

(C) Disclose on any public Web site for the hospital and in any public advertising for the hospital that the hospital is owned or invested in by physicians. Any language that would put a reasonable person on notice that the hospital may be physician-owned would be deemed a sufficient statement of physician ownership or investment. For purposes of this section, a public Web site for the hospital does not include, by way of example: social media Web sites; electronic patient payment portals; electronic patient care portals; and electronic health information exchanges.

(4) *Ensuring bona fide investment.* The hospital satisfies the following criteria:

(i) The percentage of the total value of the ownership or investment interests held in the hospital, or in an entity whose assets include the hospital, by physician owners or investors in the aggregate does not exceed such percentage as of March 23, 2010.

(ii) Any ownership or investment interests that the hospital offers to a physician owner or investor are not offered on more favorable terms than the terms offered to a person who is not a physician owner or investor.

(iii) The hospital (or any owner or investor in the hospital) does not directly or indirectly provide loans or financing for any investment in the hospital by a physician owner or investor.

(iv) The hospital (or any owner or investor in the hospital) does not directly or indirectly guarantee a loan, make a payment toward a loan, or otherwise subsidize a loan, for any individual physician owner or investor or group of physician owners or investors that is related to acquiring any ownership or investment interest in the hospital.

(v) Ownership or investment returns are distributed to each owner or investor in the hospital in an amount that is directly proportional to the ownership or investment interest of such owner or investor in the hospital.

(vi) Physician owners and investors do not receive, directly or indirectly, any guaranteed receipt of or right to purchase other business interests related to the hospital, including the purchase or lease of any property under

the control of other owners or investors in the hospital or located near the premises of the hospital.

(vii) The hospital does not offer a physician owner or investor the opportunity to purchase or lease any property under the control of the hospital or any other owner or investor in the hospital on more favorable terms than the terms offered to an individual who is not a physician owner or investor.

(5) *Patient safety.* The hospital satisfies the following criteria:

(i) If the hospital does not have a physician available on the premises to provide services during all hours in which the hospital is providing services to the patient, the hospital must disclose this information to the patient. Before providing services to the patient, the hospital must receive a signed acknowledgment from the patient stating that the patient understands that a physician may not be present during all hours services are furnished to the patient.

(ii) The hospital must have the capacity to provide assessment and initial treatment for all patients, and the ability to refer and transfer patients to hospitals with the capability to treat the needs of the patient that the hospital is unable to address. For purposes of this paragraph, the hospital inpatient stay or outpatient visit begins with the provision of a package of information regarding scheduled preadmission testing and registration for a planned hospital admission for inpatient care or an outpatient service.

(6) *Prohibition on conversion from an ambulatory surgery center.* The hospital must not have been converted from an ambulatory surgical center to a hospital on or after March 23, 2010.

[75 FR 72260, Nov. 24, 2010, as amended at 76 FR 74581, Nov. 30, 2011; 79 FR 67029, Nov. 10, 2014; 80 FR 71378, Nov. 16, 2015; 85 FR 86299, Dec. 29, 2020; 88 FR 59328, Aug. 28, 2023]

§411.363 Process for requesting an exception from the prohibition on facility expansion.

(a) *Definitions.* For purposes of this section—

Baseline number of operating rooms, procedure rooms, and beds means the number of operating rooms, procedure

rooms, and beds for which the applicable hospital or high Medicaid facility is licensed as of March 23, 2010 (or, in the case of a hospital that did not have a provider agreement in effect as of March 23, 2010, but does have a provider agreement in effect on December 31, 2010, the date of effect of such agreement). For purposes of determining the number of beds in a hospital's baseline number of operating rooms, procedure rooms, and beds, a bed is included if the bed is considered licensed for purposes of State licensure, regardless of the specific number of beds identified on the physical license issued to the hospital by the State.

External data source means a data source that—

- (i) Is generated, maintained, or under the control of a State Medicaid agency;
- (ii) Is reliable and transparent;
- (iii) Maintains data that, for purposes of the process described in this section, are readily available and accessible to the requesting hospital, comparison hospitals, and CMS; and
- (iv) Maintains or generates data that, for purposes of the process described in this section, are accurate, complete, and objectively verifiable.

Main campus of the hospital means “campus” as defined at § 413.65(a)(2) of this chapter.

Procedure room has the meaning set forth at § 411.362(a).

(b) *CMS consideration of requests for an exception from the prohibition on facility expansion.* (1) CMS will not consider a request for an exception from the prohibition on facility expansion from a hospital that is not eligible to request the exception.

(2) A hospital that meets the criteria for an applicable hospital or a high Medicaid facility is eligible to request an exception from the prohibition on facility expansion for consideration by CMS, provided that—

- (i) CMS has not previously approved a request for an exception from the prohibition on facility expansion that would allow the hospital's number of operating rooms, procedure rooms, and beds for which the hospital is licensed to reach 200 percent of the hospital's baseline number of operating rooms, procedure rooms, and beds if the full expansion is utilized; and

- (ii) It has been at least 2 calendar years from the date of the most recent decision by CMS approving or denying the hospital's most recent request for an exception from the prohibition on facility expansion.

