United States Senate Committee on Finance

For Immediate Release
Friday, July 28, 2006

Grassley, Baucus seek valid survey to underpin government plan for specialty hospitals

WASHINGTON — Sens. Chuck Grassley and Max Baucus said today that Medicare officials have made some missteps in their study of specialty hospitals and need to take more time to collect information about how specialty hospitals really affect local community health care delivery.

Medicare program officials have been conducting a survey of both specialty and "competing" hospitals as part of their effort to meet a requirement set by Congress to develop a plan to address physician investment in specialty hospitals. Grassley and Baucus said the trouble is some of the hospitals selected for this survey to represent hospitals that compete with specialty hospitals are not even located in a state where specialty hospitals are allowed to operate. In turn, some traditional hospitals that compete directly with specialty hospitals have been left out of the survey all together.

The Centers for Medicare and Medicaid Services is required by the *Deficit Reduction Act of 2005* to deliver its plan on specialty hospitals by August 8, 2006. However, the law allows an extension of that deadline and continuation of the moratorium on approving new specialty hospitals for two months.

"Medicare officials ought to take that extra time to make sure the plan they will present is credible, defensible and precise," Grassley said. "If the survey's no good, or it's skewed in any way, then it's hard to argue that the resulting plan will be any good. Congress requested this plan to better understand the financial workings of these facilities, as well as the extent to which they provide care to Medicaid and uninsured patients. The impact this plan will have on the long term sustainability of Medicare underscores the need to get this right in a very clear-cut way."

"The issue of specialty hospitals continues to concern me. CMS has been tasked with reviewing the situation and issuing a report, but a report based on bad data would be worse than no report at all," said Baucus. ""CMS should delay issuing this particular report, rather than risk guiding policy in the wrong direction with erroneous information. We need to make decisions about the expenditure of Medicare dollars based on the best data possible."

The *Deficit Reduction Act of 2005*, which the President signed into law in February, specifically requires the Department of Health and Human Services to develop a strategic and implementing plan to address specific issues concerning physician investment in specialty hospitals as well as the extent to which these hospitals provide care to Medicaid, underinsured

and uninsured patients.

Grassley is Chairman and Baucus is Ranking Member of the Senate Committee on Finance. The committee held a hearing in May of this year to examine the conflicts and shortcomings of specialty hospitals. The senators raised questions about the survey during this hearing, as well, which have not yet been addressed by Medicare officials.

Last year, Grassley and Baucus introduced the *Hospital Fair Competition Act of 2005* (S.1002) to rein in the growth of physician-owned specialty hospitals. The legislation that was included in the *Deficit Reduction Act of 2005* was based on findings of a March 2005 hearing of the Finance Committee and a series of government reports showing that specialty hospitals treat patients who are less sick and hence more profitable, do not have lower costs than community hospitals, and treat fewer Medicaid patients.

The Senate Committee on Finance is responsible for Medicare legislation and oversight. The text of the letter sent today by Grassley and Baucus to the Administrator of the Centers for Medicare and Medicaid Services follows here.

July 28, 2006

The Honorable Mark McClellan, MD, Ph.D.
Administrator
Centers for Medicare and Medicaid Services
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Administrator McClellan:

The United States Senate Committee on Finance (Committee) has exclusive jurisdiction over, among other things, the Medicare and Medicaid programs. Accordingly, we have a responsibility to the more than 80 million Americans who receive healthcare and services from these programs. As Chairman and Ranking Member of the Committee, we write today regarding the status of the strategic and implementing Plan for specialty hospitals the Centers for Medicare & Medicaid Services (CMS) is developing, as required by the Deficit Reduction Act of 2005 (DRA).

Section 5006 of the DRA requires the Secretary of Health and Human Services (HHS) to develop a strategic and implementing plan to address physician investment in specialty hospitals and to issue both an interim and final report on this plan. The Secretary delegated authority to address these statutory requirements to CMS. The Agency delivered the interim report to Congress on May 9, 2006, and noted that it required more information before completing the final report to Congress due on August 8, 2006.

In order to obtain the necessary information to complete the strategic and implementing

plan and to issue the final report, CMS conducted a survey of "all physician-owned limited service hospitals and about 300 "competing" community hospitals". It is our understanding that the survey instrument was sent on May 8, 2006 to 130 specialty hospitals and 285 "competitor," community hospitals.

We have learned of significant shortcomings concerning the survey, which may adversely affect the integrity of the information that CMS will obtain. Specifically, we have received numerous reports that inappropriate hospitals are being surveyed, while appropriate hospitals are not being surveyed. At least five of the "competitor" hospitals that CMS surveyed are located in a state with certificate of need (CON) laws prohibiting the operation of specialty hospitals. Because there are no specialty hospitals in these states, these hospitals cannot be considered true competitor hospitals. Moreover, numerous hospitals that should be considered "competitor" hospitals were not surveyed. As a result, these hospitals obtained and responded to the CMS survey instrument on their own initiative.

