tribunal and recalculate the cap. The Ruling provides that, given the CMS instructions to recalculate the cap, the tribunal no longer has jurisdiction to decide the merits of the appeal, and must remand the case upon notification by the contractor that an appeal is covered by the Ruling.

The recalculation will be based on the “best data available” at the time. However, CMS recognizes that the date of the end of hospice care for a given patient may not be known at the time of the recalculation. The Ruling therefore provides that the revised determination of the cap may be reopened within three years, in accordance with the usual reopening rules, to take into account later data regarding the length of a patient’s hospice stay.

CMS notes in the Ruling that only a few hospices have challenged the regulation, and that many hospices prefer the current single-year counting methodology. Those hospices that never filed a challenge to the cap will continue to have their cap calculated under the single-year method for any cap year ending on or before October 31, 2011, unless CMS provides otherwise in the FY 2012 final hospital regulation.

The Ruling announces that CMS will issue a proposed rule for the hospice wage index for FY 2012, in which it will propose to revise the hospice cap regulation to include the proportional counting methodology for cap years 2012 and beyond. Significantly, however, CMS will propose to permit a hospice to elect to continue to have its cap determined under the current single-year counting methodology.

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## **Ober|Kaler's Comments**

The Ruling is good news for hospices. Any hospice that has received a repayment demand notice based on the single-year counting methodology should assess whether it would fare better under the proportionate method. If so, and if the 180-day appeal period has not expired, it should file an appeal at the PRRB to avail itself of the benefits of the Ruling.

Going forward, all hospices will have to decide the method that will benefit them in each cap year, and pay attention to the procedures that will be announced for making the election to remain under the current methodology. Hospices should review carefully the proposed FY 2012 hospice rule regarding the revisions to the cap methodology and consider submitting comments by the due date.