

Amended Anti-Markup Rule Becomes Effective

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The Social Security Act and Centers for Medicare and Medicaid Services ("CMS") reimbursement regulations prohibit physicians from marking up the costs of diagnostic tests (except for clinical diagnostic laboratory tests) billed by ordering physicians to Medicare or Medicaid but purchased from outside suppliers. CMS substantially revised a payment limitation for diagnostic tests, referred to as the "anti-markup rule," in its 2008 and 2009 Physician Fee Schedules. The latest changes to 42 C.F.R. § 414.50, which became effective on January 1, 2009, were designed to address quality and over-utilization concerns raised in part by competing providers of diagnostic tests.

Previously, CMS applied the payment limitation only to the technical component of diagnostic tests purchased from outside suppliers and billed by the ordering physician ("purchased diagnostic tests"), and not the professional component. With the recent revisions, the anti-markup rule limits the amount a physician or supplier may charge and be reimbursed for diagnostic tests ordered by the physician, supplier, or a related party, and supervised (for the technical component, or "TC") or interpreted (for the professional component, or "PC") by a physician who does not "share a practice" with the billing physician or supplier. The physician performing the TC or PC "shares a practice" with the billing physician only if he or she:

1. Furnishes substantially all (at least 75%) of his or her professional services through the billing physician or other supplier (based on the performing physician's actual or expected activities during the prior or next 12 months, including the month of performance). This is known as the "substantially all" test.
2. Is an owner, employee or independent contractor of the billing physician or other supplier and the TC or the PC is performed in the "office of the billing physician," i.e., where the billing physician regularly furnishes patient care. In the case of a physician organization such as a group practice, the office is the space where the practice provides "substantially the full range of patient care services" that it provides generally. This is known as the "same building" or "site of service" test.

The determination of whether the ordering/billing and supervising/interpreting physicians share a practice is made on a test-by-test basis. In addition, CMS has made clear that, under the "site-of-service" approach, only TCs conducted and supervised in, and PCs performed in, the office of the billing physician or other supplier by an employee or independent contractor physician will avoid application of the anti-markup payment limitation.

If the ordering/billing and performing/supervising physicians do not share a practice, the anti-markup rule's payment limitation applies to restrict claims and resulting reimbursement for covered diagnostic tests to the lowest of:

1. The performing supplier's net charge to the billing physician or other supplier;
2. The billing physician or other supplier's actual charge; or
3. The fee schedule amount for the test that would be allowed if the performing supplier billed directly.

Thus, when the anti-markup rule applies, payment limitations may result in fees that do not cover the actual costs of performing the tests and interpreting their results.

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Physician practices that bill for diagnostic tests performed or supervised by outside physicians (i.e., those who do not “share their practices”) should review their arrangements to assure they comply with the Medicare reimbursement requirements, including the provisions of the anti-markup rule, as applicable.

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