

DEPARTMENT OF HEALTH CARE FINANCE

NOTICE OF FINAL RULEMAKING

The Director of the Department of Health Care Finance (DHCF), pursuant to the authority set forth in An Act to enable the District of Columbia (District) to receive federal financial assistance under Title XIX of the Social Security Act for a medical assistance program, and for other purposes, approved December 27, 1967 (81 Stat.744; D.C. Official Code § 1-307.02 (2016 Repl.)) and Section 6(6) of the Department of Health Care Finance Establishment Act of 2007, effective February 27, 2008 (D.C. Law 17-109; D.C. Official Code § 7-771.05(6) (2012 Repl.)), hereby gives notice of the adoption of an amendment to Chapter 65 of Title 29 (Public Welfare) of the District of Columbia Municipal Regulations (DCMR), entitled “Medicaid Reimbursement to Nursing Facilities.”

These rules reflect changes to the reimbursement methodology used for nursing facilities providing care to District Medicaid beneficiaries, and remove the annual inflation adjustment component of the nursing facility reimbursement methodology for Fiscal Year 2017 and all years thereafter in line with the District’s long term budget priorities. The aggregate impact of the elimination of the inflation adjustment is a reduction of approximately \$4,569,346 in each year from FY17 through FY21.

The corresponding State Plan Amendment (SPA) to the District of Columbia State Plan for Medical Assistance (State Plan) must be approved by the U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) and the Council of the District of Columbia (Council). The Council approved the corresponding SPA through the Fiscal Year 2017 Budget Support Emergency Act of 2016, signed July 20, 2016 (D.C. Act 21-463; 63 DCR 009843 (July 29, 2016)). CMS approved the corresponding SPA on November 22, 2016, with an effective date of October 1, 2016.

A Notice of Emergency and Proposed Rulemaking was published in the *D.C. Register* on September 30, 2016 at 63 DCR 011919. Comments were received from the District of Columbia Health Care Association (DCHCA). DHCF carefully considered the comments received, as detailed below.

DCHCA submitted the following comments regarding the dates for which the proposed elimination adjustments are effective:

DCHCA stated that the organization did not understand the need to enact such a modification to the State Plan on a permanent basis. The commenter asserted that the 2017 budget eliminated the inflation factor for that year but does not authorize elimination for future years. DCHCA acknowledged that DHCF is working with the provider community to revise the payment methodology and that the goal is to have the revised methodology implemented in 2018, and requested that DHCF reconsider discontinuing the annual inflation adjustment for Fiscal Year 2017 until this process is complete.

Due to the budget process for District government agencies, DHCF is only allowed to operate under an approved budget for a single fiscal year at a time. The Fiscal Year 2017 Budget Support Act authorized the elimination of the annual inflation adjustments. As the commenter noted below, DHCF is in the process of overhauling the nursing facility reimbursement methodology for Fiscal Year 2018. When DHCF makes changes to State Plan pages that are reflected in corresponding rules, the changes are drafted as effective on a date certain. The changes are then superseded by subsequent updates to the State Plan and corresponding rules. Therefore, the elimination of the inflation adjustments are drafted as effective from October 1, 2016 until the Centers for Medicare and Medicaid Services (CMS) approves the State Plan Amendment (SPA) containing the new reimbursement methodology.

DCHCA submitted the following comments regarding the existing provider tax:

DCHCA stated that provider facilities pay approximately \$14.5 million annually in the form of a provider tax, and that one of the factors that led DCHCA membership to initially propose the tax was years of Medicaid under funding the care of District residents in nursing homes and years without an inflation factor to keep up with increased costs.

DHCF acknowledges the commenter's statement regarding payment of a provider tax. DHCF notes that the funds collected through the tax are primarily used to reimburse the nursing facilities subject to the tax. DHCF also recognizes that the annual inflation adjustment for each of the three (3) cost centers was eliminated from January 1, 2011 through September 30, 2013 as a result of budget constraints during that time period. However, the inflation adjustments for all three (3) cost centers were reinstated effective October 1, 2013, as budget funds were once again made available to allocate to the inflation adjustments for Fiscal Year 2014.

DCHCA submitted the following comments regarding the frequency of rebasing of the current rates:

DCHCA stated that under the current payment methodology, nursing facility costs are scheduled to be audited every three years (3) and facility rates are rebased. The commenter noted that based on the dates reflected in the current State Plan pages, the next rebasing year is 2016, and asserted that work will likely not begin on the 2016 rebasing until 2018 if at all. DCHCA stated that the 2010 rebasing had recently been completed that the 2013 rebasing had not yet begun, and that therefore rates are currently behind by six years.

