

CMS Issues Important Proposed Changes to the Physician Supervision Requirements Applicable to Hospital Outpatient Services for CY 2010

The Centers for Medicare & Medicaid Services (CMS) is proposing to liberalize the controversial physician supervision requirements applicable to hospital outpatient services described in the 2009 Hospital Outpatient Prospective Payment System (OPPS) final rule. In the 2010 OPPS proposed rulemaking released on July 1st, CMS indicates that the physician supervision requirements for therapeutic and diagnostic services requiring “direct supervision” will be met so long as a physician is physically present on the hospital campus and immediately available to offer assistance during the service, even if no physician is actually on-site in the department or clinic where the service is being performed. Moreover, for the first time, CMS is proposing to allow non-physician practitioners (such as physician assistants and nurse practitioners) to satisfy the supervision requirements required for Medicare coverage of therapeutic services when consistent with their state-defined scope of practice and other applicable legal requirements. These new requirements will take effect January 1, 2010 if the rule is finalized. A copy of the 2010 proposed rule can be found by clicking [here](#).

If these new policy clarifications are implemented as CMS has proposed, the hospital industry will have achieved a welcome victory and done so in short order. In the 2009 OPPS rulemaking, CMS unveiled a far stricter test for on-campus physician supervision of hospital outpatient therapeutic services, requiring that an appropriately credentialed physician be physically present in the provider-based department to furnish “direct supervision” even when the department is located on campus. Although this pronouncement was termed a “restatement and clarification” of long-standing CMS policy, most industry experts perceived it to be nothing short of a wholesale, and ill-advised, change—one that flatly contradicted language in the original Medicare OPPS rulemaking differentiating between on-campus and off-campus settings and one that threatened to stretch already overtaxed hospital budgets by obligating direct on-site physician supervision as a precondition to Medicare coverage. A number of key industry stakeholders mounted a sustained protest (for a letter issued by such stakeholders in April 2009, click [here](#)).

The 2010 proposed rule portends a victory for the industry. In the 2010 proposed rule, CMS acknowledges and addresses the industry’s concerns with respect to CMS’s pronouncement and its implications for hospital budgets and patient access. The 2010 proposed rule commentary suggests that the physician supervision requirements described in the 2009 final rule will “continue to be in effect for CY 2009,” and CMS states that enforcement actions will not be delayed or discontinued. Under the proposed rule effective January 1, 2010, however, the old regime largely would be reinstated with, arguably, even more flexibility accorded to hospitals in their on-campus supervision arrangements. CMS proposes the following:

- For outpatient services provided within a hospital or in an on-campus provider-based department, a physician would be able to furnish “direct supervision” if he or she is present within the department, within the hospital or on the hospital campus, provided he or she is “immediately available.” CMS notes, however, that to comply with the “immediately available” requirement, the supervisory physician cannot be simultaneously involved in other procedures that cannot be interrupted nor be physically too distant to respond in an emergency.

- Certain non-physician practitioners would be able to provide the requisite direct supervision of outpatient therapeutic services that they may personally perform consistent with state law, their scope of practice, hospital-granted privileges and other applicable Medicare requirements. Such non-physician practitioners include physician assistants, nurse practitioners, certified nurse mid-wives and clinical nurse specialists.
- The supervision required for outpatient diagnostic services, whether furnished directly by the hospital or under arrangements, would be as stipulated for the particular test in the Medicare Physician RBVS fee schedule except that new requirements for “direct supervision” would apply to those tests requiring direct supervision. Non-physician practitioners, however, would not be permitted to furnish direct supervision of hospital outpatient diagnostic services; physician supervision would be required.

For now, the proposed CMS re-clarification is just that, proposed; it will become binding only after CMS promulgates a final rule in the latter part of 2009. For further information and update on future developments, please contact your regular Ropes & Gray attorney.

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