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Physicians Convince CMS to Delay Implementation of Anti-markup Rule Pending Further Study

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The implementation of the Final Anti-Markup Rule, originally published in the November 27, 2007 Physician Fee Schedule, has been delayed for the most part until January 1, 2009. On December 28, 2008, a separate final rule went on display at the *Federal Register* and was published officially in the *Federal Register* dated January 3, 2008. This final rule delayed all of the rules relating to the anti-markup of diagnostic tests, effective January 1, 2008 through January 1, 2009, except for anatomical pathology tests performed in a "centralized building" that does not also meet the definition of "same building" as those terms are defined in the Stark regulations. In addition, the rules also remain in effect for "purchased diagnostic tests."

For the time being, the delay in implementation of the greater part of the anti-markup rule should alleviate the fears of many physician practices that diagnostic tests that were not performed in the same office where they provided substantially the full range of services would be subject to an anti-markup rule. That rule would have limited payment to the physician practice, for all intents and purposes, to the payments for the technologists and physicians interpreting the test without including any overhead costs, let alone profit margin. (See *Payment Matters Special Alert dated 11/5/07* for a full description of the original final anti-markup rule).

CMS decided to delay implementation of the final rule due to the many comments it received regarding the lack of clarity as to which arrangements would be considered the "office of the billing physician." In addition, commenters suggested to CMS that patient access could be seriously disrupted if physicians could not recoup their overhead costs in arrangements that would be subject to the anti-markup provisions. Consequently, CMS decided to study the issues further and provide guidance and/or new proposed rules within the year. CMS retained the rules relating to anatomic pathology because, it stated, that such arrangements were the genesis of the anti-markup rule and remain a concern. Further, CMS noted that its longstanding rule that the anti-markup provisions apply to the purchased technical component of a diagnostic test, so those billing limitations remain.

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Ober|Kaler's Comments: While CMS has delayed implementation of the anti-markup provisions, it is likely that it will revisit the issue within the year and attempt again to limit the payment for diagnostic tests from which CMS believes the physicians should not profit. Additionally, CMS has stated that it will issue rules proposing to limit in-office ancillary services, many of which are diagnostic tests. It appears that CMS is interested in curbing the extent to which physicians can profit from certain services by providing them in their own office.

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