



The New Anti-Markup Rule is Delayed until 2009

On December 28, 2007, the Centers for Medicare and Medicaid Services (“CMS”) announced that it was delaying implementation of most of the newly revised anti-markup regulations for one year until January 1, 2009. This announcement was made only days before the new regulations were supposed to take effect on January 1, 2008. CMS noted that it had received “informal comments” that the new regulations were unclear as to their application, would disrupt patient access, and would reduce the amount of diagnostic tests that could be provided to patients. As a result, CMS decided that it needed “to study the issues further” and to issue clarifying guidance or propose additional rulemaking.

The one year delay applies to all of the new anti-markup rule, but for two exceptions:

- The Technical Component of Purchased Tests. First, CMS is not delaying implementation of the anti-markup rule with respect to the *technical* component of any diagnostic test *purchased* from an outside supplier. This exception, however, should have little impact in practice, because there has been for some time an anti-markup rule on the books that already applied to the technical component of purchased tests.

- Anatomic Pathology Diagnostic Testing. Second, CMS is not delaying implementation of the new anti-markup rule as to anatomic pathology diagnostic testing furnished in a certain kind of space. Specifically, the new anti-markup rule *will* apply to such testing furnished in a group practice’s “centralized building,” as that term is defined in the Stark Law, *if* that space does not meet the Stark definition of “the same building” (*i.e.*, in space which the group practice otherwise provides medical/physician services according to certain criteria set forth in the Stark regulations). Conversely, it appears that the new anti-markup rule will *not* apply to anatomic pathology testing whenever such testing is performed in the “same building.” Notably, CMS stated that anatomic pathology testing arrangements remained its “core concern” that had “precipitated” the new anti-markup rule.

If the now delayed anti-markup rule had been effective as of January 1, 2008, it would have limited what a physician or other supplier could bill to Medicare for the technical or professional components of any diagnostic test that the physician or supplier ordered and that was either: (1) purchased from an outside supplier; or (2) performed at a site other than the

continued...

“office” (which was narrowly defined) of the billing physician or supplier. According to prior CMS commentary, this rule was designed to take the “profit” out of certain diagnostic tests. Now, except for the two exceptions noted above, this broad anti-markup rule will not take effect until 2009.

* * *

If you have any questions about this important action by CMS, please call the attorney at Garfunkel, Wild & Travis, P.C. with whom you usually work.

About Garfunkel, Wild & Travis, P.C.

Garfunkel, Wild & Travis, P.C. was founded in 1980 with a single purpose in mind: to become a preeminent health care law firm attending to the unique business and legal needs of its clients. Since then, the firm has grown to 70 attorneys devoted to addressing the complex legal, regulatory, business and financial needs of its diverse clients.

If you would like to receive Legal Alert mailing from Garfunkel, Wild & Travis, P.C. electronically in the future, or if you would like to be removed from the mailing list, please contact us at (516) 393-2258 or subscriptions@gwtlaw.com. You may also visit the Firm's website at www.gwtlaw.com.

THIS MATERIAL IS INTENDED AS INFORMATIONAL ONLY AND THE CONTENT SHOULD NOT BE CONSTRUED AS LEGAL ADVICE. READERS SHOULD NOT ACT UPON INFORMATION IN THIS MATERIAL WITHOUT FIRST SEEKING PROFESSIONAL ADVICE.

111 Great Neck Road
Great Neck, NY 11021
(516) 393-2200 ● fax (516) 466-5964

411 Hackensack Avenue
Hackensack, NJ 07601
(201) 883-1030 ● fax (201) 883-1031

350 Bedford Street
Stamford, CT 06901
(203) 316-0483 ● fax (203) 316-0493

© 2007 Garfunkel, Wild & Travis, P.C.