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Physician-Owned Hospitals Face Restrictions Under Healthcare Reform

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House and Senate Bills Restrict the Whole Hospital Exception to the Stark Statute

Section 1156 of the Affordable Health Care for America Act (House bill) and Section 6001 of the Patient Protection and Affordable Care Act (Senate bill) place new restrictions on the whole hospital exception to the Stark statute (Section 1877 of the Social Security Act) prohibition on self-referrals. Language in both the House and Senate bills would effectively prevent the formation of new physician-owned hospitals and significantly impact existing physician-owned hospitals through restrictions on expansion.

Both bills would restrict the whole hospital exception by making it applicable only if the following requirements—in addition to the requirements already imposed by the Stark statute—are met:

- the hospital must be a physician-owned hospital with a Medicare provider agreement in operation as of January 1, 2009, as provided in the House bill, or as of February 1, 2010, as provided in the Senate bill (this effectively grandfathers in certain existing physician-owned hospitals)
- the hospital may not add operating rooms, procedure rooms, or beds going forward from the date of enactment of the legislation (the process to apply for an exception to this limitation is discussed below)
- the hospital must ensure that ownership in the hospital by physician owners or investors is bona fide and satisfies the Stark statute's whole hospital exception
- the hospital must provide initial assessment and treatment to patients and refer and transfer such patients to a hospital with the required capability (limited to cases of medical emergencies in the House bill)
- the hospital may not be converted from an ambulatory surgical center going forward from the date of enactment of the legislation
- physicians may not increase their ownership or investment interest in a physician-owned hospital above the percentage held by such physicians on January 1, 2009 (required only in the House bill)

- the hospital must submit to the Secretary of Health and Human Services (HHS) an annual report identifying each owner or investor of the hospital, including physician owners or investors, and the nature and extent of all ownership and investment interests (annual reports will be published on the Centers for Medicare and Medicaid Services website; required only in the Senate bill)
- the hospital must have procedures requiring referring physician owners or investors to disclose to referred patients the ownership or investment interest of such referring physician as well as that of any treating physician (required only in the Senate bill)
- the hospital must disclose any physician ownership or investment interest on the hospital's website and in any public advertisement (required only in the Senate bill)

Some Ability for Physician-Owned Hospitals to Expand Capacity

Both the House and Senate bills discuss the establishment of a process under which a hospital may apply for an exception from the prohibition on expansion of facility capacity, *i.e.*, any increase in operating rooms, procedure rooms, or beds. Each hospital may submit only one application every two years. The process will be promulgated by the Secretary of HHS, and persons and entities in the hospital's community will be able to provide input regarding the hospital's application. An exception to the prohibition on expansion will only be granted if the following requirements, in addition to any requirements set forth by the Secretary, are met:

- in the most recent five years, the county in which the hospital is located has had a population increase of at least 150% of the population growth of the state in which the hospital is located
- the hospital's annual percent of total Medicaid inpatient admissions is equal to or greater than the average percent of such admissions for all hospitals located in the county in which the hospital is located
- the hospital does not discriminate or allow its physicians to discriminate against beneficiaries of federal healthcare
- the state in which the hospital is located has a lower average bed capacity than the national average
- the hospital's average bed occupancy rate is greater than that of the state in which the hospital is located

Any permitted increase in operating rooms, procedure rooms, or beds pursuant to the abovementioned process may only occur on the main campus of the hospital and may not exceed 200% of the number of such operating rooms, procedure rooms, or beds existing as of the date of enactment of the legislation.

AMA Comments to the House and Senate Bills

On December 1, 2009, in a letter addressed to Senate Majority Leader Harry Reid, the American Medical Association (AMA) criticized the Senate bill for its negative affect on physician-owned hospitals:

While the AMA supports the disclosure of physician hospital ownership and investment information, we oppose the proposal to eliminate the whole hospital exception to the Stark self-referral law. Physician-owned hospitals have achieved the highest quality scores in some markets and have been shown to provide more net community benefits through uncompensated care and taxes than not-for-profit competitors as a share of total revenues. In addition, a recent study by the Center for Studying Health System Change found that physician-owned hospitals do not adversely affect general hospitals' ability to care for patients. Limiting the viability of physician-owned hospitals will reduce access to high-quality health care and have a destructive effect on the economy in communities these hospitals serve. Proposed limits on existing physician-owned hospitals would put them at a competitive disadvantage, making it difficult for them to respond to the health care needs of their local communities. The provisions would also effectively shut down many physician-owned hospitals currently under development. We urge that this provision be removed from H.R. 3590.

Regardless of the outcome of the House and Senate bills, physician-owned hospitals are likely to face continued scrutiny from the federal government. Physician-owned hospitals would be wise to remain informed of upcoming legislative developments concerning healthcare reform, in particular as they affect the whole hospital exception to the Stark statute.

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