

# PUBLICATION

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## CMS Comments Due August 31 on Physician Ownership Rule Changes Under PPACA

August 27, 2010

One dramatic and early impact of health care reform upon providers comes in the form of changes to the Stark law's "whole hospital" exception, which currently permits physicians to refer to hospitals in which they hold an ownership interest. Section 6001 of The Patient Protection and Affordable Care Act (PPACA), as amended by the Health Care and Education Reconciliation Act of 2010, will limit future physician ownership or investment in hospitals. Under the new law, the whole hospital exception under the Stark law will only apply to protect physician ownership in hospitals that are "grandfathered" – that is, those that have physician ownership and an effective Medicare provider number before December 31, 2010. In its Hospital Outpatient Prospective Payment System proposed rule (released August 3, 2010), CMS included its proposals for implementing the changes. 75 Fed. Reg. 46170, 46433, August 3, 2010. The law and proposed regulations strictly limit the expansion of space or services of any "grandfathered" hospitals and impose new requirements for transparency and disclosure.

**Comments on the proposed rules are due August 31, 2010.** Hospitals with outstanding issues should provide formal written comments on the proposed rule, to which CMS must respond when it issues the final rule.

The law provides for a grandfathering of certain existing physician-owned hospitals. To be eligible for the whole hospital exception a hospital must have physician ownership or investment on or before December 31, 2010, and must also have a Medicare provider agreement in effect on that date. This is a challenge for providers with new hospital construction that was planned prior to the passage of the PPACA and is currently under construction.

Even those physician-owned hospitals that qualify to be grandfathered will find that the exception comes with limitations. These hospitals are effectively frozen in time in two ways: by existing capacity and by percentage of physician ownership. A grandfathered hospital will be limited to the physical plant--those operating rooms, procedure rooms, and beds-- for which the hospital is licensed at any time on or after March 23, 2010 (or for new hospitals, opening after that date, upon the effective date of certification. ) Although PPACA would permit CMS to include rooms where other services are performed, CMS's proposed definition of procedure rooms limits the definition to the types of rooms specified in the statute. CMS solicited public comments on whether "procedure rooms" should include rooms where additional services, such as CT or PET scans, or other services, are performed.

Perhaps the most limiting aspect of the remaining exception is that the percentage of the total value of the ownership or investment interests held in the hospital by physician-owners in the aggregate may not exceed the percentages of ownership in place on [March 24, 2010](#). One source of confusion was how the December 31, 2010 deadline for having a provider agreement related to this earlier deadline for physician ownership. CMS has stated its position that the earlier deadline applies. That is, if a hospital has no physician ownership as of March 23, 2010, and later adds physician owners or investors, the hospital will not satisfy the whole hospital exception.

The effect of this provision would dictate that physicians could purchase shares only from other selling physicians (otherwise the aggregate percentage of physician ownership in the hospital would increase, which would cause all physicians' investment interests in the hospital to fall outside the exception and, accordingly, trigger the Stark law's prohibition on Medicare referrals and related claims). A hospital may reduce the number of physician-owners or investors, provided that the percentage of the total value of physician ownership or investment interests, in the aggregate, remains the same or decreases.

For questions about this or any other CMS proposed rule or for assistance with making comments, please contact your Baker Donelson attorney, or any of the attorneys or advisors in our Health Reform group.