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## CMS's Proposed Rule on Hospitals' "New" GME Programs Would Restrict Reimbursement for Such Programs

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*Thomas W. Coons*  
410-347-7389  
[twcoons@ober.com](mailto:twcoons@ober.com)

When Congress placed limits or "caps" on the number of full-time equivalents (FTEs) that a hospital could count for direct graduate medical education (DGME) and indirect medical education (IME) purposes, it expressly required the Secretary to prescribe rules addressing medical residency training programs established on or after January 1, 1995. CMS, consistent with this directive, provided for an exception to the FTE caps if the hospital had no allopathic or osteopathic residents in its most recent cost reporting period ending on or before December 31, 1996, and it established such a program on or after January 1, 1995. See 42 C.F.R. § 413.79(e). CMS then defined a new medical residency training program as "a medical residency that receives initial accreditation by the appropriate accrediting body or begins training residents on or after January 1, 1995." See 42 C.F.R. § 413.79(l).

Based on CMS's regulation, a number of providers have, in the past, established medical residency training programs, received initial accreditation for these programs from the appropriate accrediting organizations, and been able to count the FTEs allowed under the new programs for DGME and IME reimbursement purposes. In some instances, the programs were entirely new, having no carry-over from any prior program. In other instances, the hospital's program replaced a program that had once existed at another site and used some program and teaching staff from that prior program but was so changed from the prior program that it received "initial accreditation" from the accrediting body and "new program" status from Medicare.

CMS is now proposing that the second situation not be allowed. In a proposed rule published as part of the Inpatient Prospective Payment System Proposed Rule at 74 Fed. Reg. at 24191-24192 (May 22, 2009), CMS is now stating, as a matter of clarification, that it is appropriate to evaluate whether a particular program is one newly established for Medicare GME and IME purposes by looking at "not only the characterization by the accrediting body, but also supporting factors such as (but not limited to) whether there are new program directors and/or new teaching staff, and/or whether there are only new

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#### Principals

[Thomas W. Coons](#)

[Leslie Demaree Goldsmith](#)

[Carel T. Hedlund](#)

[S. Craig Holden](#)

[Julie E. Kass](#)

Paul W. Kim

Robert E. Mazer

Christine M. Morse

Laurence B. Russell

Donna J. Senft

Susan A. Turner

**Associates**

Kristin C. Cilento

Joshua J. Freemire

Mark A. Stanley

Lisa D. Stevenson

Emily H. Wein

residents training in the program(s) at the different site." 74 Fed. Reg. at 24192. CMS also states that "it may also be necessary to consider factors such as the relationship between hospitals (for example, common ownership or a shared medical school or teaching relationship) and the degree to which the hospital with the original program continues to operate its own program in the same specialty." CMS summarizes its policy by stating that "GME programs that were previously accredited at one operating entity, and that entity ceases to operate the program, but the program is then opened and operated at another entity and is accredited as a new program at the second entity ... would not be treated as new at the second entity."

**Ober|Kaler's Comments:** CMS's position is problematic in several respects. First, it is a marked departure from the current rule, yet is labeled a "clarification." This means that the rule has retroactive impact, even though it is expressly contrary to the current rule that seems to allow providers to "rely exclusively on the characterization of a particular program by the relevant accrediting body," something that CMS now says should not be permitted. Second, it lacks a bright line test. Is simply having a few shared faculty members from another program enough to prevent a new program from being considered "new" for GME and IMG payment purposes? What if there are only a handful of specialists in the region that can provide the teaching services that a program needs and another program employs those specialists? These are but two of a number of serious considerations that make CMS's proposal rather troubling.

Providers have until June 30, 2009 in which to comment. Any provider that has created in the past a new GME program that might run afoul of CMS's "clarification" and any provider that is considering establishing a new GME program should consider commenting.

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