Physician-Owned and Gainsharing Specialty Hospital Moratorium

The Second National Congress on the Un and Under Insured
The National Congress on Health Reform
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Physician-Owned Specialty Hospital Update
Physician Ownership of Hospitals

• Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA)
  – Imposed an 18-month moratorium on development of physician-owned specialty hospitals.
  – Directed MedPAC and Secretary of Health and Human Services to study specialty hospitals & issue reports.
• CMS administratively suspended enrollment of new physician-owned specialty hospitals through December 31, 2005, following the expiration of the MMA moratorium in June 2005.
• The Deficit Reduction Act of 2005 (DRA) renewed and memorialized suspension into law.
  – DRA mandated HHS to develop “a strategic and implementing plan” and to study specific issues.
Recent Congressional Interest in Physician-Owned Hospitals

- Senators Baucus and Grassley and Representative Stark want to limit or eliminate physician ownership of hospitals.
  - “Hospital Fair Competitive Action 0f 2005” (S.1002)
  - CHAMP Act of 2007 (H.R. 3162)
    - Applies to any physician-owned hospital
- Legislative vehicles in the 110th Congress that have been used to try and limit/prohibit physician ownership:
  - War Supplemental Appropriations Bill (P.L. 110-252)
  - Rural Hospital Assistance Act of 2008 (S. 3300)
  - “Paul Wellstone Mental Health & Addiction Parity Act of 2008” (H.R. 1424)
Gainsharing might be a transitional alternative to the explosion of physician-owned entities and ancillaries, where some have raised concerns about the likelihood that the conflict of interest represented by physician self-referral will create more rapid increases in use and even more fragmentation of care.”

Gail Wilensky
HealthAffairs 2006
What is Gainsharing?

• Typically referred to an arrangement in which a hospital gives physicians a share of any reduction in the hospital’s costs attributable to the physician’s efforts.
• Variety of models; essential components are cost effectiveness and clinical quality.
• Other financial arrangements may be discussed with gainsharing: bonus arrangements, compensation arrangements, joint ventures, increased risk sharing arrangements and risk pools.
## Pros and Cons of Gainsharing

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<th>Pros</th>
<th>Cons</th>
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<td>• Engages hospital medical staff [in a misaligned payment system] to improve quality, efficiency and patient safety.</td>
<td>• Potential to reduce access to services/new technology.</td>
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<td>• Treatment protocols may improve quality.</td>
<td>• Homogenizes medicine and may stifle innovation.</td>
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<td>• Helps to standardize resource use.</td>
<td>• May be a kickback/referral in disguise.</td>
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<td>• Cherry picking</td>
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<td>• Quicker-sicker discharge</td>
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<td>• Steering patients</td>
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Gainsharing: Federal and State laws

• State and federal laws impact the structure, nature and design of gainsharing programs:
  • Civil Monetary Penalty (CMP).
  • Federal Anti-Kickback Statute (AKA).
  • Stark Self-Referral Law.
  • State “All Payer” Laws.
  • Exempt Organization Tax Consideration
OIG Approach to Gainsharing

• OIG Special Advisory Bulletin on Gainsharing (1999)
• OIG Advisory Opinions identify good and bad features of gainsharing programs
  – Advisory Opinion (01-01)
  – Advisory Opinions (05-01 through 05-06)
  – Advisory Opinions (07-21 and 07-22)
  – Advisory Opinion (08-09)
• Advisory Opinions recognize that the gainsharing arrangements would result in a reduction of medical care; however, safeguards in the proposals were sufficient to warrant a favorable determination.
Congressional Developments

• Congressional Hearings
  – House Committee on Ways and Means, Subcommittee on Health Hearing (October 7, 2005)
    “I believe that gain sharing is not only misguided, it is dangerous. ... this idea of kickbacks – which is the only thing that you can call gain sharing – is wrong. If there is money to be saved, the hospitals should give it back to Medicare.”
    Representative Fortney (Pete) Stark (D-CA) (October 7, 2005), Ranking Member of Health Subcommittee.
  – Senate Committee on Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights investigation of GPOs.
Congress Sanctions Gainsharing Demonstrations

- Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (§646) established a Medicare Health Care Quality Demonstration (MHCQ).
  - Determine “if gainsharing is an effective means of aligning financial incentives to enhance quality and efficiency of care across an entire system of care.”
- Deficit Reduction Act of 2005 (§5007) requires 6 gainsharing demonstration projects (2 rural projects)
  - Test and evaluate methodologies and arrangements between hospitals and physicians designed to govern the utilization of inpatient hospital resources and physician work to improve the quality and efficiency of care provided to Medicare beneficiaries and to develop improved operational and financial hospital performance with sharing of remuneration.
CMS Initiatives in Gainsharing

• The Medicare Participating Heart Bypass Center Demonstration
• MMA §646: Medicare Health Care Quality (MHCQ) Demonstration
• DRA §5007: Gainsharing Demonstration
• Acute Care Episode Initiative
  – Announced May 2008 “…to use a global payment to better align the incentives for both types of providers [doctors and hospitals] leading to better quality and greater efficiency in the care that is delivered.”
FY2009 Medicare HIPPS Rule

- CMS considers whether to issue an exception for gainsharing.
- CMS does not propose a specific proposal, but solicits comments regarding:
  - Types of requirements/safeguards to include in an exception.
  - Whether certain services, clinical protocols or arrangements should not qualify for protection under an exception.
- Public response to solicitation included in Medicare Physician Fee Schedule proposed rule.
CMS proposes an exception to permit remuneration provided by a hospital to physicians on its medical staff under incentive payment and shared savings programs.

Exception extends beyond traditional gainsharing programs:
- Gainsharing is classified as a shared savings program
- Pay-for performance, a/k/a quality-based purchasing, is classified as an incentive payment program

Narrow application, limited to hospital-based programs, but solicits comments on expansion of the program.
• CMS states that non-abusive programs must incorporate: transparency, quality controls and safeguards against payments for referrals.
• Principal concerns reflect those mentioned in OIG Advisory Opinions: stinting; cherry picking; quicker-sicker discharge; and steering.
• Proposed rule specifies: program design; product standardization; payment limitations; duration; patient notice; independent review requirements; and other safeguards that are consistent with previous OIG Advisory Opinions.