DHCF recognizes the challenges in completing timely rebasing of nursing facility rates under the current reimbursement methodology, and this issue is being addressed as DHCF works with the provider community to reform the reimbursement methodology for Fiscal Year 2018 forward. DHCF notes that its nursing facility rates have in fact been finalized through Fiscal Year 2014. DHCF also notes that as the current reimbursement methodology model requires all provider appeals regarding their facility-specific rates to be resolved before new rates may be finalized, ongoing provider appeals have prevented the finalization of new rates.

DCHCA submitted the following comments regarding the purpose of including the inflation adjustors for each cost center in the reimbursement methodology:

DCHCA stated that the inflation factor is a very important piece of the current nursing facility payment methodology because it adds additional funds to help cover the added costs that occur between rebasing. As an example of added costs, the commenter cited the annual increase to the District minimum wage, which has increased from \$7.25 in 2008 to \$11.50 in 2016 and is set to be \$15.00 per hour by 2020.

DCHCA added that in addition to the added labor costs mentioned above, CMS has recently released their Final Rule on Requirements for Participation in the Medicare and Medicaid program and asserted that promulgation of the rule will add considerable additional costs to providers as they comply with the conditions of the rule.

The commenter stated that provider facilities continually operate close to the margin to provide care and the cuts to Medicare that occurred with the "Affordable Care Act" and that the loss of annual inflation adjustments could directly impact the quality of the operation and decisions made on programs and personnel.

DHCF appreciates the commenter's concern regarding the increase in labor costs and the potential additional costs that nursing facilities may incur as a result of meeting updated requirements of 42 CFR Part 483 as reflected in the recently issued final rule. These changes are being taken into consideration as DHCF works with the provider community to create a revised reimbursement methodology that accurately reflects the costs of providing nursing facility services to District Medicaid beneficiaries in compliance with District and federal requirements. Furthermore, the current reimbursement methodology accounts for changes to District or federal requirements that impact costs by rebasing rates every three (3) years.

DCHCA submitted the following comments regarding the annual Upper Payment Limit (UPL) demonstration for nursing facility rates:

DCHCA acknowledged that DHCF must make assurances to CMS about the UPL on an annual basis. DCHCA requested that DHCF confirm that the UPL test is applied in the aggregate and not on a facility specific level. DCHCA also requested that the organization be given the opportunity to review the UPL calculation.

DHCF can confirm that the annual UPL demonstration for District Medicaid nursing facilities is performed in the aggregate and not on a facility-specific level. DHCF will share the results of the annual UPL demonstration with the provider community once it has been completed.

Following careful consideration of all comments received as detailed above, DHCF has determined that no changes to these rules are required and therefore none have been made for these final rules.

The Director adopted these rules as final on January 17, 2017, and they shall become effective on the date of publication of this notice in the *D.C. Register*.

Chapter 65, MEDICAID REIMBURSEMENT TO NURSING FACILITIES, of Title 29 DCMR, PUBLIC WELFARE, is amended as follows:

Section 6508, FINAL PER DIEM RATE CALCULATION, is amended to read as follows:

6508 FINAL PER DIEM RATE CALCULATION

6508.1 Each nursing facility's per diem rate effective January 1, 2006 shall be the sum of Subparagraphs (a), (b), and (c) as set forth below:

- (a) The nursing and resident care base year cost per diem, which shall be calculated as follows:
- (1) Effective January 1, 2006, through September 30, 2007, the nursing and resident care base year cost per diem established pursuant to Section 6505, adjusted for inflation to March 30, 2003, using the CMS Prospective Payment System Skilled Nursing Facility Input Price Index (CMS Index).
 - (2) Effective October 1, 2007, through September 30, 2008, the nursing and resident care base year cost per diem calculated pursuant to Subsection 6508.1(a)(1), adjusted for inflation using the CMS Index for District Fiscal Years 2006, 2007, and 2008.
 - (3) Effective October 1, 2008, through September 30, 2009, the nursing and resident care base year cost per diem calculated pursuant to Subsection 6508.1(a)(2), adjusted for inflation using the CMS Index.
 - (4) Effective October 1, 2009 through December 31, 2010, the nursing and resident care base year cost per diem calculated pursuant to Subsection 6508.1(a)(3), adjusted for inflation using the CMS Index.
 - (5) Effective January 1, 2011 through September 30, 2013, the annual inflation adjustment shall be eliminated.
 - (6) Effective October 1, 2013, the nursing and resident care base year cost per diem calculated pursuant to Subsection 6508.1(a)(4), shall be annually adjusted for inflation using the CMS Index. This inflation adjustment shall not apply or be calculated for the period in which the inflation adjustment was eliminated in Subsection 6508.1(a)(5).
 - (7) Effective October 1, 2016, the annual inflation adjustment shall be eliminated.