These facts raise serious questions as to whether CMS will obtain accurate information from this survey. As you know, the strategic and implementing plan will be used to guide the policy discussion on the issue of specialty hospitals. Accordingly, it is of utmost importance that the plan be based on accurate information. By excluding hospitals that are directly impacted by specialty hospitals and are, as such, competitors, and including hospitals that are not competitors to specialty hospitals, CMS will be developing a strategic and implementing plan that is based on inaccurate information.

Therefore, we request that CMS take the necessary steps to ensure that the appropriate hospitals have been surveyed. In light of this shortfall, CMS should reexamine the information received and determine whether or not additional information or time is needed. Given that the DRA provides a limited extension of the moratorium on enrollment in the event that the final report is not issued on time, we strongly recommend that you take advantage of this additional time to ensure that the strategic and implementing plan is based on adequate and accurate information.

Finally, as we have not yet received responses to our questions for the record which were sent over a month ago, we have attached a copy of the questions that were submitted to your office following the May 17, 2006, hearing entitled, "Physician-Owned Specialty Hospitals: Profits before Patients?" One question from Senator Grassley specifically dealt with the survey instrument at issue and requested a detailed response regarding what facilities were selected and how they were chosen. These questions were sent on June 7, 2006 and remain outstanding. Had we received timely responses to these important questions, we could have pointed out the deficiencies in the survey we note in this letter earlier.

We thank you in advance for your cooperation and request that your staff provide a point of contact for this matter no later than August 4, 2006. Additionally, we request your written response to our questions on this matter, and from the hearing of May 17, 2006, not later than August 11, 2006. In complying with this request for information, please respond to each enumerated question by repeating the questions, followed by CMS' response.

Sincerely,

Charles E. Grassley
Chairman

Max Baucus
Ranking Member

Enclosure

cc: The Honorable Michael O. Leavitt
United States Senate - Committee on Finance
Physician-Owned Specialty Hospitals: Profits before Patients?

Hearing Follow-up Questions from Senator Grassley

The Honorable Mark McClellan
Administrator, Centers for Medicare and Medicaid Services (CMS)

(1) CMS Enforcement of MMA Moratorium on Physician Self-Referrals

In 2003, Congress imposed a moratorium on Medicare and Medicaid payments for patients referred by an investing physician to a specialty hospital that the referring physician had an investment interest in. The purpose of this moratorium was to slow the increased growth in physician-owned facilities by limiting federal reimbursement, however it now appears that 43 new specialty hospitals opened following the 2003 Congressional moratorium.

In your May 16, 2006 response to an inquiry by Senator Baucus and I, you noted that "CMS is not aware of any physician-owned specialty hospitals (other than Physicians [sic] Hospital) that were subject to the MMA moratorium that have received provider agreements during the moratorium without requesting an advisory opinion." Accordingly, please provide the date of Medicare certification for the following facilities, along with the date the advisory opinion was requested and the date and outcome of each advisory opinion provided to the hospitals by CMS:

(1) Irving Coppell Surgical Hospital - Irving, TX
(2) New Albany Surgical Hospital - New Albany, OH
(3) Kansas Spine Hospital - Wichita, KS
(4) Physicians' Surgical Hospital at Quail Center - Amarillo, TX
(5) Lubbock Heart Hospital - Lubbock, TX
(6) Texans Heart Hospital of San Antonio - San Antonio, TX
(7) Carson Valley Medical Center - Gardnerville, NV
(8) Wisconsin Heart Hospital, LLC - Wauwatosa, WI
(9) Providence Hospital - Laredo, TX
(10) Edgewood Surgical Hospital - Transfer, PA

