Physician-Owned Hospitals FACE OBSTACLES

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SUPPORTERS OF PHYSICIAN-OWNED hospitals suffered a setback with the enactment of the Middle Class Tax Relief and Job Creation Act on February 22. An early version of the legislation contained provisions that would have eased restrictions on the operation and expansion of physician-owned hospitals. These provisions, however, were removed from the final bill, which was signed into law by President Barack Obama. Without such legislative relief, physicians continue to face significant obstacles to acquiring ownership interest in hospitals.

Physician ownership of hospitals has come under legislative and regulatory attack in recent years. In 2003, Congress imposed an 18-month moratorium on physician ownership of specialty hospitals. Although the moratorium expired in 2005, the Centers for Medicare and Medicaid Services (CMS) then took administrative action to suspend the enrollment of all specialty hospitals in the Medicare program.

In 2006, the enrollment suspension was finally lifted following CMS' delivery of a strategic plan indicating that the agency would scrutinize specialty hospitals and pursue strict enforcement of the Stark Law's self-referral prohibition relative to physician investment interests. In 2007, CMS regulations created new disclosure requirements, including a mandate that physician owners disclose their hospital interests to patients prior to any referrals.

With the passage of the Patient Protection and Affordable Care Act (PPACA) in 2010, however, physician investment in general and specialty hospitals was once again restricted. Under the PPACA, physician investment in hospitals was prohibited and caps were imposed on existing physician ownership and investment interests. Physician-owned hospitals with a Medicare provider agreement in place as of December 31, 2010, were protected and allowed to open and operate under a grandfather clause. However, even grandfathered facilities could not increase their number of operating rooms, procedure rooms and beds beyond that for which they were licensed on March 23, 2010, unless they met two narrow exceptions.

Several lawsuits challenging the constitutionality of the PPACA restrictions followed, and significant pressure by lobbying interests led to the introduction of a bill in the U.S. House of Representatives that would allow for grandfathered physician-owned hospitals to expand their existing facilities. Hope for a quick legislative solution ended when the final version of the Middle Class Tax Relief and Job Creation Act removed the provisions that would have eased restrictions on physician-owned hospitals.

Even if physician-owned hospitals qualify for grandfather status, most do not meet either of the two exceptions to the PPACA's prohibition on expansion. The first exception applies to "applicable hospitals." An applicable hospital is one located in a county that has undergone a population increase equaling at least 150% of the population increase experienced by the rest of the state during the most recent five-year period. The facility's annual percentage of total inpatient Medicaid admissions must also equal or exceed the average percentage of such admissions for all hospitals in the county. The facility must be in a state in which the average bed capacity is lower than the national average bed capacity. Finally, to qualify for the first exception, the facility's average bed occupancy rate must be higher than the average bed occupancy rate in the state.

The second exception to the PPACA's prohibition on expansion relates to "high Medicaid facilities." To qualify as a high Medicaid facility, a grandfathered physician-owned hospital must have an annual percentage of total inpatient Medicaid admissions higher than such percentage for any other hospital located in the county for each of the three most recent fiscal years. (There must be at least one other hospital located in the county to qualify.)

While CMS has published guidance on applying for the applicable hospital and high Medicaid facility exceptions discussed above, it is unlikely that most physician-owned hospitals would qualify. Thus, significant obstacles to physician ownership of and investment in general and specialty hospitals remain.

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