

CMS Proposed Rules Leave Uncertainty for the Future of Provider-Based Sites

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The Bipartisan Budget Act (“BBA”) that was signed into law on November 2, 2015, and Section 603 made significant changes to provider-based rules. It precluded hospitals from establishing new provider-based off-campus sites that were not billing for provider-based services as of November 2, 2015. The law goes into effect on January 1, 2017, and its impact in two significant situations has left providers with much uncertainty. The first relates to the “grandfathering” of projects that were in development at the time the law was suddenly enacted. The second relates to the ability of a hospital to replace or relocate an existing provider-based site.

The issue of grandfathering is being addressed through legislation that has been approved by the House of Representatives. It allows for the “grandfathering” of projects that were in development as of November 2, 2015, so long as they come into operation prior to December 31, 2016. More on that specific exemption will be discussed as it moves through the legislative process.

The second situation concerning relocation and replacement was addressed by CMS in proposed regulations that were released on Friday, July 8. Despite requests for flexibility submitted to CMS by the provider community, the proposed rule significantly restrains hospitals with respect to the relocation or replacement of existing provider-based sites.

CMS acknowledged that many suggestions were submitted to allow for a hospital to maintain a provider-based designation for a replaced or relocated site, so long as it was substantially similar with respect to personnel, space, patient population or equipment. However, CMS believes Section 603 of the BBA is intended to limit off-campus provider-based sites to those locations and services that were being furnished and billed by off-campus provider-based sites prior to November 2, 2015. This means that the site would no longer be recognized as satisfying provider-based requirements if it moved or relocated from the physical address that was listed on the provider’s hospital enrollment form as of November 1, 2015. This also means that the hospital would not be able to expand the types of services provided at that site beyond the categories of items and services furnished at the site as operating on November 1, 2015. CMS is not proposing to limit the volume of the type of services provided at an existing site. However, it is proposing that provider-based status will be limited to the types of items and services furnished at the specific off-campus location that were in effect on November 1, 2015.

CMS recognizes that there may be extraordinary circumstances that require a hospital to replace or relocate a provider-based site due to a disaster or similar extraordinary



circumstance, and it is seeking comments on whether it should consider exceptions to its general prohibition on relocation and replacement under such circumstances.

These are proposed rules, so it is possible that they will be modified following further consideration, and it is also possible that there will be some legislative reaction through the legislative process that is dealing with the “grandfathering” scenario. Nonetheless, this is a very clear signal of CMS’s intent to severely control the use and expansion of provider-based operations and reimbursement for hospitals. Further developments will continue to be monitored, and providers should be cautious in their planning. CMS is currently seeking comments on the proposed rule and will be accepting such comments through 5:00 p.m. EST on September 5, 2016. Providers should consider comments to CMS in response to these important issues.