



## CMS Proposed Changes to Relax Physician Supervision Rules for Hospital Outpatient Services

On July 1, 2009, the Centers for Medicare & Medicaid Services (CMS) issued proposed rules regarding physician supervision of hospital outpatient services. The proposed rules relax the otherwise controversial physician supervision requirements for hospital outpatient services. The controversy stems from 2008, when CMS “clarified” its standard for physician supervision of hospital outpatient therapeutic services and required actual physician presence in the outpatient or provider-based department, even if such department was located in the hospital or on the hospital’s main campus.

Prior to the 2008 clarification, CMS had stated that it presumed that hospital outpatient therapeutic services were provided under the direct supervision of physicians in the hospital because physicians were generally nearby. The purpose of the 2008 clarification was to establish that the assumption made by many hospitals that actual physician supervision need not be provided, was incorrect. In response to the 2008 clarification, CMS was inundated by industry leaders, hospitals and other stakeholders. As a result, CMS is now proposing more relaxed rules. The following is a summary of the proposed changes.

### FOR THERAPEUTIC SERVICES

The proposed rules provide that supervision for therapeutic services be amended in several ways. First, CMS proposes that the supervision may be provided by a physician or non-physician practitioner (which includes a clinical psychologist, physician assistant, nurse practitioner, clinical nurse specialist, or certified nurse midwife) provided the non-physician practitioner is authorized to perform the services him or herself within their scope of practice and hospital-granted privileges, and meets all additional requirements, including any collaboration or supervision requirements. Second, CMS proposes differing standards on how direct supervision is to be provided depending on whether the services are rendered in an on or off-campus location.

- ∅ If therapeutic services are provided in the hospital or in an on-campus provider-based department of the hospital, the physician or non-physician practitioner must be present on the same campus, in the hospital, or in the on-campus provider-based department of the hospital and be immediately available to furnish assistance and direction throughout the performance of the procedure.
- ∅ If the therapeutic services are provided in an off-campus provider-based department of the hospital, the physician or non-physician practitioner must be present in the actual provider-based department (but need not be in the room when the procedure is performed) and be immediately available to furnish assistance and direction throughout the performance of the

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procedure.<sup>1</sup> This also reflects the incident-to billing rules which require a physician or non-physician practitioner to be present in the provider-based department and be immediately available for assistance and direction.

### **FOR DIAGNOSTIC SERVICES**

Diagnostic services, unlike therapeutic services, can only be supervised by a physician, not a non-physician practitioner. While physician assistants, nurse practitioners, clinical nurse specialists, and certified nurse-midwives may, under state law, be authorized to order and perform diagnostic tests, they may not supervise such tests because diagnostic tests must be furnished under the appropriate level of supervision by a physician as defined in the Social Security Act (which is not defined to include non-physician practitioners).<sup>2</sup>

The level of supervision (i.e., general, direct or personal supervision) is determined by the physician supervision requirements for individual tests as listed in the Medicare physician fee schedule. For diagnostic services requiring general supervision or personal supervision, there are no changes to the governing regulation. For those diagnostic services requiring direct supervision, however, the proposed rules amend the definition of "direct supervision" depending on where the services are being performed.

- For diagnostic services furnished directly or under arrangement in the hospital or on-campus provider-based department, direct supervision means that the physician must be present on the same campus, in the hospital or on-campus provider-based department of the hospital, and be immediately available to furnish assistance and direction throughout the performance of the procedure.
- For diagnostic services furnished directly or under arrangement in an off-campus provider-based department of the hospital, direct supervision means that the physician must be present in the off-campus provider-based department and be immediately available to furnish assistance and direction throughout the performance of the procedure.
- For all hospital outpatient diagnostic services provided under arrangement in non-hospital locations, such as independent diagnostic testing facilities and physicians' offices, direct supervision means that the physician must be in the office suite and be immediately available to furnish assistance and direction throughout the performance of the procedure. It does not mean that the physician must be present in the room when the procedure is performed.

### **CARDIAC REHABILITATION, INTENSIVE CARDIAC REHABILITATION AND PULMONARY REHABILITATION SERVICES**

CMS also clarified that a doctor of medicine or osteopathy must provide direct supervision for cardiac rehabilitation (CR), intensive cardiac rehabilitation (ICR) and pulmonary rehabilitation (PR) services

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<sup>1</sup> To the extent that an off-campus provider-based department provides more than one type of service, whether therapeutic or diagnostic, the commentary to the proposed rules suggests that CMS would expect more than one physician (or non-physician practitioner in the case of therapeutic services) provide the necessary supervision in the off-campus provider-based department.

<sup>2</sup> As an exception to the basic rule, clinical psychologists can supervise only diagnostic psychological and neuropsychological testing services when these services are personally furnished by the clinical psychologist or an independently practicing psychologist or when they are furnished under the general supervision of a physician or clinical psychologist.

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and that such supervision, if provided in the hospital or in an on-campus provider-based department, means that the physician must be present on the same campus or provider-based department and immediately available to furnish assistance and direction. CMS did not address supervision requirements for these services when provided in off-campus provider-based departments, and therefore, physicians are still required to be physically present in the off-campus provider-based department and immediately available to furnish assistance and direction.

In addition to requiring that only a physician may supervise CR, ICR and PR, CMS is also proposing that such physicians have certain qualifications or expertise. With respect to CR and ICR, CMS proposes that the supervision must be provided by a physician with training or experience in cardiovascular disease management and exercise training of heart diseased patients and is licensed to practice medicine in the state in which the program is offered. With respect to PR, CMS proposes that the supervision must be provided by a physician with training and proficiency in chronic respiratory disease management and exercise training of chronic respiratory disease patients and is licensed to practice medicine in the state in which the program is offered. The supervising physician for CR, IC and PR services may be provided by the medical directors of the programs, or by another physician, so long as the requisite training, expertise and licensure are satisfied.

CMS is accepting comments on the proposed rule until August 31, 2009 and expects to issue the final rule by November 1, 2009. However, providers should be aware that CMS cautioned providers that it has not instructed its contractors to delay initiation of enforcement actions or to discontinue pursuing pending enforcement actions regarding the existing physician supervision requirements. Therefore, providers should continue having physicians provide the requisite supervision in the actual outpatient or provider-based departments, both on and off-campus. These new relaxed rules, if adopted in final form, will be effective as of January 1, 2010.

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If you have any questions, please contact the GWT attorney with whom you regularly consult.

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