

October 5, 2020

Seema Verma
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW, Room 445-G
Washington, D.C. 20201

Re: CMS-1739-P, Treatment of Medicare Part C Days in the Calculation of a Hospital's Medicare Disproportionate Patient Percentage (85 FR 47723)

Dear Ms. Verma:

The Illinois Health and Hospital Association (IHA) appreciates the opportunity to comment on this proposed rule to establish a policy concerning the treating of Medicare Part C days when calculating a hospital's Medicare disproportionate patient percentage. Twenty-three IHA member hospitals are participating in the Medicare Disproportionate Share Hospital (DSH) Adjustment group appeal, which formed in response to the Centers for Medicare & Medicaid Services' (CMS) multiple attempts to include Part C days in the Supplemental Security Income (SSI) fraction despite the U.S. Supreme Court's decision in *Azar v. Allina Health Services* (*Allina*). Through this proposed rule, CMS is attempting to use retroactive rulemaking to remove the financial benefit to hospitals of this U.S. Supreme Court decision.

We strongly object to this proposed rule, as it retroactively imposes a rule that the Supreme Court of the United States determined invalid in *Allina*. It is imperative that the Administration act in accordance with established law. Failing to do so fosters an environment of uncertainty, which is particularly burdensome during the ongoing COVID-19 pandemic.

Further, we reject CMS' claim that retroactivity is appropriate in this case based on purported public interest. It is not in the public's interest to allow CMS to circumvent a Supreme Court ruling. Further, it is not in the public's interest to cause further delay and deprive hospitals with proper DSH appeals, who have faced significant financial struggles since the COVID-19 pandemic began, of their much-needed Medicare reimbursement.

The proper course, in light of *Allina* and under well-established judicial precedent, is for the Supreme Court's decision to restore the status quo or prior policy. The prior

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policy excluded Part C days from the Medicare SSI fraction and included such Dual Eligible days in the Medicaid fraction.

This proposed rule cannot stand, and should not impact hospitals that have properly pending appeals on the *Allina* Part C days issue.

Ms. Verma, thank you again for the opportunity to comment on this proposed rule.

Sincerely,

A.J. Wilhelmi
President & CEO
Illinois Health and Hospital Association