

PUBLICATION

CMS Issues Proposed Rules For Physician Ownership Of Hospitals

July 09, 2010

In its hospital outpatient prospective payment system proposed rule released July 2, 2010 [CMS-1504-P; RIN 0938-AP82], CMS included its proposals for implementing Section 6001 of the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010. Section 6001 established new requirements for taking advantage of the "whole hospital" and rural exceptions to Medicare's physician self-referral rules. New physician investment in hospitals is generally prohibited. Projects under development are given a series of deadlines for completion, and all hospitals with physician ownership will have additional restrictions on operation in order to continue to qualify for the exceptions.

Comments on the proposed rules are due August 31, 2010. Hospitals with outstanding issues should provide formal written comments on the proposed rule, to which CMS must respond when it issues the final rule.

In general, "compliance with all requirements must occur no later than September 23, 2011, and failure to satisfy earlier deadlines will preclude use of the revised exceptions after the earlier deadline has passed." Two examples are given: (1) failure to obtain a provider agreement that is effective on or before December 31, 2010, will preclude use of the revised exception after January 1, 2011; and (2) if a hospital has no physician ownership or investment as of March 23, 2010, and later adds physician owners or investors, the hospital will not satisfy the new requirements of the exception.

Overall, CMS does not provide much relief for hospitals that are completing construction or have other issues that need resolution as 2010 draws to a close. For example, no guidance is provided about how CMS will apply the regulation in the case of a hospital that completes construction and applies for a Medicare provider agreement before the end of the year, but does not receive notice of approval until after December 31, 2010. The provider agreement could be effective as of a date before the deadline. Unanswered questions include: Will this meet the requirement? and, Can referrals be made in the interim?

Nor is much said about the ability to sell or exchange ownership interests after March 23, 2010.

On the question of facility expansion, CMS's approach is generally conservative, although it does not expand the list of restricted procedure rooms beyond those articulated in Section 6001. CMS declines to address questions related to variations in state licensing practices, noting that the statute does not link licensing to operating rooms or procedure rooms in connection with establishing the baseline number of such rooms for the expansion restrictions; licensing is relevant only to establishing the number of beds.

For questions about this or any other CMS proposed rule or for assistance with making comments, please contact your Baker Donelson attorney.