To: Physician Organizations and Regulation, Accreditation, and Payment Practice Group Members

From: Physician Organizations Practice Group Leadership
Ann Bittinger, Chair
Rick Hindmand, Vice Chair of Strategic Activities
Julie Kass, Vice Chair of Membership
David Lewis, Vice Chair of Research and Website
Kim Harvey Looney, Vice Chair of Educational Programs
Sidney Welch, Vice Chair of Publications

Hospital Outpatient Prospective Payment System Final Rule Addresses Physician Supervision,Expansion of Physician-Owned Hospitals, Patient Notification Requirements

By Joshua D.W. Collins and Kim Harvey Looney*

On November 1, 2011, the Centers for Medicare & Medicaid (CMS) released the Hospital Outpatient Prospective Payment System Final Rule for calendar year (CY) 2012. In addition to various updates to payment policies and quality reporting requirements, which will be addressed in a separate email alert, the final rule contains revisions to hospital outpatient physician supervision requirements, the process for physician-owned hospitals to obtain an exemption to the prohibition on expansion, and patient notification requirements.

Hospital Outpatient Physician Supervision Requirements

CMS has finalized its proposed rule to establish an independent technical review process to assign supervision levels other than direct supervision to hospital outpatient therapeutic services. The existing advisory panel on ambulatory payment classification groups (APC Panel)--modified to include critical access hospital and small rural hospital representatives so that all hospitals subject to the supervision rules for payment of outpatient therapeutic services will be represented--has been designated as the body that will be responsible for recommending the supervision level ("general," "direct," or "personal") to CMS for each specific outpatient therapeutic service. The process is designed to provide meaningful and transparent input from stakeholders in the establishment of appropriate supervision requirements.

CMS has defined only two levels of supervision in the hospital outpatient setting--direct and general. General supervision only applies to the provision of nonsurgical extended duration therapeutic services, which requires direct supervision during an initiation period, followed by general supervision for the duration of the service. Based on the APC Panel's recommendations, CMS will assign one of the three defined levels of supervision to each specific service, which means that supervision levels for certain services may be heightened (requiring personal supervision), relaxed (requiring general supervision), or remain subject to the existing direct supervision requirements.

The APC Panel will recommend supervision levels for those services it is specifically requested to review. Priority will be given to services based upon service volume, total expenditures for the
service, and frequency of requests; services that the public has requested CMS evaluate in the CY 2010 through CY 2012 Outpatient Prospective Payment System (OPPS)/Ambulatory Surgery Center (ASC) rules; and to services that have not been previously evaluated.

In determining the appropriate level of service, the APC Panel must determine whether it is likely that the supervisory practitioner would need to reassess the patient and modify treatment during or immediately following the therapeutic intervention, or provide guidance or advice to the individual providing the service, by considering the following factors: (1) complexity of the service; (2) acuity of the patients receiving the service; (3) probability of unexpected or adverse patient event; (4) expectation of rapid clinical changes during the therapeutic service or procedure; (5) recent changes in technology or practice patterns that affect a procedure's safety; and (6) the clinical context in which the service is delivered.

CMS currently does not enforce the requirement for direct supervision of outpatient therapeutic services against critical access and small and rural hospitals and has announced that it will extend the notice of nonenforcement through CY 2012 for these provider types.

**Expansion of Physician-Owned Hospitals**

The Affordable Care Act (ACA) narrowed two exceptions--the "whole hospital" and the "rural provider" exceptions that permit physician ownership and investment interests in hospitals--by limiting the ability of existing physician-owned hospitals to expand their capacity. CMS was required by statute to promulgate regulations to create a process for a physician-owned hospital to request an exception to the prohibition on expansion of facility capacity created by Section 6001(a) of ACA. CMS published proposed regulations as part of the CY 2012 OPPS/ASC proposed rule on July 18, 2011, that set forth the process. The final rule adopts the proposed regulations with very few changes. In order to qualify for an exception to the prohibition on expansion, physician-owned hospitals must meet certain inpatient admission, bed capacity, and bed occupancy criteria, or must qualify as a "high Medicaid facility" based upon an analysis of a number of different data points. The most significant change from the proposed rule is that CMS will allow hospitals to establish eligibility based on the most recent year of data available, rather than having to satisfy the criteria for each of the three most recent years for which data is available.

**Patient Notification Requirements**

In the CY 2012 OPPS/ASC proposed rule, CMS proposed a number of changes to the regulations requiring hospitals to notify patients if a doctor of medicine or osteopathy is not on site at all times. The final rule adopts those proposed changes without modification. The rule reduces the categories of outpatients who must receive this notification to only outpatients receiving observation services, surgery, or services involving anesthesia. The final rule also adds a requirement that every hospital with a dedicated emergency department in which a doctor of medicine or osteopathy is not present at all times must post the patient notice in a conspicuous place.

*We would like to thank Joshua D.W. Collins, Esquire, and Kim Harvey Looney, Esquire (Waller Lansden Dortch & Davis LLP, Nashville, TN), for providing this email alert.*

Disclaimer: The information obtained by the use of this service is for reference use only and does not constitute the rendering of legal, financial, or other professional advice by the American Health Lawyers Association.

© 2011 American Health Lawyers Association