(c) *Criteria for an applicable hospital.* An applicable hospital is a hospital that meets the following criteria:

(1) *Population increase.* The hospital is located in a county that has a percentage increase in population that is at least 150 percent of the percentage increase in population of the State in which the hospital is located during the most recent 5-year period for which data are available as of the date that the hospital submits its request. To calculate State and county population growth, a hospital must use Bureau of the Census estimates.

(2) *Medicaid inpatient admissions.* The hospital has an annual percent of total inpatient admissions under Medicaid that is equal to or greater than the average percent with respect to such admissions for all hospitals (including the requesting hospital) that have Medicare participation agreements with CMS and are located in the county in which the hospital is located during the most recent 12-month period for which data are available as of the date that the hospital submits its request. For purposes of this paragraph (c)(2), the most recent 12-month period for which data are available means the most recent 12-month period for which the data source used contains all data from the requesting hospital and each other hospital that has a Medicare participation agreement with CMS and is located in the county in which the requesting hospital is located.

- (i) With respect to requests submitted before October 1, 2023, a hospital may use filed Medicare hospital cost report data from the Healthcare Cost Report Information System (HCRIS) or data from an external data source (as defined in paragraph (a) of this section) to estimate its annual percent of total inpatient admissions under Medicaid and the average percent with respect to such admissions for all hospitals (including the requesting hospital) that have Medicare participation agreements with CMS and

are located in the county in which the hospital is located.

(ii) With respect to requests submitted on or after October 1, 2023, a hospital may use only filed Medicare hospital cost report data from HCRIS to estimate its annual percent of total inpatient admissions under Medicaid and the average percent with respect to such admissions for all hospitals (including the requesting hospital) that have Medicare participation agreements with CMS and are located in the county in which the hospital is located.

(3) *Nondiscrimination.* The hospital does not discriminate against beneficiaries of Federal health care programs and does not permit physicians practicing at the hospital to discriminate against such beneficiaries.

(4) *Average bed capacity.* The hospital is located in a State in which the average bed capacity in the State is less than the national average bed capacity during the most recent fiscal year for which HCRIS, as of the date that the hospital submits its request, contains data from a sufficient number of hospitals to determine a State's average bed capacity and the national average bed capacity.

(i) CMS will provide on its website State average bed capacities and the national average bed capacity.

(ii) For purposes of this paragraph (c)(4), *sufficient number* means the number of hospitals, as determined by CMS that would ensure that the determination under this paragraph (c)(4) would not materially change after additional hospital data are reported.

(5) *Average bed occupancy.* The hospital has an average bed occupancy rate that is greater than the average bed occupancy rate in the State in which the hospital is located during the most recent fiscal year for which HCRIS, as of the date that the hospital submits its request, contains data from a sufficient number of hospitals to determine the requesting hospital's average bed occupancy rate and the relevant State's average bed occupancy rate.

(i) A hospital must use filed hospital cost report data from HCRIS to determine its average bed occupancy rate.

(ii) CMS will provide on its website State average bed occupancy rates. For

purposes of this paragraph (c)(5), *sufficient number* means the number of hospitals, as determined by CMS that would ensure that the determination under this paragraph (c)(5) would not materially change after additional hospital data are reported.

(6) *Hospital location.* For purposes of this paragraph (c), a hospital is located in the county and State in which the main campus of the hospital is located.

(d) *Criteria for a high Medicaid facility.* A high Medicaid facility is a hospital that meets all of the following criteria:

(1) *Sole hospital.* The hospital is not the sole hospital in the county in which the hospital is located.

(2) *Medicaid inpatient admissions.* With respect to each of the three most recent 12-month periods for which data are available as of the date the hospital submits its request, the hospital has an annual percent of total inpatient admissions under Medicaid that is estimated to be greater than such percent with respect to such admissions for each other hospital that has a Medicare participation agreement with CMS and is located in the county in which the hospital is located. For purposes of this paragraph (d)(2), the most recent 12-month period for which data are available means the most recent 12-month period for which the data source used contains all data from the requesting hospital and each other hospital that has a Medicare participation agreement with CMS and is located in the county in which the requesting hospital is located.

(i) With respect to requests submitted before October 1, 2023, a hospital may use filed Medicare hospital cost report data from HCRIS or data from an external data source (as defined in paragraph (a) of this section) to estimate its annual percentage of total inpatient admissions under Medicaid and the annual percentages of total inpatient admissions under Medicaid for each other hospital that has a Medicare participation agreement with CMS and is located in the county in which the hospital is located.

(ii) With respect to requests submitted on or after October 1, 2023, a hospital may use only filed Medicare hospital cost report data from HCRIS to estimate its annual percentage of

total inpatient admissions under Medicaid and the annual percentages of total inpatient admissions under Medicaid for each other hospital that has a Medicare participation agreement with CMS and is located in the county in which the hospital is located.

