



Center for Medicaid and State Operations/Survey & Certification Group

Ref: S&C-09-32

DATE: April 17, 2009

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Expansion of Moratorium Exception on Classification of Long-Term Care Hospitals (LTCH) or Satellites/Increase in Certified LTCH Beds

Memorandum Summary

- **Expansion of Exceptions to LTCH Moratorium:** The American Recovery and Reinvestment Act (ARRA), enacted on February 17, 2009, expands the exceptions to the three-year moratorium on LTCH or LTCH satellites previously enacted in the Medicare, Medicaid, and SCHIP Extension Act (MMSEA) (Pub. L. 110-173).
- **Nature of New Exception:** The new exception permits an increase in the number of beds in an existing LTCH or LTCH satellite when the bed increase was authorized under a Certificate of Need (CON) issued within a specified timeframe. The Centers for Medicare & Medicaid Services (CMS) is amending the guidance issued in S&C-08-26 to reflect this statutory change.
- **RO Determinations:** CMS Regional Offices (RO) will determine whether a facility qualifies for the new exception to the moratorium.

Hospitals seeking to be excluded from the Medicare Hospital Inpatient Prospective Payment System for the first time as an LTCH, under the existing regulations at 42 CFR 412.23(e)(1) and (e)(2)(i), which implement section 1886(d)(1)(B)(iv)(I) of the Social Security Act, must have a provider agreement with Medicare and must have an average Medicare inpatient length of stay (LOS) greater than 25 days. The Medicare Administrative Contractor (MAC) or legacy Fiscal Intermediary (FI), as applicable, verifies whether the hospital meets the average LOS requirement.

Section 114(d) of the Medicare, Medicaid, and SCHIP Extension Act (MMSEA) (Pub. L. 110-173), enacted December 29, 2007, established a three-year moratorium on the designation of new LTCHs or LTCH satellites, and on an increase of beds in an LTCH. The moratorium began on December 29, 2007 and ends on December 28, 2010.

Sections 114(d)(2) and (d)(3) of MMSEA provide for exceptions to the moratorium imposed by section 114(d)(1) of MMSEA. S&C-08-26, issued June 13, 2008, provided detailed guidance on the process for evaluating applications for an exception to the moratorium. We are now revising that guidance to reflect the changes enacted through ARRA.

It is important to note that there are two categories of exceptions:

1. Increase in LTCH Beds. Section 114(d)(3)(A) of MMSEA, as amended by the ARRA, provides 2 exceptions to the moratorium.
2. Establishment and Classification of an LTCH or LTCH Satellite. Three exceptions to the moratorium are specified in section 114(d)(2) of MMSEA, discussed below.

It is important to note that the exceptions in these two categories are mutually exclusive, i.e., the permitted exceptions for establishing an LTCH cannot be used as a basis to increase LTCH beds. Similarly, the permitted exceptions to the moratorium on increases in beds at existing LTCHs or LTCH satellite facilities cannot be used to establish an LTCH or LTCH satellite.

1. Increase in the Number of LTCH Beds – ARRA modification

In accordance with Section 114(d)(1)(B) of MMSEA, an existing LTCH or LTCH satellite facility may not increase the number of beds in excess of the number of Medicare-certified beds at the hospital as of December 29, 2007.

- Originally, Section 114(d)(3) provided one exception to the bed increase moratorium if an existing LTCH or LTCH satellite facility is “located in a State where there is only one other long-term care hospital; and requests an increase in beds following the closure or the decrease in the number of beds of another long-term care hospital in the State.” There is further statutory language about the intersection of this exception with “grandfathered” LTCH Hospitals within Hospitals (HwHs) as specified at 42 CFR 412.22(f) and LTCH satellite facilities as specified at §412.22(h)(3).

It is likely that there are a very limited number of cases that might meet the exception criteria for an increase in the number of certified LTCH beds. ***As previously instructed, because of the specificity of this provision, ROs that receive a request for a bed increase from an LTCH in a State with either only one certified LTCH or more than two certified LTCHs are to deny the request, unless the LTCH is eligible under the new exception discussed below.*** (Note that LTCH satellites are not considered separate LTCHs.) ROs that receive a request for a bed increase in a State that has only two certified LTCHs are to consult with David Eddinger at the CMS Central Office on the evaluation of the request.

