CMS Delays Implementation Of Anti-Markup Rule

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On November 1, 2007, the Centers for Medicare and Medicaid Services (CMS) put on public display the 2008 Medicare Physician Fee Schedule Final Rule wherein CMS published a new Medicare purchased diagnostic test and reassignment rule. The final rule created a new anti-markup prohibition to both the professional and technical components of diagnostic tests when those tests are billed by ordering physicians but performed by outside suppliers or in a location outside of the ordering physician’s office. The industry reaction to this new rule was significant. Immediately after the final rule was released, CMS was inundated with numerous requests from attorneys and providers to provide additional guidance and clarification regarding the significantly expanded application of the anti-markup prohibition. CMS representatives indicated during various teleconferences sponsored by industry associations that it intended to release a series of “Frequently Asked Questions” before the close of 2007 in order to provide additional guidance prior to the January 1, 2008 effective date. Subsequently, CMS officials decided to change their approach and, instead, elected to delay implementation of the new anti-markup provisions.

On January 3, 2008, CMS published a notice delaying implementation of the new anti-markup provisions until January 1, 2009 but with two exceptions. First, the anti-markup prohibition will, as of January 1, 2008, continue to apply to the technical component of a “purchased diagnostic test” in the manner it had been prior to the recently promulgated rule. But note that the term “purchased diagnostic test” has never been officially defined by CMS so it remains unclear as to when a technical component is “purchased.” Based on our understanding of the Medicare purchased diagnostic test rule as it existed before the changes, reverting back to the prior rule is unlikely to affect many existing technical component lease arrangements since those arrangements are structured as a lease of space, equipment, and/or technologists by the billing physician rather than “purchase” of the technical component performed by another supplier. The second exception is that, effective January 1, 2008, the new anti-markup provisions will be applicable to anatomic pathology diagnostic testing services if those services are furnished in space that: (1) is utilized by a physician group practice as a “centralized building” for purposes of complying with the physician self-referral rules; and (2) does not qualify as a “same building” as defined in CMS regulation. This latter exception will allow CMS to crack down on so-called “pod labs” even while deferring the implementation of the rule otherwise.

It will be interesting to see if CMS’ expected modifications to their rulemaking will follow the normal mid-summer publication of Notice of Proposed Rulemaking followed by a totally new final anti-markup rule in the fall to become effective with the 2009 Medicare Physician Fee Schedule Rule next January.

Read the notice.

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