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Client Alert

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CMS Delays Effective Date of Key Provisions of Anti-Markup Rule Amendments

In a final rule published on January 3, 2008, the Centers for Medicare and Medicaid Services ("CMS") delayed for one year the applicability of the key provisions of the recently promulgated amendment to the anti-markup rule as they relate to most diagnostic tests.

As reported here http://www.proskauer.com/news_publications/client_alerts/content/2007_12_12/_res/id=sa_PDF/15493-121207-2008%20Physician%20Fee%20Schedule-ca.pdf, CMS' amendment of the anti-markup rule greatly expanded the scope of the rule, making it far more difficult for practices to share diagnostic testing equipment. Before the recent change, the anti-markup rule prohibited the marking up of the technical component of a diagnostic test that is purchased from an outside supplier. The amended rule, which would have become effective on January 1, 2008, would have expanded this prohibition by (1) making the rule applicable to the professional component of a diagnostic test; and (2) by making the rule applicable not only when the test is "purchased," but also whenever it is performed at a site other than the office of the billing physician.

Crucially, the new rule defines the "office of the billing physician" such that practices billing for diagnostic tests can no longer mark up tests unless the test is performed in an office where the practice provides "substantially the full range of patient care services that [it] provides generally." Thus, a medical practice that uses centralized diagnostic equipment located outside of its "office" but in the same building appears to be subject to the anti-markup rule; moreover, the Stark Law's requirement that a practice have an office in the same building in which the DHS are provided that is open for only eight hours a week to see patients for services unrelated to DHS in order to meet the "same building" test is replaced, for anti-markup rule purposes, with the "substantially full range of services" in the same office requirement.

Following publication of the amended rule, numerous commentators pointed to important interpretive issues raised by the amendments, including the applicability of the rule to physicians who are employees of tax-exempt teaching hospitals or medical schools who practice as part of a "faculty practice plan" that is not separately incorporated but functions as a "division" of the tax-exempt hospital or school.

Acknowledging concern regarding the open interpretive questions and the potential that the rule will adversely affect patient access to diagnostic services, CMS delayed until January 1, 2009 the applicability of the changes to the rule except as they relate to anatomic pathology diagnostic testing services furnished in a centralized building (as defined under the Stark Law regulations) that does not qualify as a same building under the Stark Law. The technical component of a purchased diagnostic test remains subject to the anti-markup rule as well (as was the case before the rule was amended).

CMS noted that it will issue clarifying guidance concerning the application of the amended anti-markup rule to diagnostic tests furnished in a centralized building, and/or propose additional rulemaking in the area before the new January 1, 2009 effective date. Accordingly, providers of diagnostic testing services should stay tuned.

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