- ARRA amended Section 114(d)(3) to also allow an increase in LTCH beds, “...if the hospital or facility obtained a certificate of need for an increase in beds that is in a State for which such certificate of need is required and that was issued on or after April 1, 2005, and before December 29, 2007...”

LTCHs that seek to take advantage of this exception should contact their RO directly to apply for a bed increase, providing a copy of the pertinent CON. The RO will consult with the State Survey Agency (SA), which is expected to verify whether the State issued the applicant LTCH hospital a CON that permits an increase beyond the current number of Medicare-certified LTCH beds; and that the CON was issued on or after April 1, 2005 and before December 29, 2007. The RO must share information on applications it has approved for exceptions to the bed increase moratorium with the MAC/legacy FI.

If a State issues a CON permitting an increase beyond the current number of Medicare-certified LTCH beds in the above timeframe, but that CON is subsequently modified, revised, amended, or otherwise altered by the State, the SA must advise the RO whether, under the laws of that State, the modified, revised, amended, or otherwise altered CON is considered to be the “same” CON as the one issued on or after April 1, 2005 and before December 29, 2007. The SA must provide the RO with supporting documentation providing the rationale for its determination. The CMS RO will review and evaluate this documentation and determine whether the CON qualifies for the purposes of the bed increase exception.

2. Establishment and Classification of an LTCH or LTCH Satellite

The instructions for processing this type of exception have not changed, but are provided here for ease of reference.

In accordance with Section 114(d)(2), the moratorium on the *establishment* and classification of an LTCH or LTCH satellite facility does not apply to a LTCH that, as of December 29, 2007, met one of the following three exceptions:

- The LTCH began “its qualifying period for payment as a long-term care hospital under 42 CFR 412.23(e) of title 42, Code of Federal regulations, on or before the date of enactment of this Act” (Section 114(d)(2)(A)). This exception applies to an existing hospital that began its qualifying period for LTCH status on or before December 29, 2007. To qualify for this exception to the moratorium, the LOS data used to demonstrate that the hospital has met the average LOS requirement at 42 CFR 412.23 must be from its cost reporting period that began on or before December 29, 2007. Note that an LTCH satellite may not qualify for this exception, since there is no “qualifying period” for the establishment of a satellite facility for payment as an LTCH under §412.23(e).
- As of December 29, 2007 the LTCH has a binding written agreement with an outside, unrelated party for the actual construction, renovation, lease, or demolition for an LTCH and has expended, prior to December 29, 2007 at least 10 percent of the estimated cost of the project or, if less, \$2,500,000 (Section 114(d)(2)(B)). This exception applies in the following three circumstances:
 - (1) as of December 29, 2007, an existing hospital (that is, one that was certified as a hospital as of December 29, 2007) that will become an LTCH has a binding written agreement with an outside unrelated party for the actual construction, renovation, lease, or demolition for converting the hospital to an LTCH and has expended, before

that date, at least 10 percent of the estimated cost of the project or \$2,500,000, whichever amount is less;

(2) as of December 29, 2007, an entity that will develop a hospital that will ultimately become an LTCH has a binding written agreement with an outside unrelated party for the actual construction, renovation, lease, or demolition of a hospital and that entity has expended, before that date, at least 10 percent of the estimated cost of the project or \$2,500,000, whichever amount is less; or

(3) an existing LTCH, as of December 29, 2007, has a binding written agreement with an outside unrelated party for the actual construction, renovation, lease or demolition of a new LTCH satellite facility and the LTCH has expended before December 29, 2007 at least 10 percent of the estimated cost of the project or \$2,500,000, whichever amount is less.

- The LTCH has obtained an approved CON in a State where one is required on or before December 29, 2007 (Section 114(d)(2)(C)). This exception applies to a hospital or entity that was actively engaged in developing an LTCH, as evidenced by the fact that either:
 1. an entity that wanted to create an LTCH, but did not exist as a hospital as of December 29, 2007, had obtained an approved CON for a hospital or LTCH, as applicable, on or before December 29, 2007. Depending on the State's CON law, there may or may not be a CON that is specifically for a long-term acute care hospital, as opposed to one for a general or short-term acute care hospital. If there is a CON that is specifically for an LTCH in the entity's State, then the entity must have obtained an approved CON that is specifically for creation of an LTCH. If the State does not require a specific LTCH CON, then it is sufficient for the entity to have obtained an approved hospital CON on or before December 29, 2007, as long as it did not exist as a hospital by that date.

