



Charles N. Kahn III
President and CEO

November 20, 2023

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Re: United Policy MCS046.05 – Hospital, Emergency, and Ambulance Services

Dear Administrator Brooks-LaSure:

We are writing to alert you to a concerning development related to Medicare Advantage plans' coverage of basic benefits – and specifically inpatient hospital care. We urge the Center for Medicare & Medicaid Services (CMS) to protect America's seniors by tracking and robustly enforcing critical Medicare coverage requirements and we also request to meet with CMS on this issue.

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 leading tax-paying hospitals and health systems throughout the United States. FAH members provide patients and communities with access to high-quality, affordable care in both urban and rural areas across 46 states, plus Washington, DC and Puerto Rico. Our members include teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals and provide a wide range of inpatient, ambulatory, post-acute, emergency, children's, and cancer services.

America's hospitals are dedicated to serving MA beneficiaries and ensuring that they have full access to the high-quality, covered health care services to which they are entitled under the Medicare Part C program. To that end, the FAH strongly supports key reforms and clarifications in CMS's 2024 Policy and Technical MA Final Rule (Final Rule)¹ that were

¹ Contract Year 2024 Policy and Technical Changes to the Medicare Advantage Program, Medicare Prescription Drug Benefit Program, Medicare Cost Plan Program, and Programs of

“designed to prohibit MA organizations from limiting or denying coverage when the item or service would be covered under Traditional Medicare.” For years our members have experienced MA plans downgrading four-, five-, and six-day lengths of stays to outpatient observation status (and even longer in many instances). This type of approach to “covering” hospital stays has led to higher cost-sharing requirements for Medicare patients and is exactly the type of abuse that led CMS to make changes in the Final Rule. These patients have not been receiving the same benefits and coverage as their fee-for-service counterparts.

Yet, despite the clarity that CMS provided in the Final Rule, the FAH is concerned that a large proportion of MA members will continue to be at risk of unlawful MA denials for inpatient hospital services that would be covered under Traditional Medicare. The largest MA organization in the country, UnitedHealthcare (UHC), recently released a new coverage policy for hospital, emergency, and ambulance services effective January 1, 2024 (the “UHC Policy”).² We are concerned that ***UHC’s Policy inappropriately and unlawfully deviates from the Medicare coverage criteria for inpatient hospital care set forth at 42 C.F.R. § 412.3, impermissibly narrowing MA beneficiaries’ coverage for basic benefits and creating harmful and unnecessary risks for beneficiaries.*** In fact, UHC’s Policy goes so far as to incorporate two UHC commercial medical policies and non-public InterQual[®] criteria and apply them as MA coverage criteria in lieu of the established Medicare inpatient coverage criteria under 42 C.F.R. § 412.3.

In light of the immediate risks faced by MA enrollees under the UHC Policy, we urge CMS to undertake appropriate enforcement actions against UHC so that UHC’s 8.9 million members will receive their full inpatient hospital benefits based on established and clear Traditional Medicare coverage criteria.

The 2024 Final Rule made clear MA plans’ obligation to comply with “general coverage and benefit conditions included in Traditional Medicare laws” and expressly stated that these coverage and benefit conditions include “payment criteria for inpatient admissions at 42 CFR 412.3.”³ As a result of these clarifications, UHC must provide *inpatient hospital coverage* for MA members’ hospital stays pursuant to the so-called Two-Midnight Rule. Based on the amended text of 42 C.F.R. § 422.101(b) and CMS’ further explanation in the preamble to the 2024 Final Rule, the criteria for inpatient coverage—including those at 42 C.F.R. § 412.3(d)(2)—are “fully established” and MA organizations are prohibited from supplementing them under 42 C.F.R. § 422.101(b)(6) or otherwise.

As such, when UHC makes a coverage determination for an MA member with respect to inpatient hospital services, it must do so based on the criteria at 42 C.F.R. § 412.3 and it cannot deny inpatient coverage “based on internal, proprietary, or external clinical criteria not found in

All-Inclusive Care for the Elderly, 88 Fed. Reg. 22,120, 22,187 (Apr. 12, 2023) (2024 Final Rule).

² Policy Number MCS046.05 (Oct. 30, 2023)

<https://www.uhcprovider.com/content/dam/provider/docs/public/policies/index/macs/hospital-services-01012024.pdf>.

³ 42 C.F.R. § 422.101(b)(2)

Traditional Medicare coverage policies.”⁴ The UHC Policy, however, fails to comply with these requirements and instead unlawfully establishes additional MA coverage criteria (including InterQual[®] and commercial coverage criteria and guidelines) for inpatient hospital care.

