

THE
NATIONAL LAW REVIEW

Legislation to Expand Definition of Grandfathered Off-Campus Hospital Departments to Address “Mid-Build” and Cancer Hospital Projects Moves Forward

Thursday, June 2, 2016

A [bill amending the “site neutrality” limitations brought by Section 603](#) of the Bipartisan Budget Act of 2015 was introduced in the House of Representatives last week and passed out of committee yesterday. H.R. 5273, the “Helping Hospitals Improve Patient Care Act of 2016,” was introduced by two powerful Members of the House Ways and Means Health Subcommittee: Chairman Pat Tiberi (R-OH) and Ranking Member Jim McDermott (D-WA). The proposed amendments expand upon the definition of off-campus outpatient hospital departments (OCODPs) that are excluded from the limitations of Section 603. Section 603 does not apply to those OCODPs that are grandfathered or are Dedicated Emergency Departments for EMTALA. Those OCODPs may continue to bill at the higher rates under the Medicare Outpatient Prospective Payment System (OPPS). All other new OCODPs must bill Medicare at freestanding rates. The rules as to how those rates will be determined and other implementing requirements are anticipated this summer in the OPPS rules. For further information on the impacts of BiBA on OCODPs generally see our blog post on this topic: [Bipartisan Budget Act Section 603’s Impact on Off-campus Hospital Departments](#).

As adopted, Section 603 grandfathered any OCODPs that were billing as a hospital department on or before the bill was enacted on November 2, 2015. The proposed bill adds three new categories of OCODPs who may bill under OPPS:

1. departments that submitted “provider-based” attestations prior to December 2, 2015;
2. mid-build OCODPs; and
3. OCODPs associated with cancer hospitals

Provider-Based Attestations Prior to December 2, 2015

The first amendment applies to OCODPs that bill under OPPS for services furnished in prior to the date of enactment (November 2, 2015) if the provider filed a provider-based attestation under 42 C.F.R. 413.65 before December 2, 2015. This narrow exception expands the grandfathered facilities to a very few facilities for which the providers had submitted attestations shortly after enactment – effectively providing a one month grace period – presumably even if bills had not been dropped prior to November 2, 2015. But it appears that some OPPS-covered services must have been furnished prior to November 2 in order to qualify for this grace period. This exception offers no relief on an ongoing basis if attestations were not timely submitted and bills were not dropped prior to November 2, 2015.

Mid-Build Projects

The mid-build exception applies in 2018 and after to facilities that meet the “mid-build” requirement. The “mid-build” requirement means that before November 2, 2015 the provider entered into a written agreement with an



Article By [Taylor E. Whitten](#)
[Lawrence W. Vernaglia](#)[Jennifer F. Walsh](#)
[Foley & Lardner LLP](#)
[Health Care Law Today](#)
[Health Law & Managed Care](#)
[All Federal](#)

“outside unrelated party for the actual construction” to build the OCODP. A non-binding letter of intent, business plan or other non-binding contract is very likely insufficient. Commencement of actual construction is *not* required, though it is a likely reading that the construction needs to be substantially complete prior to December 31, 2016. Again, this exception only applies to those hospitals with binding written agreements in place prior to November 2, 2015. It provides no relief for other “under development” OCODPs. To take advantage of this limited relief, the hospital must submit the following:

- A provider-based attestation not later than December 31, 2016;
- Proper provider enrollment information; and
- Written certification from the Chief Executive Officer or Chief Operating Officer that the facility meets the “mid-build” requirements prior to December 31, 2016.

The requirement of submitting an attestation likely means that the construction is essentially complete by December 31, 2016.

Cancer Hospital OCODPs

The final amendment would provide relief to specifically certified cancer hospitals. There are only a small number of such hospitals nationally. This amendment will be applied to services furnished in 2017 and beyond. Under current regulations, the provider-based attestation process as to any hospital (including cancer hospitals) is voluntary.

The new amendments would require cancer hospitals to submit provider-based attestations if they want to take advantage of the relief from Section 603. Cancer hospital OCODPs that met the provider-based requirements after November 1, 2015, but before the amendment’s enactment, will have to submit a provider-based attestation within 60 days of enactment. Alternately, cancer hospitals OCODPs that meet the provider-based requirements after enactment have 60 days from when they meet the provider-based requirements to submit an attestation.

Cancer hospital OCODPs that were billing under OPPIs prior to November 1, 2015 likely need not submit a provider-based attestation.

The proposed amendment also includes an audit requirement for OCODPs submitting provider-based attestations to meet the “mid-build” requirement as well as the new cancer hospital OCODP requirements. The Secretary will audit an OCODP’s compliance with the attested-to requirements for mid-build projects before December 31, 2018. For cancer hospitals, the Secretary will audit compliance within two years of receiving its attestation. Therefore, if passed as-is, it is essential that each OCODP rigorously comply with the requirements summarized above.

Previous efforts to amend the OCODP language in the Bipartisan Budget Act of 2015 were unsuccessful. A Senate companion has not yet been introduced, but significant support exists in the Senate for changes to the current OCODP policy. The Centers for Medicare and Medicaid Services are likely to issue regulations around implementation of the current OCODP policy in the coming months.

© 2019 Foley & Lardner LLP

Source URL: <https://www.natlawreview.com/article/legislation-to-expand-definition-grandfathered-campus-hospital-departments-to>