

CY 2012 OPPTS/ASC FINAL RULE: PROCEDURE FOR REQUESTING EXCEPTION TO GENERAL PROHIBITION ON PHYSICIAN-OWNED HOSPITAL EXPANSION

SUMMARY

On November 30, 2011, the Centers for Medicare and Medicaid Services ("CMS") published the CY 2012 OPPTS/ASC Final Rule with comment period ("Final Rule"). The Final Rule implemented a portion of Section 6001(a) of the Affordable Care Act ("ACA") requiring CMS to develop a process for physician-owned hospitals to request an exception to the ACA-imposed prohibition on expansion of facility capacity. The Final Rule is effective on January 1, 2012. To be considered, comments must be received no later than 5 p.m. EST on January 3, 2012 per instructions in the Federal Register. The Final Rule can be found at: <http://www.gpo.gov/fdsys/pkg/FR-2011-11-30/pdf/2011-28612.pdf>.

BACKGROUND

Section 6001 of the ACA brought to a grinding halt the formation of new physician-owned hospitals while it grandfathered existing hospitals. It permanently froze the percentage of total aggregate physician ownership or investment interest permitted to be held in a physician-owned hospital, as well as the total number of operating rooms, procedure rooms and beds (emergency rooms or departments excepted). However, the ACA also provided for an exceptions process under which physician-owned "applicable hospitals" or "high Medicaid facilities" could apply for an exception to the general prohibition on expansion of operating and procedure rooms and beds once every two years. The Secretary of HHS delegated to CMS the task of developing the exceptions process via rulemaking to be finalized no later than January 1, 2012. This process was published as part of the Final Rule.

FINAL RULE - GENERALLY

Regulations implementing the exceptions process permit physician-owned "applicable hospitals" or "high Medicaid facilities" (definitions below) seeking to expand the number of hospital beds, operating rooms or procedure rooms to submit a request to CMS up to once every two years. Any approved expansion may not result in the number of operating rooms, procedure rooms and beds exceeding 200% of the hospital's baseline number of rooms and beds and may occur only in facilities on the hospital's main campus.

DEFINITIONS

Under the ACA, as well as the new regulations, "applicable hospital" means a physician-owned hospital: (i) located in a county with a percentage increase in population at least 150% of the percentage increase in population of the hospital's state during the most recent 5-year period for which data are available - population growth must be measured using Bureau of the Census estimates; (ii) with an annual percentage of total Medicaid inpatient admissions equal to or greater than the average percentage of Medicaid admissions for all hospitals located in the hospital's county; (iii) that does not itself, nor allow its practicing physicians to, discriminate against federal health care program beneficiaries; (iv) located in a state in which the average bed capacity is less than the national average; and (v) that has an average bed occupancy rate greater than the average bed occupancy rate in the hospital's state.

"High Medicaid facility" means a physician-owned hospital: (i) that is not the sole hospital in the county; (ii) that has an annual percentage of total Medicaid inpatient admissions estimated to be greater than the annual percentage of total Medicaid inpatient admission for any other hospital in the county during each of the three most recent fiscal years; and (iii) that does not itself, nor allow its practicing physicians to, discriminate against federal health care program beneficiaries.



PROCEDURE FOR SUBMITTING A REQUEST

1. A hospital must submit a request via mail or electronically.
2. All requests must include the following:
 - a. Name, address, NPI, TIN and CMS Certification Number (CCN) of the requesting hospital;
 - b. The hospital's county;

- c. Name, title, address and daytime telephone number of a contact person who will be available to discuss the request with CMS;
 - d. A statement identifying the hospital as either an "applicable hospital" or a "high Medicaid facility," including a detailed explanation and supporting documentation showing all the criteria for meeting one definition or the other are met. The request must state that neither the hospital nor its physicians discriminate against federal health care program beneficiaries;
 - e. A statement of the hospital's baseline number of operating and procedure rooms and beds with supporting documentation, as well as the number of additional rooms or beds requested; and
 - f. A specific certification signed by an authorized representative of the hospital attesting to the veracity of the submitted information and documentation.
3. A hospital requesting an exception must disclose this fact on its public website. Any person or entity in the hospital's community may provide written comments with respect to the hospital's request no later than 30 days after CMS publishes notice of the hospital's request in the Federal Register.
 4. If CMS does not receive any written comments, the request will be deemed complete at the end of the 30-day comment period. If CMS receives comments, the hospital has 30 days to submit a rebuttal statement. A request will be deemed complete at the end of this 30-day period.
 5. No later than 60 days after receiving a complete request, CMS will publish the final decision on the expansion request in the Federal Register.

CONCLUSION

With the publication of the Final Rule, CMS has met its obligation under the ACA. However, the benefit of the physician-owned hospital expansion exception procedure may be elusive insofar as it seems unlikely many hospitals will meet the criteria to obtain permission to expand.

If you have any questions, would like additional information about this topic or need help preparing and submitting comments, please contact Adele Merenstein at (317) 752-4427  or amerenst@hallrender.com, Erin Drummy at (317) 977-1470  or edrummy@hallrender.com or your regular Hall Render attorney.