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September 1, 2011

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CMS Proposes Rules Impacting Expansion of Qualifying Physician-Owned Hospitals and Patient Notice Requirements

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The Centers for Medicare and Medicaid Services (CMS) recently published proposed regulations in the Medicare hospital outpatient prospective payment system (OPPS) that would provide certain rural providers and physician-owned hospitals with a process to apply for, and possibly obtain, an exception to the general prohibition against the expansion of physician-owned hospitals. These proposed rules would also update the patient notice requirement stated in 42 C.F.R. § 489.20.

Section 6001 of the Patient Protection and Affordable Care Act (PPACA) generally prohibits the expansion of a rural provider's and physician-owned hospital's number of operating rooms, procedure rooms and beds beyond what that hospital was licensed for as of March 23, 2010 or the date of its initial provider agreement (provided such agreement was in effect by December 31, 2010). However, § 6001(a)(3) of PPACA requires CMS to create a process by which such providers could apply for an exception to the expansion prohibition. The proposed rules issued by CMS, if finalized, would implement that section of PPACA.

The rule would require physician-owned hospitals to meet one of two statutory criteria before applying for an exception. Only an "applicable hospital" or a "high Medicaid facility" may qualify for an exception to the general prohibition.

An "applicable hospital" is a physician-owned hospital that satisfies the following

criteria: (i) the hospital is located within a county or similar jurisdiction that has experienced an increase in population that is at least 150% of the percentage increase in population in that State during the most recent 5 year period; (ii) the annual percentage of total inpatient Medicaid admissions of the hospital is equal to or greater than the average percentage of inpatient Medicaid admissions with respect to other hospital admissions in the same county for each of the 3 most recent fiscal years (as indicated by the CMS Healthcare Cost Report Information System, or HCRIS); (iii) the hospital neither discriminates nor permits its physicians to discriminate against beneficiaries of federal health care programs; (iv) the hospital is located in a State in which the average bed capacity in the State is less than the average national bed capacity for each of the three most recent years; and (v) the hospital has an average bed occupancy rate that is greater than the average bed occupancy rate in the State for each of the last three years.

A "high Medicaid facility" is a facility located in a county where (i) more than one hospital is located; (ii) the facility has a greater percent of annual total admissions of Medicaid beneficiaries than any other hospital in the county; and (iii) the facility does not discriminate, or permit its physicians to discriminate, against beneficiaries of federal health care programs.

After an applicable hospital or high Medicaid facility applies for an exception, CMS will permit the local community to provide comments before CMS decides whether to grant the exception. To permit such comments, CMS proposes to require the hospital or rural provider to provide notice of the request on its website and CMS will also publish notice of the request in the Federal Register and the CMS Hospital Listserv.

The proposed rule would also limit the actual expansion of the facility in three additional ways. First, the proposed expansion would be limited to no more than 200% of the facility's baseline operating rooms, procedure rooms and beds. Second, the expansion must occur on the hospital's main campus. Third, a hospital

or rural provider can apply for an exception only once every two years. These

proposed rules incorporate similar provisions of § 6001(a)(3) of PPACA.

CMS also proposed to modify the patient disclosure and notification requirements of 42 C.F.R. § 489.20. The current regulations require hospitals to provide each inpatient and outpatient with written notice if a physician is not present in the hospital at all times. Each hospital must include in that notice how it will meet the medical needs of any patient who requires emergency medical care. Each patient is required to sign an acknowledgement of receipt of such notice.

The proposed rule would relax these requirements somewhat by permitting dedicated emergency departments of critical access hospitals to post the disclosure in conspicuous places instead of obtaining an acknowledgement signed by the patient. Hospitals, including critical access hospitals, would also no longer be required to provide notice and obtain a signed acknowledgement for those outpatients who receive services other than observation, surgery, or other procedures requiring anesthesia. The proposed regulations further clarify that a hospital that is a main provider with satellite locations should make the determination of whether it must give written notice or notice by conspicuous signage on a location by location basis.

Ober|Kaler's Comments

The proposed rule implements, and largely mirrors, the restrictive statutory language of PPACA that is currently codified at 42 U.S.C. § 1395nn(i). The rule reinforces the public policy set forth in PPACA that prohibits the expansion of physician-owned hospitals and physician-owned rural providers and the number of their operating rooms, procedure rooms, or licensed beds. Further, PPACA and the proposed rule state that a final decision by CMS on an application for an exception is not administratively or judicially appealable. The proposed rule also indicates CMS' willingness to modify the existing notice regulations where obtaining a signed written acknowledgement was ill-advised or not feasible.

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