Medical Staff Briefing

Department of Justice supports competition in board certification in open letter to Maryland legislature

The Antitrust Division of the Department of Justice (the Division) recently released an open letter addressed to Maryland Senator Dan K. Morhaim, MD, board member of the National Board of Physicians and Surgeons (NBPAS), concerning its views on Maryland House Bill 857 (the Bill), which was withdrawn after receiving an unfavorable report by health and government operations.

The Bill centers on physician specialty board certification, addressing whether an organization granting a physician privileges can require that the physician be board-certified by a specific board in order to qualify for privileges.

In a letter dated August 17, Senator Morhaim asked for the Division's opinion on the Bill, which at the time was under review by the Maryland Health Care Commission Workgroup (the Workgroup).

Discussion surrounding the Bill has also called into question the validity of the current Maintenance of Certification (MOC) requirements imposed by the American Board of Medical Specialties (ABMS), which many physicians have claimed are too strenuous and/or lack sufficient benefits. ABMS is believed by some to have a monopoly on board certification, specifically in Maryland, though this has also been alleged to be a nationwide issue.

In Morhaim's request, he asked the Division to consider:

- Whether "ABMS may harm competition by imposing overly burdensome conditions on physicians who wish to maintain their certification"
- Policy options available to legislature should the former prove to be true:
  - "Do nothing and wait for the market to self-correct"
  - "Pass a law under which hospitals may not require physicians to maintain board certification" or
  - "Promote competition between legitimate certifying bodies … by recognizing a competitor to ABMS … as a legitimate accrediting organization"

However, the Division acknowledges that these two issues implicitly raise other important questions. For instance, if board certification "functions as a de facto requirement for practice by physicians in certain specialty fields" and one board has a monopoly on certification, does that board have an incentive to adopt more stringent requirements than needed to verify competency? Furthermore, if the board does adopt burdensome requirements, will that restrict the available supply of specialty practitioners, thus harming competition?

At the time of the Division's opinion, the Workgroup's latest public draft recommended adding the NBPAS to the list of approved certifying bodies for legal purposes. The current list includes ABMS, the American Osteopathic Association, and the American Board of Physician Specialties (ABPS) as approved certifying bodies. The Workgroup also suggested allowing physicians to retain board certification in the eyes of the law if their certification lapsed due to a lack of participation in MOC. Finally, the Workgroup added a provision prohibiting hospitals and insurers from requiring physicians to participate in MOC and like programs as a condition of obtaining or retaining privileges, employment, reimbursement, and so on.

Breaking down the MOC requirements

ABMS is composed of 24 specialty boards that certify physicians in 39 specialties and 86 subspecialties. It has changed its MOC requirements several times over the years to meet the evolving needs of physicians and the healthcare industry. In particular, ABMS' member board, the American Board of Internal Medicine (ABIM), has significantly changed its standards in 1990, 2005, and 2014.

As of 2014, all ABIM-certified physicians must complete a full day of formal testing once every 10 years, participate in continuing medical education (CME) per state board requirements, and earn MOC points through "medical knowledge modules and quality improvement projects." Furthermore, these MOC points must be earned at regular intervals over the 10-year board certification, with some points accruing every two years. With this change also came increases in required fees.

Should physicians not meet these MOC requirements but still have unexpired certificates, they are put on a public list as not participating in MOC requirements.

The recent changes have been met with staunch criticism, and many who are unhappy with the increasing requirements point to literature that suggests MOC does not deliver on the benefits it claims. Furthermore, they emphasize the burden placed on physicians in terms of time and money.

The opinion of the Division

At the time of the Division's response to Morhaim, the Bill had not yet been withdrawn, and although it has since been, the response still contains important information concerning board certification competition. The Division offers several opinions pertaining to issues that still exist in the medical board community, even if this particular bill is no longer on the table.

In its response to Morhaim, the Division addresses both of his concerns extensively, indicating its view of competition in board certification and making recommendations for the state legislature to consider, should the Workgroup pass along the Bill.

In preparing a new draft of the Bill, the Division "encourages drafters of the Bill to consider ways to allow for entry by additional, legitimate certifying bodies," thereby promoting and protecting competition in board certification.

