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Analysis & Perspective

Hospitals

House SCHIP Legislation Would Halt Physician-Owned Hospitals

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The House Aug. 1 approved legislation that, if enacted, would score a significant victory for opponents of physician ownership of hospitals by banning future development and outlawing growth of such facilities.

The legislation, H.R. 3162, the Children's Health and Medicare Protection Act of 2007, would reauthorize the State Children's Health Insurance Program (SCHIP), which provides state-sponsored health insurance to millions of low-income children.

The recent rapid rise of physician-owned specialty hospitals--particularly those focused on cardiac care, orthopedics and surgical procedures, and owned in whole or in part by physicians--spurred a protracted and acrimonious debate between physicians and traditional general acute hospital lobbies, and bitterly divided Congress.

In 2003, responding to complaints from groups representing community hospitals, Congress amended the federal physician self-referral proscription, commonly known as the "Stark Law," by imposing an 18-month moratorium on development of new specialty hospitals. Congress allowed this original moratorium to lapse in 2005, but enacted additional legislation in early 2006 that directed the Centers for Medicare & Medicaid Services to withhold new provider numbers from specialty hospitals for six months while the agency prepared a plan for dealing with concerns identified by Congress regarding physician investment in specialty hospitals.

These successive moratoriums had the desired effect of slowing development of physician-owned specialty hospitals during the applicable periods.

However, when the Republican-controlled Congress declined to act further on specialty hospitals in Medicare legislation enacted in late 2006, many observers viewed the issue as resolved in favor of allowing physicians to own specialty hospitals. Promoters of specialty hospitals revived development plans, and physician-owned facilities once again appeared to be on the rise.

August Legislation: A Sea Change

Recent action taken by the House signals yet another sea change. Legislation approved by

lawmakers in August would effectively outlaw physician ownership of hospitals, except for those already in existence, and prohibit further expansion of those existing facilities.

Under the Stark Law, physicians are prohibited from making referrals for certain specified services to entities in which the physician (or an immediate family member of the physician) has a financial relationship, including a direct or indirect ownership or investment interest. Penalties for violating the law are severe and include steep civil monetary penalties and exclusion from the Medicare and Medicaid programs.

Despite this self-referral prohibition, physicians have been permitted to make referrals to hospitals that they own through an exception to the law. Under existing law, an "ownership interest" does not include ownership in a hospital if the referring physician is authorized to perform services at the hospital (which generally means the physician has privileges at the hospital), and the physician's ownership or investment interest is in the entire hospital, and not merely in a distinct part or department of the hospital.

This exception is commonly referred to as the "whole hospital exception" because of the requirement that the physician's interest be in the entire hospital. As long as physician investment in a hospital satisfies these two conditions, referrals to the hospital would not violate the Stark Law's prohibition against physician self-referrals.

Under the changes embraced by the House, a third requirement would have to be satisfied to qualify for the whole hospital exception: the hospital would be required to have had a Medicare provider agreement as of July 24. Any hospital not enrolled in Medicare as of that date could not qualify for the exception, thereby rendering referrals to the facility by physician owners impermissible under the law.

Although existing physician-owned hospitals would be permitted to continue without violating **the law, the new legislation would impose additional requirements on those hospitals for them to continue to qualify for the whole hospital exception.**

First, the legislation would require that existing facilities not increase the number of operating rooms or beds at any time after the date of enactment. Theoretically, physician-owned hospitals with provider agreements could expand other services, such as imaging, without jeopardizing their ability to qualify for the exception, but physician-owned hospitals with plans **to expand surgical or overnight accommodation capabilities may wish to hasten such plans to raise their own bar before the legislation is enacted.**

Additionally, the legislation would limit the amount of investment interest in the hospital that can be owned by physicians--seemingly regardless of whether the physician is a referral source--to no more than 40 percent, and limit each individual physician's interest to no more than 2 percent. If enacted, many existing physician-owned hospitals would have to restructure ownership interests to comply with this new requirement in order to continue to protect future referrals.

The legislation also would require physician-owned hospitals to occasionally make certain ownership-related reports to CMS and disclose ownership interests and staffing capabilities to patients, as well as comply with certain investment-related restrictions.

Some of the patient disclosure provisions in the bill are similar to and would potentially be redundant of new regulations recently announced by CMS.

Under regulations that will become effective Oct. 1, physician-owned hospitals (and not just specialty hospitals) will be required to notify patients that they are physician owned and provide patients with a list of physician owners upon request.

Additionally, *all* hospitals, not just those owned by physicians, will be required to notify patients if a doctor of medicine or osteopathy is not present in the hospital 24 hours per day,

seven days per week, and tell patients how the hospital will meet the medical needs of any patient who develops an emergency medical condition at a time when there is no physician present in the hospital.

Affected parties should note a key difference between the House-approved legislation and past attempts to halt development of specialty hospitals.

Whereas the debate in recent years has centered on "specialty hospitals," and past legislation likewise has applied only to hospitals that are "primarily or exclusively" engaged in the care and treatment of patients with a cardiac condition, orthopedic condition, or receiving a surgical procedure, the new restrictions would apply to all hospitals with an element of physician ownership. As such, even general acute care hospitals could be affected by these restrictions.

These provisions are included in legislation that would reauthorize the State Children's Health Insurance Program (SCHIP), which provides state-sponsored health insurance to millions of low-income children. Although reauthorizing SCHIP is a top political and legislative priority for congressional Democrats, and the program itself is generally popular among Democrats and Republicans alike, the future of the bill--and thereby the proposed self-referral changes--are very much in question.

The Senate's version of SCHIP reauthorization legislation does not include a similar provision, nor does it include Medicare-related provisions. It is unclear at this point whether the Senate will accept the House strategy of advancing Medicare legislation in the context of SCHIP reauthorization legislation.

If the Senate does embrace this approach, then the chances of a final bill including self-referral provisions akin to the House provisions are good. Several key senators likely would support this change, including Sens. Max Baucus (D-Mont.) and Charles E. Grassley (R-Iowa), the chairman and ranking member, respectively, of the Senate Finance Committee, which has jurisdiction over Medicare. Both are long-time vocal critics of physician-owned hospitals.

Even if the Senate does approve the legislation, the future remains murky. The president has threatened to veto any legislation that expands SCHIP on the order sought by congressional Democrats. A threatened or actual veto could persuade congressional Democrats to scale back or even drop these self-referral provisions.

Despite this uncertainty, hospitals with some degree of physician ownership should take note of these changes, evaluate the potential impact, and take appropriate steps to prepare. 📄

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