(11) Ouachita Surgical Hospital - West Monroe, LA
(12) Saint Francis Heart (Tulsa) - Tulsa, OK
(13) Nebraska Orthopedic Hospital - Omaha, NE
(14) Medical Centre Surgical Hospital - Fort Worth, TX
(15) Trophy Club Medical - Trophy Club, TX
(16) Mountain River Birthing & Surgical Center - Blackfoot, ID
(17) Arizona Orthopedic Surgical Hospital - Chandler, AZ
(18) Butler County Surgery Center - Hamilton, OH
(19) Neuromed Center Hospital - Baton Rouge, LA
(20) Southwest Surgical Hospital - Hurst, TX
(21) University Pointe Surgical Hospital - West Chester, OH
(22) Texas Institute for Surgery at Presbyterian - Dallas, TX
(23) Southlake Specialty Hospital - Southlake, TX
(24) Lafayette General Surgical Hospital - Lafayette, LA
(25) Animas Surgical Hospital - Durango, CO
(26) Fairway Medical Center - Covington, LA
(27) Presbyterian Plano Center for Diagnostics & Surgery - Plano, TX
(28) Indiana Orthopedic Hospital - Indianapolis, IN
(29) Hospital for Special Surgery - Oklahoma City, OK
(30) North Texas Hospital Rocky Mountain - Denton, TX
(31) Miracle Mile Medical Center - Los Angeles, CA
(32) Pine Creek Medical Center - Dallas, TX
(33) Thousand Oaks Surgical Hospital - Thousand Oaks, CA

Additionally,

(2) CMS Enforcement of Specialty Hospital Suspension on Enrollment:

In addition to the 33 specialty hospitals listed above, it appear that 9 additional specialty hospitals opened following CMS's administrative "suspension on enrollment" of new specialty hospitals announced on June 9, 2005. Accordingly, please provide the date of Medicare certification and the amount of money Medicare and Medicaid have reimbursed the following specialty hospitals since their respective certification dates:

(1) Greater Baton Rouge Surgical Hospital - Baton Rouge, LA
(2) Sierra Surgery & Imaging - Carson City, NV
(3) McBride Clinic Orthopedic Hospital - Oklahoma City, OK
(4) Living Hope New Boston Medical Center - New Boston, TX
(5) West Texas Hospital - Abilene, TX
(6) Kingwood Specialty - Kingwood, TX
(7) Hospital at Westlake Medical Center - Austin, TX
(8) Beaumont Bone & Joint Institute - Beaumont, TX
(9) Surgical Arts Center of Clear Lake, Webster, TX

(3) CMS Enforcement of MMA Moratorium on Physician Self-Referrals:

In your testimony you noted that CMS has taken enforcement action against two specialty hospitals for violating the Congressional moratorium outlined in Section 507 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA). The first, Physicians' Hospital in Portland, Oregon was brought to your attention by the Senate Finance Committee, the second, Southlake Specialty Hospital in Southlake, Texas, was brought to your attention after it requested an advisory opinion.

Absent Congressional investigation, self-reporting, or application for an advisory opinion, what pro-active enforcement efforts does CMS plan on conducting following evidence that facilities may have violated section 507 of the MMA?

(4) CMS Interim Report on Specialty Hospitals and EMTALA:

On May 9, 2006, CMS issued an interim report on specialty hospitals as required by the Deficit Reduction Act of 2005 (DRA). In the interim report CMS addresses the issue of EMTALA obligations and the impact their relationship to specialty hospitals. CMS states that in the proposed Inpatient Prospective Payment System (IPPS) rule, which was recently released, includes a provision that would require all hospitals (including specialty hospitals) with specialized capabilities, to accept appropriate transfers of unstable patients covered under EMTALA, without regard to whether the hospital has an emergency department. Given that this change in the IPPS rule would allow transfers of unstable patients to facilities absent an emergency department, could you please elaborate on what qualifies as "specialized capabilities" under CMS's new IPPS rule? Further, would specialty hospitals and other facilities with "specialized capabilities" be required to remain open or on call 24 hours a day 7 days a week?

(5) CMS Final Strategic and Implementing Plan on Specialty Hospitals:

The final "strategic and implementing plan" regarding specialty hospitals is due from CMS to Congress in less than three months. In your testimony, as well as in private conversations, you have made a personal commitment to me that the final strategic and implementing plan will include meaningful disclosure requirements, in addition to regulations aimed at ensuring bona fide investments, and true enforcement efforts by CMS to curb shady backdoor deals. I expect that you will stay true to your word and produce a final plan implementing real reforms and not issue just another report.

Following the hearing I remain concerned regarding a statement in the interim report that restricts the Office of the Inspector General (OIG) to a consulting role. More specifically, the report states that the OIG cannot play a direct role in developing the plan, but will be available to CMS for consultation. Could you please explain the consulting role that the OIG is playing in developing the strategic and implementing plan?

(6) CMS's Survey of Community and Specialty Hospitals for Developing the Strategic and Implementing Plan:

The interim report noted that CMS currently did not have enough information on physician

investment interests and provision of care to low income and charity patients. Accordingly, CMS sent a survey to 130 specialty hospitals and 270 general acute care hospitals. Please provide a list of the 130 specialty hospitals that received the survey along with a list of the 270 general acute care hospitals that also received the survey. Additionally, please provide a detailed response as to how CMS selected the relevant sample of hospitals.

