

Office of Clinical Standards and Quality/ Survey & Certification Group

Ref: S&C: 12-10-Hospital/CAH

DATE: December 9, 2011

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Affordable Care Act and Implications for Certification of Physician-owned Hospitals (PoHs)

Memorandum Summary

- **PoHs:** The Affordable Care Act prohibits the referral of Medicare beneficiaries by physician owners or investors to new PoHs or to existing PoHs that have expanded their facility capacity beyond their baseline (as described below). An exceptions process allows some PoHs, which meet specific criteria, to expand after the baseline date.
- **No Impact on Licensure or Certification of PoHs:** The statutory prohibition applies to physician owner referral and hospital billing activity. It does not prohibit licensure by the States or Medicare certification by the Centers for Medicare & Medicaid Services (CMS) of new or expanded PoHs.

Background:

The CMS has received questions from State Agencies and the public regarding limitations placed on new and expanded PoHs under Section 6001 of the Affordable Care Act. In particular, questions have been raised concerning the impact of Section 6001 on either the licensure or Medicare certification of new or expanded PoHs, which include hospitals and critical access hospitals (CAHs).

Section 1877 of the Social Security Act (the “Act”) establishes limitations on physician referrals of Medicare beneficiaries for certain health care services to entities in which the physician has a specific financial relationship. Further, the Act prohibits an entity from filing Medicare claims for services provided as a result of a prohibited referral. The Act also provides exceptions to these limitations, including when a physician has an ownership or investment interest in a hospital as a whole, or in a hospital that qualifies as a rural provider. The exceptions apply to both hospitals and CAHs

Affordable Care Act Amendments

Section 6001 of the Affordable Care Act amended Section 1877 of the Act by placing limitations on physician referrals to hospitals in which a physician holds an ownership or investment interest. Under the amended provisions and the implementing regulations at 42 CFR 411.362, physicians may not make referrals to a hospital in which they have an ownership or investment interest if the hospital:

- Did not have a Medicare provider agreement in effect on December 31, 2010; or
- Did have a provider agreement in effect on December 31, 2010, and increased the number of its Operating Rooms (ORs), procedure rooms, and beds beyond that for which the hospital was licensed on March 23, 2010 (the baseline); or
- Did have a provider agreement effective after March 23, 2010, but on or before December 31, 2010, and increased the number of its operating rooms, procedure rooms, and beds beyond that for which it was licensed as of the effective date of the provider agreement (the baseline).

Section 6001 of the Affordable Care Act also provided for an exception process that may allow physician owners and investors to make referrals to a PoH that increases its number of ORs, procedure rooms and beds beyond the PoH's baseline. The exception process is implemented in regulations at 42 CFR 411.362(c).

The physician self-referral prohibition in section 1877 of the Act is a payment prohibition and does not impact or address survey, certification, licensure, or participation requirements. The amendments to Section 1877 of the Act by Section 6001 of the Affordable Care Act impose no new requirement or obligation on State Agencies (SAs) or CMS Regional Offices (ROs) survey and certification personnel. The statutory limitations on physician referral and hospital Medicare claims filing activities do not affect a State's authority to license new or expanded PoHs. Likewise, the statutory limitations do not prohibit the certification for Medicare participation of new or expanded PoHs.

Accordingly, SA and RO survey and certification personnel are not required under Section 6001 of the Affordable Care Act to:

- Investigate whether a hospital seeking Medicare certification is a new PoH; *or*
- Investigate whether an existing PoH has increased the number of its licensed beds, ORs or procedure rooms beyond those licensed on the applicable date; *or*
- Advise PoHs during the Medicare certification process of the limitations on physician referrals and related billing that may apply to them. PoHs are expected to be aware of, and comply with, the applicable requirements of Section 1877 and all other Medicare laws, regulations, and program instructions that apply to the provider.

Hospital/CAH Data Base Worksheet:

The hospital/CAH data base worksheet now includes questions related to the Section 6001 requirements, in order to support future CMS analysis. There is a question on a hospital's ownership type which includes as one option "physician ownership." SAs are expected to select this option if Section 2A, Question 4 of the hospital's/CAH's Form CMS 855A application to enroll in Medicare indicates that the hospital has physician ownership or investment interest. Likewise, the worksheet contains questions for all hospitals and CAHs about their number of state-licensed beds, and the number of their ORs, endoscopy procedure rooms, and cardiac catheterization procedure rooms. SAs are expected to complete these fields based on information available to them through their licensure files or, if there is no licensure information, on hospital/CAH-provided information.

Questions concerning this memorandum may be addressed to Dina Lansey at Dina.george-lansey@cms.hhs.gov. Questions concerning limitations on physician referrals to PoHs may be addressed to Joseph C. Hudzik, Deputy Director of Technical Payment Policy in the Center for Medicare, at Joseph.hudzik@cms.hhs.gov.

/s/

Thomas E. Hamilton

cc: Survey and Certification Regional Office Management