

## BI-PARTISAN BUDGET ACT AFFECTS NEW PROVIDER-BASED FACILITIES

On October 30, 2015 Congress passed the Bi-Partisan Budget Act of 2015 (hereinafter the “Act”). Section 603 of the Act is of particular relevance to hospitals and health care providers because of its potential to chill the current wave of hospital acquisitions of physician practice groups.

Under Section 603 of the Act, the development of any new off-campus hospital outpatient departments is effectively shut down. These new departments will not be eligible for provider-based reimbursement as of January 1, 2017. The Act does provide for a grandfather clause to this limitation. This clause allows for provider-based reimbursement to continue for existing off-campus hospital outpatient departments that were billing Medicare as of November 2, 2015 and for dedicated emergency departments.

It is important to note that there is a discrepancy between the government published summary of the Act and the text of the Act. The government published summary of the Act generally states that an off-campus hospital outpatient department that executed a provider agreement after the date of enactment will not be eligible for Outpatient Prospective Payment System (“OPPS”) reimbursement. But, this text not only differs from the legislative text, which never references a provider agreement; it is also inconsistent with current Centers for Medicare and Medicaid Services (“CMS”) rules and regulations. Current regulations from CMS do not require hospitals to enter into new provider agreements for off-campus hospital departments. Therefore, it is hard to reconcile the summary of the Act with the text of the Act itself.

This ambiguity in interpreting the Act may result in clarification from CMS when it promulgates regulations to implement Section 603 during the annual OPPS rulemaking process. CMS’s promulgation of regulations carries risks for any new endeavors hospitals are planning.

For example, regulations from CMS could attempt to narrow the scope of the grandfather clause by redefining what constitutes a “department” to exclude the expansion of any services that were not provided at an established off-campus hospital outpatient department as of November 2, 2015. Currently, the definition of “department of a provider” in the provider-based regulations

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appears to refer to the word department as being synonymous with the word facility; but new regulations from CMS could narrow this definition affecting hospital projects that want to expand the scope and type of services offered at their established off-campus hospital outpatient departments. Additionally, current hospital construction projects for off-campus hospital outpatient departments will also be affected by any CMS regulations. The interpretation of the grandfather clause will have a direct impact on these projects' economic viability.

Many hospital acquisitions, construction and expansion projects are dependent on receiving provider-based reimbursement to make financial sense. The difference in reimbursement a hospital receives for provider-based departments drives many of these types of deals. Therefore, the implication of Section 603 may be that it acts as a deterrent to future deals, shifting the health care landscape. Overall, this may be just the beginning of an effort to reduce hospitals' advantage in reimbursement for certain types of services as Medicare reimbursement shifts to site-neutral payments. Hospitals must be aware of these changes and be prepared that any new off-campus hospital outpatient department services run the risk of not receiving provider-based reimbursement after December 31, 2016.

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