- (b) The routine and support base year cost per diem, which shall be calculated as follows:
- (1) Effective January 1, 2006, through September 30, 2007, the routine and support base year cost per diem established pursuant to Section 6506, adjusted for inflation to March 30, 2003, using the CMS Prospective Payment System Skilled Nursing Facility Input Price Index (CMS Index).
 - (2) Effective October 1, 2007, through September 30, 2008, the routine and support base year cost per diem calculated pursuant to Subsection 6508.1(b)(1), indexed for inflation using the CMS Index.
 - (3) Effective October 1, 2008, through September 30, 2009, the routine and support base year cost per diem calculated pursuant to Subsection 6508.1(b)(2), adjusted for inflation using the CMS Index.
 - (4) Effective October 1, 2009 through December 31, 2010, the routine and support base year cost per diem calculated according to Subsection 6508.1(b)(3), adjusted for inflation using the CMS Index.
 - (5) Effective January 2011 through September 30, 2013, the annual inflation adjustment is eliminated.
 - (6) Effective October 1, 2013, the routine and support base year cost per diem calculated pursuant to Subsection 6508.1(b)(4), shall be annually adjusted for inflation using the CMS Index. This inflation adjustment shall not apply or be calculated for the period in which the inflation adjustment was eliminated in Subsection 6508.1(b)(5).
 - (7) Effective October 1, 2016, the annual inflation adjustment shall be eliminated.
- (c) The capital-related base year cost per diem, which shall be calculated as follows:
- (1) Effective January 1, 2006, through September 30, 2007, the capital-related base year cost per diem established pursuant to Section 6507 adjusted for inflation to March 30, 2003, using the CMS Prospective Payment System Skilled Nursing Facility Input Price Index (CMS Index). The inflation adjustment in this

subparagraph shall not be applied to depreciation, amortization, and interest on capital related expenditures.

- (2) Effective October 1, 2007, through September 30, 2008, the capital-related base year cost per diem calculated pursuant to Subsection 6508.1(c)(1) adjusted for inflation using the CMS Index for District Fiscal Years 2006, 2007, and 2008. The inflation adjustment in this subparagraph shall not be applied to depreciation, amortization and interest on capital-related expenditures.
- (3) Effective October 1, 2008, through September 30, 2009, the capital-related base year cost per diem calculated pursuant to Subsection 6508.1(c)(2) adjusted for inflation using the CMS Index. The inflation adjustment in this subsection shall not be applied to depreciation, amortization and interest on capital-related expenditures.
- (4) Effective October 1, 2009 through December 31, 2010, the capital-related base year cost per diem calculated pursuant to Subsection 6508.1(c)(3) adjusted for inflation using the CMS Index. The inflation adjustment in this subsection shall not be applied to depreciation, amortization and interest on capital-related expenditures.
- (5) Effective January 1, 2011 through September 30, 2013, the annual inflation adjustment is eliminated.
- (6) Effective October 1, 2013, the capital-related base year cost per diem calculated pursuant to Subsection 6508.1(c)(4), shall be annually adjusted for inflation using the CMS Index. This inflation adjustment shall not apply or be calculated for the period in which the inflation adjustment was eliminated in Subsection 6508.1(c)(5). The inflation adjustment in this subsection shall not be applied to depreciation, amortization and interest on capital-related expenditures.
- (7) Effective October 1, 2016, the annual inflation adjustment shall be eliminated.

6508.2 Effective April 1, 2006 and every six (6) months thereafter, the nursing and resident care costs per diem shall be re-calculated in accordance with Section 6505. The per diem rates established for routine and support costs and capital-related costs established pursuant to Subsection 6508.1 shall be carried forward until costs are rebased.

- 6508.3 When necessary, each facility's per diem rate shall be reduced by the same percentage to maintain compliance with the Medicare upper payment limit requirement.
- 6508.4 DHCF may approve an adjustment to the facility's per diem rate if the facility demonstrates that it incurred higher costs due to extraordinary circumstances beyond its control including but not limited to strikes, fire flood, earthquake, or similar unusual occurrences with substantial cost effects.
- 6508.5 Each adjustment pursuant to Subsection 6508.4 shall be made only to the extent the costs are reasonable, attributable to the circumstances specified, separately identified by the facility, and verified by DHCF.