

### Statutory Elimination of Physician-Owned Hospital Exceptions

The Patient Protection and Affordable Care Act (ACA) calls for the Secretary of the Department of Health and Human Services (HHS) to eliminate exceptions for physician-owned hospitals under the Physician Self-Referral Prohibition (i.e., the Stark Law).<sup>1</sup> On July 1, 2011 the Centers for Medicare and Medicaid Services (CMS) released a proposed rule to implement provisions in ACA that impact the Stark Law *whole hospital and rural provider exceptions*.<sup>2</sup> CMS released the first final rule regarding grandfather status and restrictions for the use of the Stark law exceptions on November 24, 2010.<sup>3</sup>

Generally, the Stark Law prohibits physician referrals to hospitals in which the physician has a direct or indirect financial relationship (i.e., an owner or investor).<sup>4</sup> The *whole hospital exception* to the Stark Law allowed physician referral if the physician had privileges at the referring hospital and an ownership interest in the whole hospital as opposed to a single department.<sup>5</sup> The *rural provider exception* also exempted physician-owned hospitals in designated rural areas from certain Stark requirements.<sup>6</sup> The ACA calls for HHS to eliminate both exceptions (i.e., the 2010 rule) and establish a waiver application for their continued use by current physician-owned hospitals (i.e., the July 2011 proposed rule).

Through eliminating the *whole hospital and rural provider exceptions*, Title VI Section 6001 of the ACA indirectly prohibits the establishment of physician-owned hospitals which are not Medicare-certified by December 31, 2010.<sup>7</sup> Hospitals with a provider agreement prior to December 31, 2010, can be granted “grandfather status” and allowed continue to participate in Medicare if they meet the following four criteria: (1) located in a county with a population growth rate of at least 150% the state’s population growth over the last 5 years; (2) have Medicaid inpatient admission percentage of at least the average of all hospitals in the county; (3) located in a state with below-national-average bed capacity; and, (4) have bed occupancy rate greater than state average.<sup>8</sup> These hospitals are subject to restrictions on the total percentage in which a physician may own or invest and physicians are limited to their ownership or investment amounts in hospitals as of March 23, 2010.<sup>9</sup> Section 1106 of the *Reconciliation Act* amends this provision to provide a limited exception to the growth restrictions for grandfathered physician-owned hospitals.<sup>10</sup>

The July 2011 proposed rule establishes the exemption application process for physician-owned hospitals in existence before December 31, 2010 who wish to expand their facility.<sup>11</sup> The proposed rule allows a physician-owned hospital to apply for the exception once every two years. Applicable hospitals must meet several criteria established by the CMS Healthcare Cost Report Information System, including: above average inpatient Medicaid admission rate by county; above average state bed capacity as compared to a national average; and, above average bed occupancy as compared to a state average. Additionally, applicable hospitals must be located in an area in which the percentage increase in population over the last five years, prior to applying, is at least 150 percent of the percentage increase for population growth of the state. Criteria vary slightly for hospitals defined as high Medicaid facilities.<sup>12</sup> If a physician-owned hospital is approved for an exception for expansion, the physician-owned hospital may not grow more than 200 percent from the base rate.<sup>13</sup> Expansions can only be granted for a facilities main campus, and reviews are subject to community input. Facilities may begin applying for exceptions January 1, 2012, with decisions published on CMS’s website and in the Federal Registrar 60 days after a completed application is received.<sup>14</sup>

Physician-owned hospitals are making efforts to refute the legislation, claiming the law is “*exclusionary and unconstitutional*.”<sup>15</sup> Opponents of the law defend physician-owned hospitals as being associated with high quality outcomes due to their highly specialized nature. Dr. Michael Russell, president of the Physician Hospitals of America (PHA) has stated: “*Physician-owned hospitals have had a positive effect on health care [and] specialization has led to decreased costs and better outcomes. Physician owned hospitals are more efficient, decrease costs, produce better outcomes, and increase patient satisfaction.*”<sup>16</sup>

Despite industry concerns, the American Hospital Association (AHA) has shown support for the ACA provision. AHA spokesperson Matt Fenwick claims: “*Physician self-referral – when physicians own the facilities to which they refer patients – has long been a concern in health care because of the potential for conflicts to arise between the needs of the patient and the financial interest of the physician.*”<sup>17</sup>

Eliminating the *whole hospital* and *rural provider exceptions* will dramatically impact physician-owned hospitals abilities to adjust to market demands. Even with the July 2011 guidelines to apply for use of the exceptions, industry experts believe that the ACA’s guidelines are so strict that physicians will not be able to comply with the exception regulations.<sup>18</sup> The changes surrounding the Stark Law in the ACA will have a significant effect on the growth, competition, and continued existence of physician-owned hospitals.