or

2. a hospital that did exist as a hospital on December 29, 2007, had obtained an approved CON on or before December 29, 2007 to convert the hospital into a new LTCH, or an existing LTCH had obtained an approved CON by that date to create a satellite. This exception does not apply to an existing hospital that obtained an approved CON for a hospital type other than an LTCH on or before December 29, 2007. The fact that a hospital may have had a CON issued to it years before December 29, 2007 to operate a hospital would not be a reason to grant it an exception, unless that CON was specifically for an LTCH. This exception is not available to any existing hospital in a State that does not require a specific CON for an LTCH type of hospital.

The applicable MAC/FI has the responsibility for recommending to the RO whether a provider qualifies for an exception, based either on having begun its qualifying period prior to December 29, 2007, or on having requisite binding agreements and evidence of expenditures prior to that date. With respect to the CON exception, the SA is expected to verify to the RO whether the State issued the applicant hospital a CON that meets the criteria described above. The RO will share this information with the MAC/FI.

LTCH Classification Effective Date

For those LTCH applications that are found to meet the exception requirements, as well as all other requirements for LTCH classification, the effective date of the provider's LTCH classification will be the date when all Medicare requirements were met. The RO determines when all Medicare requirements are met. For example, if the RO determines that an applicant qualifies for the moratorium exception because its qualifying period started before December 29, 2007, and that, as of February 1, 2008, the applicant had satisfied all Medicare requirements for LTCH classification, then the effective date of its LTCH classification would be February 1, 2008, even though the determination is made after that date.

Advance Determinations for CON Exceptions & Projects Under Development

Providers who believe that they will qualify for an exception on the basis of having a CON, or on the basis of having a binding agreement with an outside party and having made the requisite minimum expenditures, may seek an advance determination from CMS that the project qualifies for an exception to the moratorium well before the time when they are able to submit a CMS-855A application to participate in Medicare as a hospital or to be reclassified as an LTCH. Providers may need such determinations in order to qualify for continued financing of the project. In such cases the provider must submit all the required documentation supporting the project's eligibility for the moratorium exception to the MAC/FI, which will inform the RO of the provider's submission.

- The RO will review and evaluate the CON documentation as indicated above.
- The MAC/FI will review and evaluate the documentation concerning binding agreements/actual expenditures for projects under development, and make a recommendation to the RO on whether the exception criteria have been met. The RO will communicate the results of the MAC/FI review to the provider as described below.
- The results of the CON or project under development documentation review will be communicated by the RO to the provider. If it is determined as a result of this review that the project qualifies for one of the two exceptions, the RO letter to the provider will indicate that the project meets the criteria for an exception to the LTCH moratorium, and must also state that this determination of meeting the moratorium exception criteria does not constitute a representation that the project will be approved for participation in Medicare as an LTCH. There are many other criteria that the project would have to meet for LTCH certification, such as satisfactory completion of the application process, certification as a hospital, demonstration of the required LOS, etc., which can only be evaluated by CMS after the provider submits its complete application to participate in Medicare.

- When/if the provider eventually submits its complete application to CMS, it must include the advance determination letter. It will not be necessary for the MAC/FI and RO to conduct a new review of its eligibility for an exception to the moratorium.

Tracking LTCH Moratorium Exception Approvals and Advance Determinations

ROs must submit a copy of all letters approving the establishment of a new LTCH or LTCH satellite, or approving an increase in the number of LTCH beds during the three-year moratorium, as well as all letters providing an advance determination of meeting one of the exception requirements to:

CMS
Center for Medicare Management
Division of Acute Care
Mail-stop C4-07-07
7500 Security Boulevard
Baltimore, MD 21244

Questions: If you have questions about the LTCH moratorium exception requirements, please contact Judith Richter via e-mail at Judith.richter@cms.hhs.gov. Survey and Certification operational questions should be directed to David Eddinger via e-mail at david.eddinger@cms.hhs.gov

Effective Date: This guidance is effective immediately. Please ensure that all certification personnel are appropriately informed as to using this guidance within 30 days of this memorandum.

Training: The information contained in this letter should be shared with all survey and certification staff, their managers, and the State/RO training coordinators.

/s/

Thomas E. Hamilton

cc: Survey and Certification Regional Office Management