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Reminder: Self-Disallowing Items on Your Medicare Cost Report

In preparing their 2019 cost reports, Medicare providers should remember that failure to comply with HHS's self-disallowance requirement can have material financial impacts down the road. Several significant Medicare reimbursement regulations are pending review at the U.S. Court of Appeals for the District of Columbia. To recoup additional payments if these regulations are later invalidated, a provider must self-disallow the costs that were affected by the challenged regulations. This GT Alert outlines HHS's self-disallowance requirement under the most recently amended cost-reporting regulations, and provides practical considerations for identifying and protesting issues.

Brief History of the Self-Disallowance Requirement

The self-disallowance requirement mandates that a provider identify payments related to the validity of any reimbursement regulation in its cost report. HHS's self-disallowance requirement has gone through several iterations in the past 30 years.

- For cost-reporting years before Dec. 31, 2008 – no self-disallowance requirement: The U.S. Supreme Court rejected HHS's first attempt to impose a self-disallowance requirement to challenge the validity of a reimbursement regulation.[1]

[1] *Bethesda Hospital Association v. Bowen*, 485 U.S. 399, 403-04 (1988) (concluding that providers could claim dissatisfaction without incorporating their challenges in the cost reports).

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- For cost-reporting years ending on or after Dec. 31, 2008 but beginning before Jan. 1, 2016 – no self-disallowance requirement: In 2008, HHS promulgated regulations requiring providers to preserve their right to challenge their Medicare reimbursement by either: (1) including a claim for specific items on their cost report; or (2) self-disallowing items as protest costs in their cost report.[2] HHS later abandoned the 2008 regulation after providers challenged the requirement.[3]
- For cost reporting years beginning on or after Jan. 1, 2016 – new self-disallowance requirement: HHS reintroduced the self-disallowance requirement as a part of cost report, under which claiming or protesting an item on the cost report is a condition of payment (the "2016 Regulation").[4] Providers must include an appropriate claim for a specific item on its cost report – either by affirmatively claiming reimbursement or expressly self-disallowing the cost by filing the item under protest – to be eligible to receive Medicare reimbursement, either by the Medicare Administrative Contractor (MAC) in a Notice of Program Reimbursement (NPR) or by any reviewing body such as the Provider Reimbursement Review Board (PRRB) or a federal court.

Complying With the 2016 Regulation

The 2016 Regulation may have rebranded the self-disallowance requirement as a cost-reporting mandate, but the process for a provider to disallow a cost remains the same. Section 115 of the Provider Reimbursement Manual, Part 2, is now expressly incorporated in the 2016 Regulation. Providers are required to include an estimated payment amount for each self-disallowed item in the "protested amount" lines of the cost report, and attach a worksheet explaining why a self-disallowance is necessary and how the estimated amount for each of the self-disallowed item was determined.

The biggest complaint about the self-disallowance requirement is that it is difficult to identify reimbursement regulations that a provider may want to challenge years after the cost report is submitted and the NPR is finalized. Below are some considerations for identifying issues to self-disallow:

- If a provider is participating in group appeals challenging the validity of ongoing reimbursement policies, those issues must be self-disallowed annually on the cost report.
- Each year, the Federation of American Hospitals and the American Hospital Association submit thoughtful and detailed comments on HHS's annual proposed rulemakings. These comments are helpful in identifying what issues may be challenged in court.
- Providers regularly receive invitations to join group appeals to challenge reimbursement regulations. Analyze the potential of each of these challenges with your reimbursement counsel and weigh the costs and benefits of being a named plaintiff versus preserving your appeal rights and waiting for others to litigate the issue. If you decide on the latter course, make sure you properly self-disallow the issue.
- Remember that the 2016 Regulation acknowledged that it may be difficult for hospitals to obtain sufficient information from state agencies for the purpose of claiming DSH Medicaid-eligible patient days. HHS specifically instructed MACs, in this limited circumstance, to accept one amended cost report submitted within a 12-month period after the provider's cost report due date, solely for the

[2] 42 C.F.R. § 405.1835 (2008).
[3] 79 Fed. Reg. 50199-201, 50350-51 (technical amendment to eliminate the self-disallowance requirement for appeals based on untimely final contractor determinations); CMS Ruling 1727-R, available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Rulings/Downloads/CMS-1727-R.pdf (conceding that a provider has a right to a MAC or a PRRB hearing for an item the provider did not include on its cost report due to a good faith belief that the item was subject to a payment regulation or other policy that gave the MAC no authority or discretion to make payment in the manner the provider sought); *see also e.g. Lee Memorial Hospital v. Sebelius*, No. 1:13-cv-00643-RMC (D.D.C.); *Banner Heart Hospital v. Burwell*, 201 F. Supp. 3d 131 (D.D.C. 2016).
[4] 80 Fed. Reg. 70298, 70555-580 (Nov. 13, 2015).

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purpose of revising a claim for DSH by using updated Medicaid-eligible patient days, after a hospital receives updated Medicaid eligibility information from the state.

The second step after identifying the issues for self-disallowance is working with the finance team that handles the cost-reporting process. A provider's legal department can assist the finance team in complying with the 2016 Regulation by doing the following:

- Ensure that the protest lines under Worksheet E, Part A and Part B, each contain the total sum of the estimated payment amounts for all self-disallowed items under inpatient and outpatient care, respectively.
- Don't forget to attach the protest items worksheet with the as-filed cost report. The worksheet should contain calculations supporting the estimated payment amounts for each of the issues under protest.

In conclusion, issues to consider for self-disallowance in the 2019 cost reports include the reduction in off-campus provider-based departments reimbursement, calculation of 340B drugs, cost outlier reimbursements, and the various DSH issues.

Authors

This GT Alert was prepared by **Michi Tsuda**, **Francis J. Serbaroli**, and **Mimi Hu Brouillette**. Questions about this information can be directed to:

- Michi Tsuda | +1 303.572.7432 | tsudam@gtlaw.com
- Francis J. Serbaroli | +1 212.801.2212 | serbarolif@gtlaw.com
- Mimi Hu Brouillette | +1 303.685.7415 | brouillettem@gtlaw.com
- Or your Greenberg Traurig attorney

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