

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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THE AMERICAN HOSPITAL ASSOCIATION,))
ASSOCIATION OF AMERICAN MEDICAL))
COLLEGES, MERCY HEALTH MUSKEGON,))
CLALLAM COUNTY PUBLIC HOSPITAL))
NO. 2, d/b/a OLYMPIC MEDICAL CENTER,))
and YORK HOSPITAL,))
))
<i>Plaintiffs,</i>))
))
v.)	Civil Action No. 1:18-cv-2841
))
ALEX M. AZAR II,))
in his official capacity as SECRETARY OF))
HEALTH AND HUMAN SERVICES,))
))
<i>Defendant.</i>))
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NOTICE OF INTENT TO FILE MOTION TO ENFORCE JUDGMENT
AND REQUEST FOR BRIEFING SCHEDULE

Last Friday, CMS made publicly available the Medicare Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System for Calendar Year 2020. *See* CMS, Fact Sheet, *CY 2020 Medicare Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System Final Rule* (CMS-1717-FC) (Nov. 1, 2019) (the 2020 OPPS Rule).¹

In September, this Court found ultra vires and vacated the site neutral policy finalized in the 2019 OPPS Rule, which contemplated a two-year phase-in for reductions to payments for certain clinic visits. *See* Dkt. 32 (ordering that “the Secretary’s Method to Control for

¹ Available at <https://www.federalregister.gov/documents/2019/11/12/2019-24138/medicare-program-changes-to-hospital-outpatient-prospective-payment-and-ambulatory-surgical-center>. The 2020 OPPS Rule will be published in the Federal Register on November 12, 2019.

Unnecessary Increases in the Volume of Outpatient Services, 83 Fed. Reg. 58,818, 59,004-15 (Nov. 21, 2018) (Section X.B), is **VACATED**”).

Despite the Court’s Order, the 2020 OPSS Rule purports to continue the two-year phase-in of the site neutral policy that this Court expressly declared invalid and vacated. The 2020 OPSS Rule is not just unlawful for the same reasons as the 2019 OPSS Rule; it also directly violates this Court’s vacatur order. The two-year phase-in of the site neutral policy was finalized in Section X.B of the 2019 OPSS Rule, and thus was expressly vacated by this Court. And yet in the 2020 OPSS Rule, CMS stated that it was “continuing the policy with the second year of the two-year transition in CY 2020.”² It also stated in an associated press release: “As *finalized in last year’s rule*, CMS is *completing the two-year phase-in* of the method to reduce unnecessary utilization in outpatient services by addressing payments for clinic visits furnished in the off-campus hospital outpatient setting.”³ Lest there be any doubt: Rather than going through a robust notice-and-comment process for the 2020 OPSS Rule, the agency merely stated in the proposed rule that the site neutral policy was an “application” of the policy that was “finalized” in the 2019 OPSS Rule. *See, e.g.*, 84 Fed. Reg. 39,528 and 39,512.

This is completely improper, and violates both this Court’s substantive ruling and its order denying the government’s motion for reconsideration. For that reason, Plaintiffs in Civil Action No. 1:18-2841 intend to file—imminently—a motion to enforce this Court’s judgment. Plaintiffs respectfully request issuance of a briefing schedule to permit resolution of that motion as expeditiously as possible—*before* the 2020 Final Rule takes effect on January 1. Plaintiffs

² *See* <https://www.federalregister.gov/documents/2019/11/12/2019-24138/medicare-program-changes-to-hospital-outpatient-prospective-payment-and-ambulatory-surgical-center>.

³ *See* <https://www.cms.gov/newsroom/fact-sheets/cy-2020-medicare-hospital-outpatient-prospective-payment-system-and-ambulatory-surgical-center-0>.

suggest a short briefing schedule would be appropriate to permit the parties to air the issue before this Court, and to permit plaintiffs to seek to enforce this Court's judgment. A proposed briefing schedule is attached.

Pursuant to Local Rule 7(m), Plaintiffs' counsel notified the Government of its intention to file this notice and the forthcoming motion to enforce judgment. The Government has indicated that it opposes both Plaintiffs' motion to enforce and the proposed briefing schedule.

Respectfully submitted,

/s/ Catherine E. Stetson
Catherine E. Stetson (D.C. Bar No. 453221)
Susan M. Cook (D.C. Bar No. 462978)
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, D.C. 20004
Phone: (202) 637-5491
Fax: (202) 637-5910
cate.stetson@hoganlovells.com

*Counsel for the American Hospital Association,
Association of American Medical Colleges, Mercy
Health Muskegon, Clallam County Public Hospital
No. 2, d/b/a Olympic Medical Center, and York
Hospital*

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