(3) *Nondiscrimination.* The hospital does not discriminate against beneficiaries of Federal health care programs and does not permit physicians practicing at the hospital to discriminate against such beneficiaries.

(4) *Hospital location.* For purposes of this paragraph (d), a hospital is located in the county in which the main campus of the hospital is located.

(e) *Procedure for submitting a request for an exception from the prohibition on facility expansion.* (1) A hospital must submit the request for an exception from the prohibition on facility expansion and the signed certification set forth in paragraph (e)(3) of this section electronically to CMS according to the instructions specified on the CMS website.

(2) For a hospital's request for an exception from the prohibition on facility expansion to be considered by CMS, the request must include all of the following information:

(i) The name, address, national provider identification number(s) (NPI), tax identification number (TIN), and CMS certification number (CCN) for the hospital.

(ii)(A) The name of the county in which the main campus is located; and

(B) The names of any counties in which the hospital provides inpatient or outpatient hospital services.

(iii) The name, title, daytime telephone number, electronic mail address, and hard copy mail address for the contact person who will be available to discuss the request with CMS on behalf of the hospital.

(iv)(A) A statement identifying the hospital as an applicable hospital or high Medicaid facility; and

(B) A detailed explanation with supporting documentation regarding whether and how the hospital meets each of the criteria for an applicable hospital or high Medicaid facility.

(v) A statement and supporting documentation, if available, explaining how the hospital satisfies the criterion in

paragraph (c)(3) or (d)(3) of this section that it does not discriminate against beneficiaries of Federal health care programs and does not permit physicians practicing at the hospital to discriminate against such beneficiaries.

(vi) Documentation supporting—

(A) The hospital's calculations of its baseline number of operating rooms, procedure rooms, and beds;

(B) The number of operating rooms, procedure rooms, and beds for which the hospital is licensed as of the date that the hospital submits a request for an exception;

(C) Whether and how the hospital has used any expansion facility capacity approved in a prior request; and

(D) The additional number of operating rooms, procedure rooms, and beds by which the hospital requests to expand.

(3) A hospital may submit other information with respect to the request, including but not limited to information regarding—

(i) Whether the hospital plans to use expansion facility capacity to provide specialty services (for example, maternity, psychiatric services, or substance use disorder care) if the request is approved; and

(ii) The current or future need, if any, for additional operating rooms, procedure rooms, and beds—

(A) For the hospital to serve Medicaid, uninsured, and underserved populations;

(B) In the county in which the main campus of the hospital is located; and

(C) In any county in which the hospital provides inpatient or outpatient hospital services as of the date the hospital submits the request.

(4) A request for an exception from the prohibition on facility expansion must include the following certification signed by an authorized representative of the hospital: "With knowledge of the penalties for false statements provided by 18 U.S.C. 1001, I certify that all of the information provided in the request and all of the documentation provided with the request is true and correct to the best of my knowledge and belief." An authorized representative is the chief executive officer, chief financial officer, or other

individual who is authorized by the hospital to make the request.

(f) *Community input.* (1) Upon submitting a request for an exception from the prohibition on facility expansion and until the hospital receives a CMS decision on the request, the hospital must disclose on any public website for the hospital that it is requesting an exception from the prohibition on facility expansion.

(2) A hospital submitting a request for an exception from the prohibition on facility expansion must provide actual notification that it is requesting an exception, in either electronic or hard copy form, directly to hospitals whose data are part of the comparisons in paragraphs (c)(2) and (d)(2) of this section.

(3)(i) Individuals and entities in the hospital's community may provide input with respect to the hospital's request for an exception from the prohibition on facility expansion, including, but not limited to, input regarding whether the hospital meets the criteria for an applicable hospital or a high Medicaid facility and the factors listed in paragraph (i)(2) of this section that CMS will consider in deciding whether to approve or deny a hospital's request.

(ii) The hospital's community includes the geographic area served by the hospital (as defined at §411.357(e)(2)) and all of the following:

(A) The county in which the hospital's main campus is located.

(B) The counties in which the hospital provides inpatient or outpatient hospital services as of the date the hospital submits the request.

(iii) Community input must be—

(A) In the form of written comments;

(B) Submitted according to the instructions in the FEDERAL REGISTER notice of the hospital's request; and

(C) Received no later than 60 days after CMS publishes notice of the hospital's request in the FEDERAL REGISTER.

(iv) If CMS receives written comments from the community, the hospital has 60 days after CMS notifies the hospital of the written comments to submit a rebuttal statement.

(g) *Timing of complete request.* (1) If only filed Medicare hospital cost report data from HCRIS are used in the hos-

pital's request for an exception from the prohibition on facility expansion, the written comments, and the hospital's rebuttal statement, a request will be deemed complete no later than 90 days after the end of—

(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.

(2) If data from an external data source are used in the hospital's request for an exception from the prohibition on facility expansion, the written comments, or the hospital's rebuttal statement, a request will be deemed complete no later than 180 days after the end of—

(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

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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