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## CMS Proposes Refinement of Outpatient Supervision Rules for Therapeutic Services

By: [Thomas W. Coons](#)

In its recently proposed [Calendar Year 2012 Hospital Outpatient PPS \(OPPS\) payment rule \[PDF\]](#), 76 Fed. Reg. 42170, 42277-42285 (July 18, 2011), which CMS recently put on its web page, CMS proposes refinements to its hospital outpatient physician supervision policies. First, CMS proposes to state clearly in the regulatory text at 42 C.F.R. § 410.27 that all hospital outpatient therapeutic services are subject to that section's payment limitations, including the direct supervision requirement. Additionally, CMS clarifies that hospitals are not permitted to furnish therapeutic services or surgery to their patients under arrangements with ASCs. As justification for this position, CMS states that it does not make provider-based determinations for ASCs under 42 C.F.R. § 413.65(a)(1)(ii)(A) and that under 42 C.F.R. § 410.27(a)(1)(iii), therapeutic services must be furnished in provider-based space. As a result of these two provisions, ASCs may not be a provider-based department of a hospital pursuant to the regulations and their services, consequently, may not be covered as therapeutic hospital services under 42 C.F.R. § 410.27.

Second, CMS proposes that the existing APC Panel serve as an independent review body to consider requests for assignment of supervision levels other than direct supervision for specific outpatient hospital therapeutic services. The review panel would evaluate services for assignment to both higher (personal) and lower (general) levels of supervision. CMS proposes to add 2-4 representatives from Critical Access Hospitals (CAHs) as panel members so that all hospitals subject to the supervision rules will be represented. The CAH representatives, however, will not participate in deliberations about APC assignments under OPSS because those assignments will not affect CAHs.

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CMS proposes that, in recommending a supervision level, the APC Panel will determine whether there is a significant likelihood that the supervisory practitioner would need to reassess the patient and modify treatment during or immediately following the therapeutic intervention, or to provide guidance or advice to the individual who provides the service. The panel would consider the complexity of the service; the acuity of the patients receiving the service; the probability of expected or adverse patient event; and the expectation of rapid clinical changes during the therapeutic service or procedure. These criteria would include, but extend beyond, the likelihood of the need to manage medical emergencies during or after the provision of the service.

CMS also proposes that it issue, through sub-regulatory guidance, “the supervision level” decisions based on APC Panel recommendations. CMS decisions would be posted on the OPPS website for public review and comment, and would be effective either in July or January following the most recent APC Panel meeting, or only in January of the upcoming payment year.

Finally, CMS anticipates that it will extend for another year, through Calendar Year 2012, the notice of nonenforcement of the direct supervision requirement applicable to CAHs and small rural hospitals.

#### **Ober|Kaler’s Comments**

CMS’s clarification of its policy regarding therapeutic services and the coverage limitations applicable to those services brings no surprises. CMS has earlier stated this position in prior preamble discussions. Now, however, the policy will be clearly stated in the regulatory text itself. CMS’s policies regarding the use of the APC Panel additionally brings no surprises. CMS suggested that it was leaning in this direction when it published its OPPS rule last year. Providers will likely find it useful to have a mechanism that will enable them to seek relief from the supervision standards, particularly when there is compelling medical evidence to support a lower level of supervision. Until such “supervision” decisions are issued, however, providers will have to live with the rule that therapeutic services are subject to CMS’s direct supervision requirements.

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