Furthermore, the Division also emphasizes the importance of having multiple certifying bodies available to physicians and "encourages states to adopt policies that do not foreclose entry by bona fide certifying bodies that may serve as a competitive alternative to existing certifying bodies." Doing so will create competition where currently there may not be much.

According to the Division, increasing competition "by bona fide certifying bodies may offer important benefits—including lowering the costs for physicians to be certified or improving the quality of certification services." When there are more options to choose from, board-certifying agencies are more likely to provide incentives for physicians to seek certification from them as opposed to a competitor; therefore, prices will likely go down and quality will likely go up.

Additionally, if costs were to decrease as a result of this increased competition, it "may also encourage some physicians to seek additional subspecialty certification or to stay in practice longer, as the costs of doing so decline … these potential benefits of entry may be especially meaningful for underserved areas where specialist physicians may already be in short supply."

If more physicians are able to obtain subspecialty certification, it could help with the nationwide physician shortage problem, at least at a local level, by making specialists more available and accessible. Additionally, decreasing the costs for physicians to obtain board certification may encourage non-certified, eligible physicians to seek certification, increasing the pool of physicians who have demonstrated competency in a standardized way.

The Division also strongly recommends that the legislature "continue allowing hospitals and insurers independently to decide whether to consider a physician's MOC status when making business decisions, such as granting hospital privileges." This suggestion is based on the fact that prohibiting hospitals from requiring board certification could actually harm competition in Maryland healthcare by interfering in organizations' independent business decisions. The Division thus encourages a method of *laissez-faire* instead of interference.

The Division also emphasizes the primary importance of board certification: to provide patients and hospitals with the knowledge that a physician is capable.

"Certification can signal that a practitioner has the distinct skills, knowledge, and abilities to practice a specialty that go beyond licensing requirements, if any, in a particular field. That signal can promote specialization, choice, and competition," states the Division.

Patients may not understand all of the factors that make a physician qualified to practice, but board certification is a clear indicator of competency and necessary education. Prohibiting hospitals from considering board certification could make the certification itself superfluous, thus encouraging physicians to forgo it and adversely affecting the availability of information for patients.

However, the Division cautions the legislature against mandating board certification "because, like other forms of professional standards-setting, certification can become a de facto requirement for meaningful participation in certain markets; [therefore,] a certification requirement may create a barrier to entry. In such circumstances, certification may function more like licensing requirements—establishing who can and cannot participate in the market—rather than voluntary certification."

Ultimately, the Division sees value in opening the gates to other certifying bodies, allowing physicians to choose whom they wish to seek board certification from. Allowing for other, qualified bodies to enter the market would make the market more competitive and, therefore, likely more helpful to physicians and consumers alike.

The response of the American Board of Medical Specialties

Upon the publication of the Division's letter to Morhaim, ABMS released an official statement of its position.

This statement alleges that Morhaim's request for the Division's opinion "appears to have been motivated by Dr. Morhaim's objections to the Maintenance of Certification (MOC) program, of physician certifying Boards that are members of the American Board of Medical Specialties (ABMS)."

ABMS stands by its current MOC requirements and believes they help to ensure patient safety. It asserts, "The MOC program is designed to help assure that physicians certified by ABMS Boards are committed to a program of lifelong learning, are keeping up with developments in their medical specialties, and are maintaining their medical knowledge, skills and expertise."

While ABMS welcomes competition in the market, it also is worried that other certifying bodies may not have the same standards as ABMS and is "concerned about deception of patients if physicians are permitted to market themselves as 'Board Certified' based on certification by a Board whose standards do not rigorously assess medical knowledge and maintenance of skills. After all, most consumers do not have the experience to differentiate between a claim of Board Certification based on the exacting standards of ABMS Boards and a claim of Board Certification not based on such standards."

ABMS concludes its statement by affirming its willingness "to work with physicians and specialty and medical societies to ensure our programs do not become overly burdensome; we are proud that our certificate represents the highest standard of knowledge and assessment currently available."

ABMS also adds that patients and organizations have a right "to determine which program best meets their expectations for high quality specialty care," and ABMS "continues to welcome an accurate comparison of our programs to other certification programs currently in the marketplace."

When contacted by **Medical Staff Briefing,** ABMS declined the opportunity to comment on its statement and/or the Division's letter.

The response of the American Board of Physician Specialties

ABPS responds positively to the Division's position as outlined in the letter to Morhaim. ABPS has also offered its own opinions concerning the issues discussed in the letter.

