



**Center for Clinical Standards and Quality/Survey & Certification Group**

**Ref: S&C: 15-03 Hospitals**

**DATE:** October 10, 2014

**TO:** State Survey Agency Directors

**FROM:** Director  
Survey and Certification Group

**SUBJECT:** Implementing the New Moratorium on Establishment of New Long-Term Care Hospitals (LTCH) or New LTCH Satellites, or Increases in LTCH Beds

**Memorandum Summary**

- ***New LTCH Moratorium:*** A new statutory moratorium prohibits, with certain exceptions, the establishment of new LTCHs or new LTCH satellites of existing LTCHs. Additionally, the moratorium prohibits, with no exceptions, an increase in the number of an LTCH's certified beds. The moratorium is effective April 1, 2014 to September 30, 2017.
- ***LTCH Determinations:*** Centers for Medicare & Medicaid Services (CMS) Regional Offices (ROs) will determine whether a hospital seeking to convert to LTCH status, or an LTCH seeking to add a satellite, qualifies for an exception to the moratorium.

**Background**

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, hospitals seeking to be excluded from the Medicare Hospital Inpatient Prospective Payment System for the first time as an LTCH 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) verifies whether the hospital meets the average LOS requirement.

As we noted in S&C 14-26 issued on May 9, 2014, section 1206(b) of the Pathways to SGR Reform Act of 2013 (Pub. L. 113-67) was enacted December 26, 2013 and was later amended by section 112(b) of the Protecting Access to Medicare Act of 2014 (Pub. L. 113-93), enacted April 1, 2014. The statute provides for a new moratorium on the establishment of new Medicare-participating LTCHs, the addition of LTCH satellite facilities to an existing LTCH, and any increase in the number of certified beds in existing LTCHs and LTCH satellites, "for the period beginning April 1, 2014 and ending September 30, 2017." The statute also provides for certain exceptions to the moratorium on new LTCHs and additional LTCH satellite facilities. A prior

moratorium was in effect from December 29, 2007 through December 28, 2012. The primary difference between the “expired” moratoria and the “new” moratorium is that, while the “expired moratoria” provided for specific exceptions to both the moratorium on the establishment of new LTCHs and LTCH satellite facilities and on increases in the number of beds in existing LTCHs and LTCH satellite facilities, the “new” moratorium only provides exceptions to the moratorium on the establishment of new LTCHs and LTCH satellite facilities. However, no exceptions are provided for increases in the number of certified beds in existing LTCHs and LTCH satellites. (For a detailed description of the “expired” moratoria provisions (including the applicable exceptions) that were in effect from December 29, 2007 through December 28, 2012, see the May 22, 2008 Interim Final Rule with Comment Period (73 FR 29705 through 29708) as well as S&C-8-26, June 13, 2008; S&C-9-32, April 17, 2009; S&C 10-25, July 27, 2010; and S&C 13-08, January 25, 2013).

We indicated in S&C 14-26 that CMS had proposed regulations implementing the new moratorium requirements, including the exceptions to the moratorium allowed under the statute. We also stated that CMS ROs could not make any determinations as to whether a prospective new LTCH or new LTCH satellite could be approved until after the final regulations were adopted and further guidance was released. The LTCH moratorium regulations at 42 CFR 412.23(e)(6) – (7) were adopted as part of the *FY 2015 Inpatient Prospective Payment System and LTCH Prospective Payment System, Etc.* final rule (79 *Federal Register* 49854, August 22, 2014). This final rule was effective on October 1, 2014.

In this memorandum we are providing guidance on the implementation of the new moratorium. The guidance is effective October 1, 2014, to coincide with the effective date of the final regulations. However, this does not mean that the effective date for a new LTCH may not be prior to October 1, 2014. See the discussion further below for determining the effective date for LTCH classification.

#### **LTCHs Not Impacted by the Moratorium:**

- A hospital that met the regulatory criteria for approval as an LTCH prior to April 1, 2014, as evidenced by the RO having received a written recommendation dated prior to April 1, 2014 from the applicable MAC, in which the MAC states that the hospital meets the LTCH length of stay criteria. This is the case even if the RO did not process the hospital’s conversion to LTCH status and issue a tie-in notice (CMS Form 2007) to the MAC until after April 1, 2014.
- An LTCH satellite that was fully operational and for which the CMS RO issued a tie-in notice to the MAC approving the LTCH prior to April 1, 2014.
- Any increase in the number of certified beds in an LTCH that was received by CMS before April 1, 2014.

#### **Exceptions to the Moratorium for the Establishment of a New LTCH or LTCH Satellite**

To qualify for an exception under the moratorium to establish a new LTCH or LTCH satellite facility between April 1, 2014, and September 30, 2017, a hospital must meet one of the following three exceptions:

- I. For a new LTCH, an existing hospital (that is, one that was certified for Medicare participation as a hospital prior to April 1, 2014) must have begun “its qualifying period for payment as a long-term care hospital under 42 CFR 412.23(e) . . . prior to the date of enactment of this Act” (Section 112(b) of Pub. L. 113-93). This exception applies to a hospital that already participates in Medicare and which began its qualifying period for LTCH status prior to April 1, 2014. 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 the hospital’s cost reporting period that began prior to April 1, 2014. 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).

