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YOU CAN SHARE A GOVERNING BOARD BUT NOT A MEDICAL STAFF: MEDICARE PROPOSES CHANGES TO HOSPITAL CONDITIONS OF PARTICIPATION

SUMMARY

Yesterday, February 7, 2013, CMS issued a proposed rule that addresses a number of changes to the Conditions of Participation ("CoP") for hospitals, 78 FR 9216 ("Proposed Rule"). Beyond hospitals, this Proposed Rule speaks to other areas affecting ambulatory surgical centers, CLIA proficiency testing and transplant centers, among others. This summary deals with the CoP changes for hospitals related to governing boards and the medical staff.

BACKGROUND

In May 2012, CMS issued a final rule concerning the composition of a hospital's governing body. This change required hospital boards to include at least one medical staff member. CMS received considerable feedback on this change. In response, the Proposed Rule rescinds this requirement to include a medical staff member. However, in view of the importance of ensuring regular communication and feedback, CMS proposes to require that boards regularly consult with the leadership of the organized medical staff. CMS anticipates these consultations would occur at least twice a year and include the scope and complexity of hospital services, patient populations served and patient safety and quality issues.

Where there is a single governing board for multiple hospitals, that board would be required to meet with the medical staff leadership of each hospital. This proposed requirement joins with CMS's "long-standing interpretation" that each hospital have "its own independent medical staff." So, while a system may have a consolidated board to "gain important efficiencies and achieve significant progress in quality programs"[1], it is not permitted to have a single shared medical staff. CMS proposes to reinforce this position by a change reflecting that each hospital must have an organized and individual medical staff, distinct to that facility, that operates under bylaws approved by the governing body and responsible for the quality of care at that individual location.

CMS also proposes to revise current language to clarify that a medical staff may include other categories of non-physician practitioners as determined by the board and as permitted by applicable state scope of practice laws. This change is consistent with existing interpretative guidance and appears to be nothing more than a clarification. CMS envisions the potential inclusion of advance practice nurses, physician assistants, dieticians and PharmDs, etc., as deemed appropriate by the board.

CONCLUSION AND SUBMISSION OF COMMENTS

This Proposed Rule would eliminate the requirement that a medical staff member serve on the board, but it reinforces CMS's intention that the board remain in regular communication with those delegated the responsibility for the quality of patient care. These proposed changes are particularly relevant for hospital systems seeking to consolidate functions and increase efficiency. While the governance function for multiple hospitals may be merged, CMS is solidifying its position that each hospital must operate an individual medical staff. Where there is a consolidated board, the Proposed Rule would require the board to remain in regular, meaningful dialogue with medical staff leadership at each individual hospital. Given CMS's underlying basis for permitting a single governing board, there seems to be some inconsistency when applying this rationale to multi-hospital medical staff organizations given the clear expectation that hospitals achieve true improvements in patient safety, quality and efficiency, particularly when considering the growing consolidation and innovation activities currently underway throughout the country.

The Proposed Rule can be accessed here. We recommend all organizations interested in submitting comments in response to this Proposed Rule do so. **The deadline for submitting comments is April 8, 2013**.

If you have any questions, please contact James B. Hogan at 317.977.1439 or jhogan@hallrender.com, Brian C. Betner at 317.977.1466 or bbetner@hallrender.com or your regular Hall Render attorney.

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[1] CMS proffered this as the basis for permitting single governing boards in its Final Rule dated May 16, 2012 (77 FR 29038).

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