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Clarity Is Hard to Find:

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In this Issue

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New Medicare-Certified Provider? Not So Fast – New Providers Continue to be Lowest Priority for State Survey Agencies

CMS Announces Final Five Medicare MACs

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CMS's CY 2009 final rule for the outpatient prospective payment system (OPPS) includes a "restatement and clarification of [CMS's] longstanding OPPS policy" regarding physician supervision of hospital outpatient department (HOPD) services. The "clarification," which CMS introduced in its CY 2009 OPPS proposed rule, emphasizes CMS's position that outpatient therapeutic services must be directly supervised by a physician, even if the services are provided on the campus of a hospital. CMS indicated that it does not relax the direct supervision requirement for services provided on a hospital campus, notwithstanding language in the CY 2000 OPPS final rule, which stated that the Agency assumed that the physician supervision requirement was met for on campus services "because staff physicians would always be nearby within the hospital."

Reiterating the language it used in the CY 2009 proposed rule, CMS stated its concern that the Agency's use of the word "assume" in the 2000 preamble may have led some providers to the incorrect conclusion that general supervision would suffice in on-campus outpatient departments. The final rule references 42 CFR 410.27(f), which requires direct physician supervision for any location designated as a hospital department. CMS pointed out that "direct supervision" is defined to require that the physician is present at the location and immediately available to furnish assistance throughout the performance of the procedure. Responding to hypothetical scenarios supplied by commenters, CMS stated that, per the CY 2000 OPPS final rule, "'on the premises of the location' means that the physician must be...present in the provider-based department."

While CMS acknowledges that it has not defined the term "immediately available" in the context of physician supervision of HOPD services, the final rule notes that "the lack of timely physician response to a problem in the HOPD would represent a quality concern...that Hospitals should consider in structuring their provision of services...."

Ober|Kaler's Comments: In our **August 6, 2008 issue of *Payment Matters***, we noted that CMS's most recent statements warrant close attention. As we noted, the "clarification" clearly signals an Agency concern that some hospitals are not ensuring that outpatient therapeutic services are being adequately

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supervised. We also noted that the clarification introduces new confusion for providers who are attempting to determine the proper level of supervision for HOPD services, particularly with respect to the meaning of the term "immediately available" in the context of such services. Providers, therefore, should keep a close eye on further guidance regarding the direct supervision requirement.

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