



# Health Law CHECKUP

www.swlaw.com

December 2008

If you have questions about this article or would like to inquire about an educational program for your facility or organization, please contact any of following:

## Authors:

### Terry Roman

602.382. 6293  
troman@swlaw.com

### Kris Gates

602.382. 6278  
kgates@swlaw.com

### Amy Lohman

602.382. 6330  
alohman@swlaw.com

## Welcome to the Health Law Checkup

Snell & Wilmer L.L.P. is pleased to announce the first in a series of Healthcare Legal Alerts – “Anti-Markup Rule for Diagnostic Tests”. Over the course of the next few months, our healthcare legal team will provide a periodic summary of issues impacting healthcare entities and providers. The first topics in the series will focus on changes made in the 2009 Hospital Inpatient Prospective Payment Systems Rule and in the 2009 Physician Fee Schedule. These topics will include: “Anti-Markup Rule for Diagnostic Tests,” “IDTF Overview,” “Under Arrangement Transactions,” “Equipment and Space Agreements,” “Physician Recruitment” and “Percentage Based Compensation.”

## Anti-Markup Rule for Diagnostic Tests

### Question 1: What is the Anti-Markup Rule?

As background, the final Anti-Markup Rule broadens the existing anti-markup rule that prohibits physicians and other suppliers from marking up the technical component of certain diagnostic tests purchased from outside suppliers and billed to Medicare. In 2007, CMS proposed expanding the scope of this anti-markup rule to the professional component of diagnostic tests and adding a site of service requirement to the payment limitation. In response to public concern regarding



the changes, CMS delayed the effective date of the proposed rule to January 1, 2009 (with a limited exception for anatomic pathology arrangements), to provide time for CMS to review and respond to comments. CMS subsequently revised the proposed rule and published the final Anti-Markup Rule on November 19, 2008.

The final Anti-Markup Rule prohibits a physician, physician organization or supplier that orders AND bills for diagnostic tests from marking up his charge to Medicare for any tests performed or supervised by a physician who does not “share a practice” with the billing physician, physician organization or supplier. For simplicity, we refer to physicians, physician organizations and suppliers as “physician” below.

**Question 2: Does the Anti-Markup Rule apply to both the professional and technical components of diagnostic tests?**

Yes, the Anti-Markup Rule applies to both the professional and technical components of diagnostic tests, but it does not apply to clinical laboratory tests.

**Question 3: When does the Anti-Markup Rule become effective?**  
January 1, 2009.

**Question 4: As described above in Question 1, the Anti-Markup Rule applies to tests performed or supervised by a physician who does not “share a practice” with the billing physician. How does CMS define “share a practice?”**

CMS states that a physician “shares a practice” with the billing physician if (i) the physician furnishes at least 75% of his professional services for the billing physician (the “Substantially All Calculation”) OR (ii) the physician performs (including conducting and supervising) the service in the same building where the ordering physician (not just a member of his or her group practice) provides substantially the full range of patient care services that he generally furnishes (the “Site of Service Approach”).

**Question 5: What if the Anti-Markup Rule applies to an arrangement?**

If a physician bills Medicare for a diagnostic test that he ordered, the billing physician may only charge Medicare an amount equal to the lowest of:

1. The performing supplier’s net charge to the billing physician or other supplier,
2. The billing physician or other supplier’s actual charge, or
3. The Medicare fee schedule amount.

In the case of the purchase of a test or interpretation for a fixed fee, the net charge



is easy to calculate. It more difficult to calculate in those cases where compensation is otherwise based on the actual costs of the performing physician. In those cases, the net charge is limited to the salary and benefits paid; other overhead costs for the space or equipment may not be included in the calculation.

#### Question 6: What are the penalties for failing to comply with the Anti-Markup Rule?

The billing physician may be sanctioned under the civil monetary penalties law and may be excluded from the Medicare program for a violation of the Anti-Markup Rule. In addition, the claim can be considered a false claim which could result in liability under the civil False Claims Act or even criminal liability under the Criminal False Claims Act.

#### Examples:

To illustrate the application of the Anti-Markup Rule, consider the following fact pattern: Dr. Anderson is a full-time employee of Southwest Medical Group. She performs all of her professional services for Southwest Medical Group. Dr. Anderson supervises a diagnostic test for Southwest Medical Group in its Oasis Medical Office (“Oasis MOB”) that was ordered by Dr. Burton (an employee of Southwest Medical Group) and is being

conducted at the Oasis MOB. Southwest Medical Group is billing for the test.

