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# Client Alert


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## Changes to Medicare Anti-Markup Rules Effective January 1, 2009

As part of the final rule implementing the Medicare Physician Fee Schedule for 2009, the Centers for Medicare and Medicaid Services ("CMS") established an exception to the anti-markup rule which governs diagnostic tests billed to Medicare. The exception will allow a physician or to avoid the charge limitations otherwise applicable to diagnostic tests. The exception will become effective on January 1, 2009.

Prior to the 2009 Fee Schedule changes, the anti-markup rule provided that, if a physician orders and bills Medicare for the professional component ("PC") or technical component ("TC") of a diagnostic test that is either performed by another supplier or performed at a site other than the office of the billing physician, then the billing physician is limited to charging Medicare the lowest of:

- The performing supplier's net charge to the billing physician;
- The billing physician's actual charge; or
- The Medicare fee schedule amount for the test.

For example, the existing rule would apply when a physician group purchases MRI equipment and contracts with an outside radiologist to provide interpretations and then bills Medicare for the PCs purchased from the radiologist.

The new exception would allow a billing physician to avoid the anti-markup rule's charge limitations if the billing physician is deemed to "share a practice" with the supplier performing the purchased PC or TC. Two separate tests must be applied to determine if the billing physician and performing supplier "share" a practice, and the tests must be considered in order.

Under the first test, referred to as "Alternative 1" or the "Substantially All Test," the performing supplier will be considered to share a practice with the billing physician if the performing supplier furnishes substantially all (defined as at least 75%) of his professional services through the billing physician. The "substantially all" requirement would also be satisfied if, at the time the billing physician submits the claim to Medicare for the purchased PC or TC, the billing physician has a reasonable belief that:

- For 12 months prior to and including the month in which the purchased service was performed, the performing supplier furnished substantially all of his professional services through the billing physician; or
- The performing supplier will furnish substantially all of his professional services through the billing physician for the next 12 months, including the month in which the service is performed.

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If Alternative 1 is not satisfied, then the second test, referred to as "Alternative 2" or the "Site of Service Test," should be considered. Under this test, the performing supplier will be deemed to share a practice with the billing physician if the performing supplier is:

- An owner, employee or independent contractor of the billing physician; and
- The purchased TC or PC is performed in the "office of the billing physician." For this purpose, the office of the billing physician is the same building where the billing physician performs substantially the full range of patient care services that the billing physician generally provides.

If neither test is satisfied, then the billing physician cannot take advantage of the exception and will instead be subject to the anti-markup rule's charge limitation. However, if either one of the tests is met, then the billing physician is free from the anti-markup limitations. Failure to comply with the anti-markup rule can result in harsh penalties against the billing physician, including civil monetary penalties and possible exclusion from the Medicare program.