

November 10, 2008

## **CMS Revises Medicare Anti-Markup Rule**

The Centers for Medicare & Medicaid Services (“CMS”) has had a long-standing restriction on the purchase of the technical component of diagnostic tests, commonly referred to as the “Anti-Markup Rule.” In the past, the Anti-Markup Rule has prevented physicians and other Medicare suppliers from purchasing the technical component of a diagnostic test from an outside supplier and marking up (i.e., profiting from) the test by billing Medicare for more than the cost of the purchased test.

Over the past year, CMS proposed several alternatives to modify and expand the Anti-Markup Rule. These proposals would have dramatically and adversely impacted the provision of diagnostic tests to Medicare patients by physicians and physician groups. However, in the recently released 2009 Medicare Physician Fee Schedule regulation, CMS finalized changes to the Anti-Markup Rule that both change the manner in which the Anti-Markup Rule has been applied in the past and adopt new standards (different from the various proposed standards) for how the Anti-Markup Rule will be applied in the future.

In general, the new Anti-Markup Rule will enable physicians and physician groups to continue providing diagnostic tests to patients as long as the tests are performed by group practice physicians or provided in a building where the physician group practice maintains an office. CMS has also stated that, at least for now, physicians and physician groups that provide diagnostic tests will not be required to enroll in the Medicare program as independent diagnostic testing facilities (“IDTFs”) or comply with the IDTF standards. The details of the new Anti-Markup Rule are discussed in further detail below.

### **Summary of the New Anti-Markup Rule**

Effective January 1, 2009, the Anti-Markup Rule will apply only to the technical component and the professional component of diagnostic tests (other than those paid under the Medicare clinical diagnostic laboratory test fee schedule or that do not require physician supervision) that are ordered by the billing physician or other supplier (or by a party under common ownership or control of such billing physician or other supplier) but performed by a physician who does not “share a practice” with the billing physician or other supplier. The concept of “sharing a practice” with the billing physician or other supplier has two alternative tests: (i) a 75% test or (ii) a same building test. The “performing physician” is the physician who supervises the technical component of the test or performs the professional interpretation of the test.

Under the 75% test, a performing physician will be deemed to share a practice with a billing physician or other supplier if the performing physician furnishes at least 75% of his or her professional services through the billing physician or other supplier. The 75% test can be satisfied by looking at whether the physician met the test over the prior 12 months or whether the physician is reasonably expected to meet the test over the next 12 months. In locum tenens arrangements, the focus is on whether the permanent physician, rather than the locum tenens physician, meets the 75% test.

If the 75% test is not satisfied, it is necessary to consider whether the diagnostic test is provided in the same building where the billing physician or other supplier maintains an office. Under the same building test, the performing physician must be an owner, employee or independent contractor of the billing physician or other supplier and the diagnostic test must be performed in the “office of the billing physician or other supplier.”

The “office of the billing physician or other supplier” is defined as any medical office space or space in the same building<sup>1</sup> in which the ordering physician or other ordering supplier regularly furnishes patient care. With respect to physician groups, it must be office space or space in the same building in which the ordering physician provides substantially the full range of patient care services that the ordering physician provides generally. Thus, if the performing physician does not meet the 75% test, diagnostic tests provided in a “centralized building” are subject to the anti-markup prohibition, notwithstanding the “centralized building” exception under the in-office ancillary service exception to the Stark law.

CMS declined to modify the definition to include a mobile van, vehicle or trailer, even if the van, vehicle or trailer is located in the parking lot of a building in which the physician group sees patients. However, CMS is now requiring that mobile providers of diagnostic tests both enroll in the Medicare program as an IDTF and bill for the technical component of any tests provided by the mobile provider unless the provider is providing such tests “under arrangements” to a hospital. This will effectively eliminate the ability of physicians to bill for diagnostic tests purchased from mobile providers, even where the Anti-Markup Rule would not be triggered.

