

RADIOLOGISTS: BEWARE OF THE REVISED ANTI-MARKUP RULE!

On January 1, 2009, the Centers for Medicare and Medicaid Services' ("CMS") revised anti-markup rule went into effect. The revised rule prohibits the markup of the professional component (PC) and/or technical component (TC) of a diagnostic test when the billing physician does not share a practice with the physician providing the test. Over the past several years, in an effort to derive additional income, many radiology practices (as well as other practices which provide diagnostic services) have entered into business arrangements with other specialty practices whereby the billing practice would markup the PC and/or TC fee when billing payors. These relationships have been scrutinized in the past, but with the revised anti-markup rule now in effect, many relationships which were not expressly prohibited before could very well be illegal today.

Under the revised rule, the billing physician can bill Medicare for a radiological study performed or interpreted by a different practice an amount equal to the lower of (i) the net charge billed to the billing physician by the radiologist who performed the radiological study; (ii) the actual charge to the billing physician; or (iii) the amount Medicare allows for the radiological study as if the radiologist would have billed Medicare directly. This rule applies to both the PC and TC of the radiological study. However, as with any rule, there are exceptions when the anti-markup rule will not apply.

The first exception is referred to as the "substantially all" test. If the radiology practice provides "substantially all" of its professional services to the billing physician, the rule will not apply. What is "substantially all"? CMS defined this term to mean that the radiology practice must provide at least 75% of its services through the billing physician. The locations of the testing site and billing site are not relevant under this exception. On the other hand, if this exception cannot be met, then the second exception must be explored and in this case the locations do matter.

It should therefore come of no surprise that the second exception is referred to as the "site of service" or "location" test. CMS has provided that the rule will not be applicable if the radiological study (PC and/or TC) is performed in the same building in which the billing physician regularly furnishes patient care. Moreover, there is a "supervision" requirement (separate and apart from Medicare's billing supervision requirements) in that: (1) with respect to the PC, the radiologist providing the PC must be on the billing practice's premises and supervised by a physician who is an owner, employee or independent contractor of the billing practice; and (2) with respect to the TC, the physician supervising the TC must be an owner, employee or independent contractor of the billing practice and on the premises where the test is being performed.

If you have a relationship that could trigger the anti-markup rule you should reassess the arrangement to make sure that you are either in compliance with the rule or that you meet one of the exceptions. Many physicians may have to restructure their arrangements and it is therefore very important for you to have a full understanding of the rule and its potential impact on your practice. Unfortunately, the anti-markup rule is only one rule that impacts the ability of physicians to provide diagnostic tests in their offices and we should expect that in the next few years other rules will be finalized that will further impact this area of medical practice.

Should you wish to discuss the matter further, please feel free to contact Barry B. Cepelewicz, M.D., Esq. or Gary S. Sastow, Esq. at Meiselman, Denlea, Packman, Carton & Eberz P.C.'s Health Care Group which, for over 30 years, has successfully represented physicians and other health care providers in litigation, transactional and regulatory matters. Barry and Gary can be reached at (914) 517-5000, or bcepelewicz@mdpcelaw.com and gsastow@mdpcelaw.com.

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