

(i) The 60-day comment period if CMS does not receive written comments from the community.

(ii) The 60-day rebuttal period, regardless of whether the hospital submits a rebuttal statement, if CMS receives written comments from the community.

(h) *Determination that the hospital is an applicable hospital or a high Medicaid facility.* Based on the information described in paragraph (e) of this section and the community input described in paragraph (f) of this section, if any, CMS will first determine whether the hospital meets the criteria for an applicable hospital or a high Medicaid facility.

(i) *CMS decision to approve or deny a request for an exception from the prohibition on facility expansion—*(1) *Data and information for consideration by CMS.* In reviewing a request for an exception from the prohibition on facility expansion, CMS—

(i) Will consider data and information provided by the hospital in its request, included in the community input, if any, and provided by the hospital in its rebuttal statement, if any; and

(ii) May also consider any other data and information relevant to its decision.

(2) *Factors considered by CMS.* Factors that CMS will consider in deciding whether to approve or deny a hospital's request for an exception from the prohibition on facility expansion include but are not limited to the following:

(i) The specialty (for example, maternity, psychiatric, or substance use disorder care) of the hospital or the services furnished by or to be furnished by the hospital if CMS approves the request.

(ii) Program integrity or quality of care concerns related to the hospital.

(iii) Whether the hospital has a need for additional operating rooms, procedure rooms, or beds.

(iv) Whether there is a need for additional operating rooms, procedure rooms, or beds in the county in which the main campus of the hospital is located or in any county in which the hospital provides inpatient or outpatient hospital services as of the date the hospital submits the request.

(j) *Permitted increase in facility capacity.* (1) Except as provided in paragraph (j)(2) of this section, a permitted increase under this section—

(i) May not result in the number of operating rooms, procedure rooms, and beds for which the hospital is licensed exceeding 200 percent of the hospital's baseline number of operating rooms, procedure rooms, and beds; and

(ii) May occur only in facilities on the hospital's main campus.

(2) The limitations of paragraph (j)(1) of this section do not apply to an increase in facility capacity approved by CMS with respect to a request for an exception from the prohibition on facility expansion submitted by a high Medicaid facility between January 1, 2021, and September 30, 2023.

(k) *Publication of final determination and decision.* Not later than 60 days after receiving a complete request—

(1) If CMS determines that the hospital does not meet the criteria for an applicable hospital or a high Medicaid facility, CMS will publish in the FEDERAL REGISTER notice of such determination; or

(2) If CMS determines that the hospital meets the criteria for an applicable hospital or a high Medicaid facility, CMS will publish in the FEDERAL REGISTER notice of such determination and its decision regarding the hospital's request for an exception from the prohibition on facility expansion.

(l) *Limitation on review.* There shall be no administrative or judicial review under section 1869 of the Act, section 1878 of the Act, or otherwise of the process under this section (including the establishment of such process and any CMS determination or decision under such process).

[88 FR 59328, Aug. 28, 2023]

§ 411.370 Advisory opinions relating to physician referrals.

(a) *Period during which CMS accepts requests.* The provisions of § 411.370 through § 411.389 apply to requests for advisory opinions that are submitted to CMS during any time period in which CMS is required by law to issue the advisory opinions described in this subpart.

(b) *Matters that qualify for advisory opinions and who may request one.* Any

individual or entity may request a written advisory opinion from CMS concerning whether a physician's referral relating to designated health services (other than clinical laboratory services) is prohibited under section 1877 of the Act. In the advisory opinion, CMS will determine whether a business arrangement described by the parties to that arrangement appears to constitute a "financial relationship" (as defined in section 1877(a)(2) of the Act) that could potentially restrict a physician's referrals, and whether the arrangement or the designated health services at issue appear to qualify for any of the exceptions to the referral prohibition described in section 1877 of the Act.

(1) The request must relate to an existing arrangement or one into which the requestor, in good faith, specifically plans to enter. The planned arrangement may be contingent upon the party or parties receiving a favorable advisory opinion. CMS does not consider, for purposes of an advisory opinion, requests that involve the activities of third parties.

(2) The requestor must be a party to the existing or proposed arrangement.

(c) *Matters not subject to advisory opinions.* CMS will not address through an advisory opinion—

(1) Whether the fair market value was, or will be, paid or received for any goods, services, or property; and

(2) Whether an individual is a *bona fide* employee within the requirements of section 3121(d)(2) of the Internal Revenue Code of 1986.

(d) *Facts subject to advisory opinions.* The requestor must include in the advisory opinion request a complete description of the arrangement that the requestor is undertaking, or plans to undertake, as described in §411.372.

(e) *Acceptance of requests.* (1) CMS does not accept an advisory opinion request or issue an advisory opinion if—

(i) The request is not related to a named individual or entity;

(ii) The request does not describe the arrangement at issue with a level of detail sufficient for CMS to issue an opinion, and the requestor does not timely respond to CMS requests for additional information;

(iii) CMS is aware, after consultation with OIG and DOJ, that the same course of action is under investigation, or is or has been the subject of a proceeding involving the Department of Health and Human Services or another governmental agency;

(iv) CMS believes that it cannot make an informed opinion or could only make an informed opinion after extensive investigation, clinical study, testing, or collateral inquiry; or

(v) CMS determines that the arrangement or course of conduct at issue is or would be in violation of applicable State or Federal law or regulation.

(2) CMS may elect not to accept an advisory opinion request if it determines, after consultation with OIG and DOJ:

(i) The course of action described is substantially similar to a course of conduct that is under investigation or the subject of a proceeding involving the Department or other law enforcement agencies; and

(ii) Issuing an advisory opinion could interfere with the investigation or proceeding.

(f) *Effects of an advisory opinion on other Governmental authority.* Nothing in this part limits the investigatory or prosecutorial authority of the OIG, the Department of Justice, or any other agency of the Government. In addition, in connection with any request for an advisory opinion, CMS, the OIG, or the Department of Justice may conduct whatever independent investigation it believes appropriate.

[69 FR 57227, Sept. 24, 2004, as amended at 72 FR 51098, Sept. 5, 2007; 84 FR 63191, Nov. 15, 2019]

§411.372 Procedure for submitting a request.

(a) *Format for a request.* A party or parties must submit a request for an advisory opinion to CMS according to the instructions specified on the CMS Web site.

(b) *Information CMS requires with all submissions.* The request must include the following:

(1) The name, address, telephone number, and Taxpayer Identification Number of the requestor.

(2) The names and addresses, to the extent known, of all other actual and