



Garfunkel, Wild & Travis, P.C.

New York New Jersey Connecticut

Legal Alert

December 2008

New Anti-Markup Rule Goes Into Effect on January 1, 2009

Effective January 1, 2009, significant new rules go into effect with respect to a billing provider's ability to markup certain diagnostic tests provided to Medicare beneficiaries. The newly revised anti-markup rule ("Anti-Markup Rule") was issued as part of the final Medicare Physician Fee Schedule for calendar year 2009, which was published by the Centers for Medicare & Medicaid Services ("CMS") in the Federal Register on November 19, 2008. This new Rule is noteworthy because it significantly changes the application of the Anti-Markup Rule, which historically has been limited to a physician who orders a test, but "purchases" the technical component of the test from a third-party.

Under the new Anti-Markup Rule, the anti-markup restrictions will apply to the technical component and professional component of certain diagnostic tests that are billed by the physician (or physician group) or supplier that ordered the test unless the physician that supervises the technical component of a test or performs the professional component of a test (each referred to as a "Performing Physician") satisfies certain requirements. These requirements, which CMS refers to as "Alternative 1" and "Alternative 2", focus on the underlying principal that there is no anti-markup prohibition if the Performing Physician "shares a practice" with the ordering physician.

Under Alternative 1, the anti-markup restrictions will not apply if the Performing Physician meets the "substantially all" test. This test requires that the Performing Physician perform "substantially all" (at least 75 percent) of his or her professional services for the billing physician or other supplier. Under Alternative 2, the anti-markup restrictions will not apply, even if the Performing Physician does not perform "substantially all" of his or her professional services for the billing physician, provided the Performing Physician meets the "site-of-service" test. This test requires that the Performing Physician (1) be an employee or independent contractor of the billing physician or supplier; and (2) conduct or supervise the technical component or perform the professional component in the "office of the billing physician or other supplier".

The location of the test and what constitutes an allowed "office" is thus critical under the new Anti-Markup Rule. In this regard, CMS defined "office" as medical office space, regardless of the number of locations, where the ordering physician/supplier regularly furnishes patient care, and includes space where the billing physician/supplier furnishes diagnostic testing if the space is located in the "same building" (as defined for purposes of the Stark Law) in which the ordering physician/supplier regularly furnishes patient care. If the billing physician/supplier is a "physician organization", such as a professional corporation or medical group, the term "office" means space in which the ordering physician provides substantially the full range of patient care services that the ordering physician provides generally.

When the Anti-Markup Rule applies, the physician who orders and bills for the test cannot profit from the test. Rather, Medicare will pay the billing physician or physician group only the lesser of: (1) the Performing Physician's net charge to the billing physician or other supplier; (2) the billing physician or group's actual charge; or (3) the Medicare fee schedule amount for the test that would be allowed if the Performing Physician billed directly. The Performing Physician's net charge encompasses only what the billing physician paid the Performing Physician for supervising the technical component or for performing the professional component. Stated differently, the cost does not include any of the billing physician's other expenses in connection with the diagnostic test, such as the overhead expenses related to the equipment, space, or personnel.

Because of CMS's narrow definition of what constitutes a physician or physician group's "office," many otherwise compliant arrangements in which physician groups own diagnostic equipment and perform diagnostic tests would suddenly become economically unviable under the newly expanded Anti-Markup Rule. Therefore, we encourage all providers to review their existing relationships with other providers for the provision of the technical and/or professional components of diagnostic tests. We have prepared a decision tree that can provide assistance in determining whether the Anti-Markup Rule will apply. The decision tree is available on our website at www.gwtlaw.com.

To the extent any of these relationships involve services that are ordered and billed by the same physician or physician group, the Anti-Markup Rule may be implicated. You should contact your health care counsel to assist you in reviewing these relationships and their compliance with the new Rule.

* * * * *

If you have any questions, please contact the GWT attorney with whom you regularly consult.

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 80 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.