(7) Medicaid Error Rate:

The Centers for Medicare and Medicaid Services (CMS) have jurisdiction over the Medicaid program which is jointly administered by the various state governments in addition to the federal government. Last June, the Committee held a hearing entitled "Medicaid Fraud, Waste and Abuse: Threatening the Healthcare Safety Net," which addressed the vulnerabilities that exist in the Medicaid program. At that hearing, a representative from CMS stated that there was no way to calculate an overall error rate for the Medicaid program and, subsequently, no way to accurately determine how much money is lost to fraud, waste, or abuse in the Medicaid program.

At a recent hearing before the Senate Homeland Security and Government Affairs Committee, Subcommittee on Federal Financial Management officials from CMS stated a guess at Medicaid losses between 5-8% of total outlays in the Medicaid program. As Chairman of the Committee of jurisdiction over the Medicaid program, I would like to know where this estimate came from and what the total breakdown in fraud, waste and abuse to the Medicaid program is. Accordingly, please provide a written response detailing any estimates for losses to the Medicaid program for fraud, waste, or abuse, including losses attributed to both providers and state governments.

Senate Finance Committee
"Physician-Owned Specialty Hospitals: Profits Before Patients?"

Questions from Senator Baucus

For The Honorable Mark B. McClellan, MD, PhD

1. On February 14 and March 29, 2006, Senator Grassley and I sent letters to Secretary Leavitt raising concerns and questions about physician-owned specialty hospitals. You responded to us on the Secretary's behalf on the evening of May 16, 2006, just hours before the Finance Committee hearing. The following questions relate to your response.

a. Why was your response delayed until the evening before the hearing on physician-owned specialty hospitals?

b. In our February 14 letter, we asked how many physician-owned specialty hospitals have policies, either written or verbal, that do not require a physician to be on duty or on call when patients are present. You responded that Medicare hospital Conditions of Participation require a physician to be on duty or on call at all times. Given that Physicians' Hospital did not meet this

standard, how does CMS monitor whether hospitals are abiding by this standard?

c. In our February 14 letter, we asked how many physician-owned specialty hospitals have policies directing hospital staff to call 911 in case of a patient emergency. You responded that 'CMS does not collect or track such information.' Is it CMS' position that tracking such information is unimportant? Is CMS planning to track such information in the future?

d. In response to our March 29 letter, you stated that CMS has no method of tracking the number of physician investors in physician-owned specialty hospitals. Yet you also stated that during the advisory opinion process for a particular specialty hospital, you discovered that this hospital increased its number of physician investors during the MMA-mandated moratorium. Please describe how you discovered this increase, and the steps you took to determine whether other specialty hospitals had similarly increased their number of physician-investors. Finally, is CMS planning to create a method by which it could track the number of physician investors in hospitals?

e. In response to our March 29 letter, you stated that CMS has no mechanism in place to track the number of beds for which a hospital is licensed. Is it CMS' position that tracking such information is unimportant? Is CMS planning to add a mechanism by which it could track such information in the future?

2. The "whole hospital" exception for physician self-referrals seems to have different application for physician-owned specialty hospitals than it does for general hospitals. Do you believe that the whole hospital exception should apply the same to a 400-bed full service hospital as it does to a 4-bed surgical hospital? As CMS is responsible for enforcing the ban on physician self-referrals, do you apply the whole hospital exception differently depending on the type of hospital? If so, what are the differences in application? If not, why not?

3. CMS began a suspension enrollment for specialty hospitals while it considered the correct definition of hospital. Please describe in detail the current definition and the changes CMS is considering to account for physician-owned specialty hospitals.

4. You said at the hearing that CMS lacked the authority to extend the enrollment suspension currently in effect. Please provide a detailed explanation for that statement, including an analysis of the basis for CMS' authority to enact the enrollment suspension initially in June 2005, as well as the limitations on that authority you believe prevent you from extending the moratorium when it expires later this year.

5. In response to question 5 from our February 14 letter, you noted that Physicians' Hospital was certified to participate in the Medicare program effective January 26, 2005, having met all participation requirements. Please explain how CMS determined that Physicians' met Medicare's Condition of Participation requiring that a hospital always have a physician either on duty or on call (42 CFR 482.12(c)(3)).

6. As was discussed at the hearing, physicians are not required to disclose their ownership

interest in a specialty hospital. Does CMS support instituting such a requirement? Could such a requirement be incorporated into the Medicare provider agreement?

7. Your May 16 response noted that many of your findings on specialty hospitals were incomplete, based on preliminary analysis. Please provide updated answers to questions 4, 6, 7 and 8 from our February 14 letter, and question 5 and 7 from our March 29 letter.