For example, under 42 C.F.R. § 412.3(d)(1) inpatient coverage is available based on the admitting physician’s expectation, based on complex medical factors, that the patient would require hospital care that crosses two midnights as per 42 C.F.R. § 412.3(d)(1). The UHC Policy, however, misarticulates the criteria, focusing whether “complex medical factors support inpatient admission” without regard for the duration of hospital care expected based on complex medical factors. It then incorporates commercial coverage guidance (using non-public InterQual[®] criteria), which states that “additional clinical information should be submitted to support an inpatient level of care” *after* the hospital stay has already crossed two midnights.”⁵ This is expressly at odds with the two-midnight rule, which is guided by the physician’s prospective expectation that hospital care will cross two midnights, and it will result in the denial of medically necessary inpatient admissions in favor of prolonged observation services.

Furthermore, even if additional, unspecified criteria were needed to interpret or supplement the Medicare inpatient coverage criteria in order to determine medical necessity consistently, UHC’s Policy fails to satisfy the remaining regulatory requirements for internal coverage criteria. For example, under the Final Rule, if supplementation is needed for consistency, the MA organization must also *demonstrate* that and *explain how* “the additional criteria provide clinical benefits that are highly likely to outweigh any clinical harms, including from delayed or decreased access to items or services.”⁶ United’s Policy, however, simply concludes, without demonstration or explanation, that use of its additional criteria “provides clinical benefits that are highly likely to outweigh any clinical harms, including from delayed or decreased access to items or services, because this additional criteria will provide greater consistency in determining when a patient’s complex medical factors support inpatient admission.”

This unsupported assertion collapses two distinct regulatory requirements—(1) the determination that additional criteria are needed for consistency in determining medical necessity and (2) the demonstration and explanation regarding clinical benefits and harms. This is a tautology that wrongly concludes that the second requirement is satisfied by the first. This approach impermissibly renders meaningless the regulatory text regarding the comparison of clinical benefits. Nowhere else in the UHC Policy does UHC address any other clinical benefits and harms. Nor does it address clinical harms that might result from, *inter alia*, delayed or

⁴ 88 Fed. Reg. at 22,188

⁵ UHC Policy No. 2023T0643D (Nov. 1, 2023), <https://www.uhcprovider.com/content/dam/provider/docs/public/policies/comm-medical-drug/hospital-services-observation-inpatient.pdf>. For elective procedures not on the inpatient-only list, the Policy also incorporates UHC’s commercial medical policy for elective inpatient services, which does not apply the Medicare two-midnight criteria. Policy Number MP.19.05 (Oct. 1, 2023), <https://www.uhcprovider.com/content/dam/provider/docs/public/policies/comm-medical-drug/elective-inpatient-services.pdf>.

⁶ 42 C.F.R. § 422.101(b)(6)(i)(A), (ii)(C)

decreased beneficiary access to inpatient hospital care and clinical confusion arising from the deviation from the established two-midnight rule for inpatient hospital care.

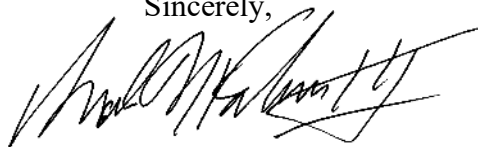
The UHC Policy also fails to satisfy the public accessibility requirements under 42 C.F.R. § 422.101(b)(6)(ii)(A) and (B) by referencing nonpublic InterQual[®] criteria both as a source of medical evidence under the UHC Policy and as criteria made applicable under the commercial policies incorporated into the UHC Policy as clinical criteria and guidelines. As made clear in the Final Rule, “MA plans may not use InterQual or MCG criteria, or similar products, to change coverage or payment criteria already established under Traditional Medicare laws.”⁷

Because the Policy cannot be lawfully applied to MA members under 42 C.F.R. § 422.101(b)(2) and (6) and is inconsistent with the Medicare coverage criteria under 42 C.F.R. § 412.3(d), we again urge you to undertake appropriate enforcement action so that each UHC member will receive the inpatient hospital coverage to which they are entitled and upon which they rely.

The FAH strongly supports the key reforms and clarifications in the Final Rule that protect America’s seniors and ensures that MA enrollees receive the same coverage as those in the Traditional program. While this letter shares our concerns with the UHC Policy, we believe that there are opportunities to support CMS as it tracks and enforces the requirements in the Final Rule on an ongoing basis and we look forward to discussing this issue with you in more detail.

If you have any questions, please contact me or a member of my staff at 202-624-1534.

Sincerely,



cc: Jon Blum
Meena Seshamani
Cheri Rice

⁷ 88 Fed. Reg. at 22,194