

PUBLICATION

Medicare's LTCH Moratorium - CMS Issues Instructions and Proposed Regulation [Ober|Kaler]

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From the early 1980s until the end of the first decade of the 21st century, the number of long-term acute care hospitals (LTCHs) expanded many fold. Addressing this growth, Congress, in enacting the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA) and the Affordable Care Act of 2010 (ACA), imposed moratoria on new LTCHs and new LTCH satellite units, as well as on new beds in LTCHs, all subject to certain exceptions. These moratoria expired at the end of December 2012, but more recently in the Pathway for SGR Reform Act of 2013, as amended by the Protecting Access to Medicare Act of 2014 (collectively, the "SGR Reform Act"), Congress reinstated them. The SGR Reform Act bars the establishment of new Medicare-participating LTCHs and LTCH satellite facilities and prevents increases in the number of certified beds in existing LTCHs and satellite facilities. The new moratorium is in effect from April 1, 2014, through September 30, 2017, and, in most respects, tracks the earlier moratoria, with one significant difference: the legislation provides for certain exceptions for new LTCHs and satellite facilities, but, unlike the past moratoria, it does not authorize exceptions that would permit increases in the number of certified beds in existing LTCHs or satellite facilities.

Under the new legislation, a "new" LTCH arrangement may be excepted from the bar related to new LTCHs and satellite facilities if it: (1) began its qualifying period for payment as an LTCH (see 42 CFR 412.23(e)) by April 1, 2014; (2) had a binding written agreement with an outside, unrelated party for the actual construction, renovation, lease or demolition of an LTCH and had, before April 1, 2014, expended at least 10% of the estimated cost of project or, if less, \$2.5 million; or (3) has obtained an approved CON to establish an LTCH in a state where a CON is required.

As part of the acute care IPPS/LTCH PPS rule published May 15, 2014, CMS proposed regulations that would implement the moratorium and interpret the exceptions. 79 Fed. Reg. 27978, 28198-28200. As proposed, CMS would limit the first exception to LTCHs and not apply it to satellite units because such units have no qualifying period. To qualify under the second exception, CMS says, the LTCH would need a binding agreement for the actual construction, renovation, lease, or demolition associated with the LTCH, and it must have actually expended funds, with the transfer of funds actually having occurred as payment for the stated aspects of the project prior to April 1, 2014. As to the third exception, CMS would require that the CON actually authorize the LTCH, and not any other type of hospital or hospital service.

Additionally, on May 9, 2014, CMS issued [instructions to its State Survey Agency Directors](#) providing guidance concerning both the recent legislative changes and proposed regulations. CMS informed the directors that final rulemaking and associated guidance are required in order for them to make determinations regarding an LTCH's eligibility for any exception to the moratorium. Once the rule is finalized, determinations will then be handled on a case-by-case basis by the applicant's Medicare contractor and by the CMS Regional Office and Survey and Certification personnel. No actions are to be taken until final regulations are released and further guidance is issued. Prior to that point, any applications that the Regional Office receives are to be held without processing.

Ober|Kaler's Comments

CMS's proposed regulations and guidance largely track the language of the statute and are largely consistent with past policies regarding the expired moratoria except for the fact, as noted, that no exceptions are permitted for new LTCH beds. Any application for an exception, however, will have to wait until the fall, after CMS has published its final IPPS/LTCH PPS rules and guidance.