ABPS is firmly opposed to ABMS' current MOC requirements. **Jeff Morris, JD,** executive director of ABPS, states, "[T]o date the ABMS has been unable to show any scientific data that their current MOC requirements can rigorously assess medical knowledge and maintenance of skills."

That does not mean ABPS is against CME, though. It instead takes issue with the time-consuming and financially burdensome system of ABMS MOC points.

Morris adds, "As a leader in physician board certification, we believe it is essential that a physician maintains their knowledge in the medical specialty in which they are certified."

ABPS also does not believe that physicians should be mandated to receive CME credits only through one particular avenue. As a volunteer-based organization, ABPS provides opportunities to obtain cost-free CME credits and believes "that it is a conflict of interest to mandate CME/MOC points that become a sole financial benefit to the organization that certifies you."

In addition, ABPS takes a stance against current MOC requirements because it believes MOC does not adequately protect patients from incompetent physicians. Morris explains, "There are instances where physicians may have numerous negative peer reviews but can easily complete the ABMS MOC requirements. There are many measures a hospital or insurer can take to ensure patient safety and care and being board certified is just one of them."

In terms of competition in the board-certification market, ABPS stands behind the Division's position and recommendations. Unlike ABMS, ABPS thinks the Division was right to offer its opinion upon Morhaim's request, and Morris states, "The government does have a role in ensuring that organizations, for profit or nonprofit, do not create monopolies that drive up healthcare costs, allow for discrimination, and prevent competition."

Furthermore, ABPS agrees that competition is a necessary component of the marketplace and is needed all across the country, not just in Maryland. Morris argues, "Smaller and credible competing physician certifying bodies are not aiming to reduce standards nor relax patient safety rules; their collective goal is to better the care that is currently being provided."

ABPS views itself as one of the credible competing physician certifying bodies and looks for the government to dissemble ABMS' monopoly over the market so that ABPS and others can assist with improving care.

"As a volunteer physician-based organization, transparency and our push for the betterment of patient safety and care has long been not just our standard, but our mission," Morris states.

There are several reasons why ABPS believes that increasing competition would benefit healthcare consumers, as Morris explains.

"First and foremost, competition leads to innovation … Monopolies are a violation of antitrust laws. One of the very reasons we have antitrust laws in place is due to not only cost control but the stifling of innovation." Morris argues that ABMS alone cannot provide the innovation needed to constantly improve patient care.

Additionally, Morris affirms that "competition leads to choice, which forces all certifying bodies to become more transparent." As mentioned in ABMS' position statement, patients do not always have the needed knowledge or experience to distinguish between the quality and standards of individual certifying boards. Allowing them a choice would force these boards to increase transparency and convey information in a way that consumers can easily understand.

ABPS states that ABMS should not be allowed a monopoly on board certification because there are many boards in existence that meet the requirements to be a physician-certifying body.

Furthermore, Morris argues, "Competing boards should not be measured against ABMS but should be measured against the standard in physician board certification, not their self-proclaimed 'Gold Standard.' "

Morris asserts that just because ABMS positions itself as the standard does not mean that it should automatically be considered as such. Instead, he petitions for all bodies to be measured against a true and unbiased standard.

On a final note, Morris reminds all physicians, "ABPS is a recognized choice by the medical community for initial board certification as well as for ABMS-certified physi-cians seeking recertification. A variety of industry stakeholders acknowledge the value ABPS brings to competition and choice. State medical boards, federal entities, state legislatures, healthcare leaders, and industry organizations recognize ABPS boards of certification and their value in the betterment of pa-tient safety and care. ABPS plays a key role in assisting hospi-tals and healthcare organizations in determining physician competency in the specialties in which they practice."

Ultimately, Morris and ABPS believe that physicians should have a right to choose which certifying body they believe is best, and ABPS is fighting for other credible certifying bodies to be perceived as viable options.

Final thoughts

While it is important to recognize that this bill has since been withdrawn, it is equally important to realize that the questions it raises remain. Issues of competition in board certification, maintenance of such certification, and the extent of government involvement will always be at the forefront of any board certification discussion. As the healthcare industry and its consumers' needs continue to evolve, it is crucial to revisit and reconsider such issues regularly.

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