<sup>1</sup> “Status of Physician Owned Hospitals in a Reformed Healthcare Environment” By Cheryl G. Murer, Murer Group, Rehab Management, November-December 2010, p. 1.

<sup>2</sup> “Proposed Changes to Whole Hospital and Rural Provider Exceptions to the Physician Self-Referral Prohibition: Exception for Expansion of Facility Capacity; and Proposed Changes to Provider Agreement Regulations Relating to Patient Notification Requirements” 76 FR 137, Section XV (July 18, 2011), p. 42349.

<sup>3</sup> The final rule is set to be issued November 1, 2011. <sup>Final Rule:</sup> Changes to Whole Hospital and Rural Provider Exceptions to the Physician Self-Referral Prohibition and Related Changes to Provider Agreement Regulations” 75 FR 226, Section XXII (November 24, 2010).

<sup>4</sup> “Financial Relationships Between Physicians and Entities Furnishing Designated Health Services” 42 C.F.R. 411.353 (Oct. 1, 2008)

<sup>5</sup> “Status of Physician Owned Hospitals in a Reformed Healthcare Environment” By Cheryl G. Murer, Murer Group, Rehab Management, November-December 2010, p. 1; “Stark Law – Information on Physician Investment” Starklaw.org, 2008, <http://starklaw.org/investment.htm#> (Accessed 7/18/2011).

<sup>6</sup> “Final Rule: Changes to Whole Hospital and Rural Provider Exceptions to the Physician Self-Referral Prohibition and Related Changes to Provider Agreement Regulations” 75 FR 226, Section XXII (November 24, 2010), p. 72240.

<sup>7</sup> “Section-by-Section Analysis with Changes Made by Title X and Reconciliation included within Titles I-IX,” Democratic Policy Committee, <http://dpc.senate.gov/healthreformbill/healthbill96.pdf> (Accessed 5/24/2010).

<sup>8</sup> “Section-by-Section Analysis with Changes Made by Title X and Reconciliation included within Titles I-IX,” Democratic Policy

Committee, <http://dpc.senate.gov/healthreformbill/healthbill96.pdf> (Accessed 5/24/2010).

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<sup>11</sup> “Proposed Changes to Whole Hospital and Rural Provider Exceptions to the Physician Self-Referral Prohibition: Exception for Expansion of Facility Capacity; and Proposed Changes to Provider Agreement Regulations Relating to Patient Notification Requirements” 76 FR 137, Section XV (July 18, 2011), p. 42349.

<sup>12</sup> “Proposed Changes to Whole Hospital and Rural Provider Exceptions to the Physician Self-Referral Prohibition: Exception for Expansion of Facility Capacity; and Proposed Changes to Provider Agreement Regulations Relating to Patient Notification Requirements” 76 FR 137, Section XV (July 18, 2011), p. 42350-51.

<sup>13</sup> “Proposed Changes to Whole Hospital and Rural Provider Exceptions to the Physician Self-Referral Prohibition: Exception for Expansion of Facility Capacity; and Proposed Changes to Provider Agreement Regulations Relating to Patient Notification Requirements” 76 FR 137, Section XV (July 18, 2011), p. 42353

<sup>14</sup> “Proposed Changes to Whole Hospital and Rural Provider Exceptions to the Physician Self-Referral Prohibition: Exception for Expansion of Facility Capacity; and Proposed Changes to Provider Agreement Regulations Relating to Patient Notification Requirements” 76 FR 137, Section XV (July 18, 2011), p. 42350.

<sup>15</sup> “Physician-Owned Hospitals Fire Back at Obamacare Restrictions” By Kenneth Artz, Health Care News, December 28, 2010.

<sup>16</sup> “Physician-Owned Hospitals Fire Back at Obamacare Restrictions” By Kenneth Artz, Health Care News, December 28, 2010.

<sup>17</sup> “Physician-Owned Hospitals Fire Back at Obamacare Restrictions” By Kenneth Artz, Health Care News, December 28, 2010.

<sup>18</sup> “Physician-Owned Hospitals Fire Back at Obamacare Restrictions” By Kenneth Artz, Health Care News, December 28, 2010; “Obamacare Ends Construction of Doctor-Owned Hospitals” By Jeffrey H. Anderson, The Weekly Standard, January 3, 2011





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