

The Sun Sets on Physician-Owned Hospitals

After years of regulatory back-and-forth (now there's a moratorium, now there's not), it appears CMS, with a big assist from Congress, has now put a permanent lock on the growth of the physician-owned hospital market. Provisions within the Patient Protection and Affordable Care Act (PPACA)¹ and the Health Care and Education Reconciliation Act (HCERA)², both passed in 2010, significantly narrow the "whole hospital" exception to the Stark law, effectively blocking the development of new physician-owned hospitals after December 31, 2010, while also curtailing the growth of existing physician-owned hospitals. CMS published proposed regulations implementing the amended statute on August 3, 2010.³

The Stark law's prohibition on physician self-referral⁴ generally prohibits physicians from making a referral of a federal health care plan patient for certain "designated health services" to an entity in which the physician or an immediate family member has some financial interest. The prohibition is subject to a number of exceptions, one of which is the "whole hospital" exception. Prior to the enactment of PPACA, this exception applied to referrals made by a physician to a hospital where the referring physician was authorized to perform services at the hospital and the physician's financial interest was in the whole hospital and not merely a subdivision of the hospital.⁵

Under PPACA, however, in order to satisfy the whole hospital exception, a physician-owned hospital must have had physician ownership or investment as well as a Medicare provider agreement in effect on December 31, 2010.⁶ In other words, physician-owned hospitals that did not have a provider agreement in effect on December 31 of last year will not be allowed to participate in the federal health care plans.

PPACA and the proposed regulations also curtail the expansion of existing physician-owned hospitals by limiting the number of operating rooms, procedure rooms and beds for which the hospital is licensed to the number in service as of the date of PPACA's enactment, March 23, 2010. If the hospital did not have a provider agreement on the date of enactment, but subsequently obtained an agreement prior to December 31, the limit applies to the number of beds on the date the hospital's provider agreement becomes

¹ Pub. L. No. 111-148, H.R. 3590 (2010)

² Pub. L. No. 111-152, § 1106, Stat. 1029, 1049-50 (2010).

³ 75 Fed. Reg. 46169

⁴ 42 U.S.C. § 1395nn

⁵ 42 U.S.C. § 1395nn(d)(3)

⁶ 42 U.S.C. § 1395nn(i)(1)(A) (as amended by PPACA §§ 6001, 10601 and HCERA § 1106).

effective. The statute provides that certain hospitals, such as those that treat a high volume of Medicaid patients, will be able to apply for an exception to the prohibition on the addition of new beds and rooms.

The Act also limits the aggregate percentage of physician ownership in a hospital to the percentage of such ownership that existed on the date of PPACA's enactment. The Act requires physician-owned hospitals to submit an annual report to HHS detailing the breakdown of hospital ownership. Physician-owned hospitals are also now required to implement a procedure for disclosing the ownership interest of both the referring and treating physicians to patients at the time of referral to the hospital.

Across the country, physician-owned hospitals that were already in development prior to the enactment of PPACA were in a panic to finish construction and finalize provider agreements in an effort to open their doors ahead of the December 31, 2010 deadline. The fate of those hospitals that were unable to beat the clock is anybody's guess. Already, at least one lawsuit has been filed seeking to enjoin the implementation of those sections of PPACA and HCERA which amend the whole hospital exception.⁷ However, barring judicial or Congressional intervention, it appears the juggernaut of physician ownership has come to a rather abrupt halt.

This article was originally published in the December 2010 edition of Greater Kansas MD News published by Sunshine Media, Inc.

⁷ *Physician Hospitals of America, et al v. Sebelius*, Case No. 6:10-cv-00277-MHS (June 3, 2010, E. Dist. TX)