*or*

- II. Prior to April 1, 2014 the LTCH has a binding written agreement with an outside, unrelated party for the actual construction, renovation, lease, or demolition for an LTCH or LTCH satellite, as applicable, and has expended, prior to April 1, 2014, at least 10 percent of the estimated cost of the project or, \$2,500,000, whichever amount is less. (Section 114(d)(2)(B) of Pub. L. 113-93) This exception applies in any one of the following three circumstances:
  1. Prior to April 1, 2014, an existing hospital (that is, one that was certified for Medicare participation as a hospital prior to April 1, 2014) seeking to 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; or
  2. Prior to April 1, 2014, an entity that is developing a hospital that will ultimately seek to 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, prior to April 1, 2014, 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 prior to April 1, 2014 at least 10 percent of the estimated cost of the project or \$2,500,000, whichever amount is less.

*or*

- III. An entity has obtained prior to April 1, 2014 an approved certificate of need (CON) in a State where one is required. 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 is seeking to create an LTCH, but which was not an existing hospital (that is, one that was certified for Medicare participation as a hospital prior to April 1,

2014), had obtained an approved CON for a hospital or LTCH, as applicable, prior to April 1, 2014. 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 the State's CON law provides for a CON that is specifically for an LTCH, then the entity must have obtained an approved CON that is specifically for creation of an LTCH. If the State's CON law does not provide for a specific LTCH CON, then it is sufficient for the entity to have obtained an approved hospital CON prior to April 1, 2014, so long as it was not on that date an existing hospital (that is, one that was certified for Medicare participation as a hospital prior to April 1, 2014); or

2. An existing hospital (that is, one that was certified for Medicare participation as a hospital prior to April 1, 2014) had obtained an approved CON prior to April 1, 2014 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 prior to April 1, 2014. The fact that an existing hospital may have also had a CON issued to it prior to April 1, 2014 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 provide for a specific CON for an LTCH type of hospital.

The applicable MAC 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 April 1, 2014, 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.

### **Bed Size of New LTCH Satellites that Meet One of the Exceptions to the Moratorium**

The statute prohibits, with no exceptions, an increase in the number of an LTCH's Medicare-certified beds during the moratorium period. Therefore, a LTCH that establishes a new satellite, based upon meeting the criteria for an exception to the moratorium, must reduce beds elsewhere in the LTCH in order to have beds in the new satellite location. Overall, the LTCH and all satellites must have no more Medicare-certified beds than it did on March 31, 2014.

### **Advance Determinations for CON Exceptions & Projects Under Development**

Entities that believe 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 preliminary determination from CMS that the project qualifies for an exception to the moratorium before they submit a Form CMS-855A application to participate in Medicare as a hospital or to be reclassified as an LTCH. The Form CMS-855A may not be submitted before a hospital or LTCH satellite is operational and actually seeing patients, or, in the case of a new LTCH, before the hospital has completed its qualifying period. CMS is aware that an entity may need such an advance preliminary determination in

order to qualify for continued financing of the project. In such cases, the entity must submit all the required documentation supporting the project's eligibility for an exception to the moratorium to the MAC, which will inform the RO of the provider's submission.

- The MAC 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 review to the provider as described below.
- The RO will review and evaluate the CON documentation, with the assistance of the SA, as indicated above.

The results of the review of the documentation to meet an exception will be communicated by the RO to the entity seeking the advance determination. If it is determined as a result of this preliminary review that the project qualifies for one of the two exceptions, the RO letter to the entity 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 or LTCH satellite. 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 Form CMS-855A application to enroll in Medicare, along with all other documentation normally required for Medicare certification.

When the entity eventually submits its complete enrollment and certification application to CMS, it must include the advance preliminary determination letter. In such cases, it will not be necessary at that time for the MAC and RO to conduct a new review of the hospital's eligibility for an exception to the moratorium.

### **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 for a new LTCH is eligible for an exception to the moratorium because its LTCH qualifying period started prior to April 1, 2014, and further determines that, as of August 1, 2014, the applicant had satisfied all Medicare requirements for LTCH classification, then the effective date of its LTCH classification would be August 1, 2014, even though the determination is made after that date.

### **Tracking LTCH Moratorium Exception Approvals and Advance Determinations**

The ROs must submit a copy of all letters approving the establishment of a new LTCH or LTCH satellite during the moratorium, as well as all letters providing an advance determination of meeting one of the exception requirements, to Emily Lipkin at the address below or via email at [emily.lipkin@cms.hhs.gov](mailto:emily.lipkin@cms.hhs.gov).

Centers for Medicare & Medicaid Services  
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 Dan Schroder via e-mail at [daniel.schroder@cms.hhs.gov](mailto:daniel.schroder@cms.hhs.gov). Survey and Certification operational questions should be directed to [hospitalscg@cms.hhs.gov](mailto:hospitalscg@cms.hhs.gov).

**Effective Date:** This guidance is effective October 1, 2014. 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