Although Southwest Medical Group (through its physicians) is both ordering and billing for the test, since Dr. Anderson performs all of her professional services for Southwest Medical Group, she “shares a practice” with Southwest Medical Group under the Substantially All Calculation, and, therefore, the Anti-Markup Rule does not apply.

However, consider the following changes to the fact pattern: The same facts as above but Dr. Anderson is a part-time employee of Southwest Medical Group and only performs approximately 60% of her professional services for Southwest Medical Group. She performs approximately 40% of her professional services as an independent contractor for another physician group.

Since Southwest Medical Group (through its physicians) is both ordering and billing for the test, the Anti-Markup Rule applies if Dr. Anderson does not “share a practice” with Southwest Medical Group. Since Dr. Anderson only provides 60% of her professional services for Southwest Medical Group (and, therefore, fails the Substantially All Calculation), she will only “share a practice” with Southwest Medical Group if the Site of Service Test applies meaning that Dr. Burton (as the ordering physician) provides substantially the full range of patient care services that he provides generally at the Oasis MOB (although such services are



not required to be performed in the same office suite as where the test is conducted and supervised so long as they are performed in the "same building" as defined in the Stark Law). Therefore, the Anti-Markup Rule will not apply if Dr. Burton provides substantially the full range of patient care services that he provides generally at the Oasis MOB but will apply if he does not.

When analyzing arrangements for compliance with the final Anti-Markup Rule, physicians, physician groups and suppliers must be aware

of and comply with other applicable laws, regulations and standards. These include the Stark laws, federal anti-kickback laws and Medicare supervision requirements, among others.

Remember, the effective date of the Anti-Markup Rule is January 1, 2009, so now is the time to revisit and revise current arrangements implicated by the Anti-Markup Rule.

## Health Care Services Group

### Partners and Of Counsel

**Curtis Drake**  
801.257.1805 | cdrake@swlaw.com

**Robert Feinberg**  
602.382.6380 | rfeinberg@swlaw.com

**Kris Gates**  
602.382.6278 | kgates@swlaw.com

**Paul Giancola**  
602.382.6324 | pgiancola@swlaw.com

**Barry Halpern**  
602.382.6345 | bhalpern@swlaw.com

**Tom Hoecker (Benefits)**  
602.382.6361 | thoecker@swlaw.com

**Libby Petersen**  
602.382.6378 | lpetersen@swlaw.com

**Jody Pokorski (Real Estate)**  
602.382.6399 | jpokorski@swlaw.com

**Terry Roman**  
602.382.6293 | troman@swlaw.com

**Gina Slattery**  
520.882.1200 | gslattery@swlaw.com

**Joshua Woodard (Employment)**  
602.382.6281 | jwoodard@swlaw.com

**Laura Zeman (Intellectual Property)**  
602.382.6377 | lzeman@swlaw.com

**Associates**  
**Samantha Butler**  
602.382.6575 | sbutler@swlaw.com

**Brett W. Johnson**  
602.382.6312 | bwjohnson@swlaw.com

**Robert Kethcart**  
602.382.6533 | rkethcart@swlaw.com

**Amy Lohman**  
602.382.6330 | alohman@swlaw.com

**Angela Lutich**  
602.382.6354 | alutich@swlaw.com

**Josette Mollica**  
714.427.7032 | jmollica@swlaw.com

**Rhonda Needham**  
602.382.6392 | rneedham@swlaw.com

**Kimberly Neville**  
801.257.1846 | kneville@swlaw.com

**Scott Shuman**  
602.382.6283 | sshuman@swlaw.com

**Emily Smith**  
801.257.1550 | ehoffman@swlaw.com

**Victoria Warren**  
602.382.6323 | vwarren@swlaw.com

**Snell & Wilmer**  
— L.L.P. —  
LAW OFFICES

Character comes through.®

DENVER LAS VEGAS LOS CABOS ORANGE COUNTY PHOENIX SALT LAKE CITY TUCSON

©2008 All rights reserved. The purpose of this newsletter is to provide our readers with information on current topics of general interest and nothing herein shall be construed to create, offer, or memorialize the existence of an attorney-client relationship. The articles should not be considered legal advice or opinion, because their content may not apply to the specific facts of a particular matter. Please contact a Snell & Wilmer attorney with any questions.