

## MEDICARE'S SUPERVISION POLICY FOR CY 2012

On November 30, 2011, the Centers for Medicare and Medicaid Services ("CMS") published the CY 2012 OPPS/ASC Final Rule with comment period ("Final Rule") that established a formal process for review and reconsideration of the supervision level assigned to certain outpatient therapeutic services furnished in hospitals and critical access hospitals ("CAHs"). The Final Rule is effective on January 1, 2012, and comments must be received no later than 5 p.m. EST on January 3, 2012 per instructions in the Federal Register. The Final Rule can be found at: <http://www.gpo.gov/fdsys/pkg/FR-2011-11-30/pdf/2011-28612.pdf>.

Over the years, CMS has put forth considerable effort reviewing and refining its policies with respect to the level of supervision required for outpatient diagnostic and therapeutic services provided in hospitals and CAHs. Currently, the general rule is that outpatient therapeutic services must be directly supervised by physicians or certain non-physician practitioners. In the CY 2011 OPPS Final Rule, CMS revised the definition of "direct supervision" to eliminate the supervising practitioner location requirements for on-campus and off-campus settings, extended through CY 2011 the non-enforcement of the policy for direct supervision of all outpatient therapeutic services furnished in CAHs and in small rural hospitals and established a limited set of non-surgical extended duration services for which direct supervision is required at the initiation of the services followed by general supervision for the remainder of the services (e.g., certain intravenous infusions and observation services). CMS then announced its intention to develop a process to consider industry requests to change service-specific supervision levels from "direct" supervision to "personal" or "general" supervision. (A detailed discussion can be found at: [http://www.hallrender.com/library/articles/718/HLN\\_11\\_23\\_10.html](http://www.hallrender.com/library/articles/718/HLN_11_23_10.html).)

CMS further developed its proposals for establishing a specific therapeutic service review process in the CY 2012 Proposed Rule.

For CY 2012, CMS has finalized a process for reviewing hospital- and CAH-furnished outpatient therapeutic services by HCPCS or CPT Code so that the level of supervision may be changed to general or personal, if clinically appropriate. A stakeholder must request such a review. Details of this process are as follows:

1. First, CMS is extending its notice of non-enforcement of the direct supervision requirement for outpatient therapeutic services in CAHs and small rural hospitals through CY 2012. This will give CMS an opportunity to review previous requests for changes in the supervision level for key therapeutic services. Small rural hospitals are those with 100 or fewer beds and are geographically located in a rural area or are paid under the hospital Outpatient Prospective Payment System ("OPPS") with a rural wage index.
2. CMS has selected the Federal Advisory Panel on Ambulatory Payment Classification Groups ("APC Panel") to serve as the independent review entity to consider requests for service-specific alternative supervision standards. The APC Panel is statutorily authorized to make independent recommendations to CMS, and its members are geographically diverse and have clinical, administrative and billing and coding expertise. CMS will add two voting panel members from CAHs and two voting panel members from rural hospitals to ensure these entities' interests are adequately represented in supervision level designation matters.
3. CMS will consider the recommendations of the APC Panel and will issue decisions via a sub-regulatory process. This means CMS will post preliminary decisions on the OPPS website for 30 days for public review and comment. Once CMS considers comments, it will issue its final decisions, which will be effective in either July or January following the most recent APC Panel meeting.
4. The APC Panel will consider a number of factors as it decides whether direct, personal or general supervision will ensure the appropriate level of quality and safety for a given service. Those factors include:
  - a. Complexity of the service;
  - b. Acuity of the patient;

- c. Probability of any unexpected or adverse events;
  - d. Expectation of rapid clinical changes during the service;
  - e. Recent changes in technology or practice patterns that affect a procedure's safety; and
  - f. Clinical context in which the services are delivered.
5. CMS has developed a system for prioritizing requests for review. For example, it will give priority to public requests for review of specific services received in the CY 2010 through CY 2012 OPPS/ASC rules and to services not previously evaluated. All requests for review must include justification for the requested change backed by clinical evidence if possible.
6. CMS will clarify via regulation that non-physician practitioners may provide direct, general or personal supervision of outpatient therapeutic services in accordance with state scope of practice laws. The definitions of personal and general supervision will not change from those currently in regulation.

CMS noted that it may ask the APC Panel to consider requests for review of a service that has already been evaluated. If a decision has been made, a requestor should submit new evidence to support a change in policy. Supervision reviews for many key services are expected in CY 2012.

If you have any questions, would like additional information about this topic or need help preparing and submitting comments, please contact Adele Merenstein at (317) 752-4427 or [amerenst@hallrender.com](mailto:amerenst@hallrender.com), Regan Tankersley at (317) 977-1445 or [rtankersley@hallrender.com](mailto:rtankersley@hallrender.com) or your regular Hall Render attorney.