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Final "Anti-Markup Rule" Issued by Medicare for Diagnostic Tests

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An expanded **"Anti-Markup Rule" (AMR)** went into effect on **January 1, 2009** for all **diagnostic tests** (other than clinical laboratory tests) billed under the **Medicare** billing and payment rules. This rule will have wide-reaching implications for any medical professional that routinely, or even occasionally, bills Medicare for diagnostic tests.

The AMR will prevent ordering physicians and other ordering suppliers, such as nurse practitioners, from "marking up," i.e., charging the full Medicare fee, for a diagnostic test performed on a Medicare patient if the test is not performed or supervised by the ordering physician or another physician with whom the ordering physician "shares a practice." The AMR applies to both the technical and professional components of diagnostic tests, i.e., both the performance and supervision of the technical portion of the test, as well as the professional interpretation. If the AMR applies to a diagnostic test ordered by a physician, he is restricted to billing Medicare only the lowest of: (a) the performing supplier's net charge to the billing physician; (b) the billing physician's actual charge; or (c) the Medicare fee schedule amount that would be payable if the performing supplier billed directly.

The AMR is intended by the Centers for Medicare and Medicaid Services (CMS) to prevent ordering physicians from marking up to the Medicare program, and making a profit from, the cost of a test performed by another physician who does not "share a practice" with the ordering physician who bills for the test. Some ordering physicians will be able to meet the requirements to avoid the AMR and may continue to perform diagnostic tests without being affected by the rule. However, it is expected that many physicians will be required to restructure the way in which they conduct diagnostic tests in order to conform to the AMR's requirements. If they cannot conform to the new rule, they will have to abandon the performance of the non-conforming component of the diagnostic test (either the technical or interpretation component or both) in order to avoid losing money.

"Sharing a Practice" with the Billing Physician

How do you determine if the AMR applies? You must ascertain if the physician who performs a diagnostic test for the physician who orders and bills for the test "shares a practice" with such ordering/billing physician by satisfying **one of two alternative tests**. If you satisfy one of these tests, you can avoid the AMR payment restriction and may bill Medicare's full fee schedule rate. CMS believes that if the physician who performs or supervises a diagnostic test and/or interprets the test can satisfy one of the two alternative requirements, then a sufficient nexus or connection to the ordering physician is established to justify his billing for the test, and the AMR will not apply.

Alternative Test #1 – "Substantially All" or "75% Test"

To satisfy test #1, the physician who conducts or supervises the technical component, or performs the professional component of a diagnostic test must devote at least 75% percent of his work effort/professional time to working on behalf of the physician or medical practice that orders and bills for the test, regardless of whether he is an employee or independent contractor[1], or whether he works full-time or part-time for such physician or practice. Under this Substantially All Test, the diagnostic test and interpretation can be performed at any location, as long as the performing and supervising physician works at least 75% for the physician/practice that orders and bills for the test.

Alternative Test #2 – "Same Building" Test

To satisfy test #2, the diagnostic test must be conducted and supervised, and where applicable, interpreted, by a physician (i) who is an owner, employee,

or independent contractor of the billing physician, and (ii) in the "offices of the billing physician or other supplier." "Offices of the billing physician" has two definitions, one for physicians, and one for "physician organizations" (POs) which include sole-shareholder professional corporations, physician practices, or group practices.

For physicians that are not POs, the "offices of the billing physician" means the "same building" where the "ordering" physician regularly furnishes patient care. For physicians that are POs, it means where "the ordering physician provides substantially the full range of patient care services that the ordering physician provides generally. Like the Stark Law, "same building" means a structure, or combination of structures, with a single street address, excluding exterior spaces, parking lots and garages, interior loading docs, mobile vehicles, vans and trailers.

Only one of the above alternative tests must be satisfied for each of the technical and professional components of every diagnostic test performed on a Medicare patient in order to avoid the AMR, but a different test could be used for each component. If one component of a diagnostic test performed on a Medicare patient cannot satisfy at least one of the alternative tests, that component cannot be billed by the ordering physician at the full Medicare fee rate, however, it may be billed at the full rate and the proceeds may be retained by the physician who performed (but did not order) the test, just like a traditional referral to an unrelated physician.

Potential Problem Areas for Physicians

Some medical practices that order diagnostic tests intending to bill the full Medicare rate may not be permitted to do so. If they utilize a part-time physician to perform diagnostic tests in the offices of the part-time physician, such as a radiologist who reads films at home or in the radiologist's office, they would be unable to satisfy either alternative test #1 or #2. Physician practices that order diagnostic tests from multiple office sites, but perform such tests in a centralized location may be unable to satisfy alternative test #2, and if such practices use part-time physicians who work less than 75% for the practice to supervise or perform a diagnostic test, they would be unable to meet alternative test #1 as well.

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Physicians would be well advised to review the structure of their diagnostic testing arrangements with their legal counsel to determine if they are able to comply with the new AMR or must make alternative arrangements.

Footnotes

1. There may be other implications to consider under the Stark Law, the New York State Referral Law or other laws, if the Physician is an employee or an independent contractor. This should be reviewed with legal counsel.

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