If the Anti-Markup Rule applies to the technical component or professional component of a test, payment to the billing physician or other supplier is limited to the lowest of (i) the performing physician’s “net charge” to the billing physician or other supplier, (ii) the billing physician or other supplier’s actual charge or (iii) the fee schedule amount for the service that would be allowed if the performing physician billed directly for the service. CMS requires the billing supplier to be responsible for determining the “net charge” of the performing physician and states that suppliers should retain contemporaneous documentation to support their net charge determination. CMS prohibits suppliers from taking their overhead into account when determining their net charge. The net charge determination is complicated, and legal counsel should be consulted for guidance in the event the Anti-Markup Rule applies to a diagnostic test.

### **Common Arrangements Analyzed Under the Anti-Markup Rule**

**Cath lab block lease arrangements.** A cardiology group enters into a block lease with a leasing organization pursuant to which, during four-hour blocks of time, the leasing organization provides the space, equipment and personnel necessary to own and operate a cath lab. The cardiology group’s physicians use the cath lab, which is located in a separate building from the building in which the group sees patients, to perform diagnostic cardiac catheters ordered by the physicians, and the cardiology group bills for these services under the group’s name and numbers. As long as the physicians performing the diagnostic cardiac catheters (i.e., supervising the technical component and performing the professional component) provide 75% of their professional services through the cardiology group, the 75% test is met, the performing physicians will be deemed to “share a practice” with the group, and the anti-markup prohibition will not apply.

**CCTA overread arrangements.** A cardiology group enters into an arrangement with radiologists under which the radiologists perform overreads on CCTA scans that are performed by the cardiology group on its patients. The cardiology group bills for the technical component and the professional component of the CCTA scan under its name and numbers. The Anti-Markup Rule’s application to these tests depends on whether the radiologists are designated as the physicians performing the primary read of the CCTA scan or whether the radiologists are designated as performing the primary read. If the former, the anti-markup prohibition will apply. In that situation, the radiologists should consider billing Medicare directly for the interpretation in their names and under their numbers. If cardiologists are designated as the primary reading physicians, the markup prohibition will not apply.

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<sup>1</sup> The term “same building” means a structure with, or combination of structures that share, a single street address as assigned by the U.S. Postal Service, excluding all exterior spaces (for example, lawns, courtyards, driveways, parking lots) and interior loading docks or parking garages. For purposes of this section, the “same building” does not include a mobile vehicle, van, or trailer.

**Diagnostic testing block lease arrangements.** A physician group enters into a block lease with a leasing organization under which it leases space and equipment for diagnostic testing in four-hour time blocks. The space is located in the same building as the group’s office, but is not part of the office space in which the group’s physicians see patients. The group’s physicians satisfy the supervision portion of the technical component of the diagnostic tests, but, for the interpretation of the tests, the group contracts with a physician who performs 80% of his or her professional services for another physician group. The contracted physician comes to the group’s offices to perform the interpretations. In this situation, the technical component of the tests will not be subject to the markup prohibition because the physicians supervising the tests should meet the 75% test. However, because the physician performing the interpretation does not meet the 75% test, the physician group would have to apply the location test on a test-by-test basis to determine whether the professional component of the tests will be subject to the markup prohibition. Here, the location test should be met, since the professional component is performed in diagnostic testing space located in the same building in which the ordering physicians see patients. Therefore, the physician performing the interpretations will be deemed to “share a practice” with the billing physician group and the anti-markup prohibitions will not apply to the professional component of the tests.

**Diagnostic testing in a “centralized building” arrangement.** A group practice maintains its diagnostic testing facilities in a “centralized building” in which the group does not have an office at which it sees patients. The group contracts with radiologists to perform the supervision component of the technical component of the diagnostic tests, as well as the interpretation of the tests. The radiologists perform more than 75% of their professional services for another group practice. Here, neither the 75% test nor the location test is met and the anti-markup prohibition will apply to the technical component and professional component of the tests. However, the radiologists can bill directly for the professional component of the test, thereby limiting the effect of the application of the Anti-Markup Rule.

#### **Additional Information**

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