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Stop Self Referral Billing Abuses

Requested Congressional Action:

To stop the proliferation of billing abuses (markups) by physicians ordering pathology services:

- Congress should remove anatomic pathology from the Stark Law's In Office Ancillary Services Exception (IOASE)
- Members of Congress should urge the Centers for Medicare & Medicaid Services (CMS) to fix the Medicare anti-markup rule on diagnostic services to prevent physicians from marking up the costs of pathology services they order on their patients.

Issue 1: Close the Loophole in the In-Office Ancillary Services Exception

The physician self-referral law – the Stark Law – prohibits physicians from referring Medicare patients for health services to an entity in which the physician has a financial relationship. As Congressman Parker Griffith, MD recently observed, “it was intended to assure that clinical decisions related to patient treatment were undertaken devoid of financial considerations, thus assuring patients accessibility to lower cost, high quality services while discouraging over-utilization and encouraging competition.”¹ However, certain exceptions to the Stark Law, such as the IOASE, are facilitating the circumvention of the Stark Law's self referral prohibitions. The result has been a significant overutilization of pathology services, increasing healthcare costs for the Medicare, tax payers and beneficiaries.

Issue 2: Urge CMS to Fix the Anti-Markup Rule for Pathology Services

In the 2008 final physician fee schedule rule, CMS identified the proliferation of abusive pathology billing arrangements as its primary reason for revising its anti-markup rule. These concerns lead CMS to express concern that “allowing physician group practices or other suppliers to purchase or otherwise contract for the provision of diagnostic testing services and to then realize a profit when billing Medicare *may lead to program and patient abuse in the form of overutilization of services and result in higher costs to the Medicare program.*”² The new rules, however, appear to have had the unintended effect of encouraging abusive billing arrangements. The changes to the rule appear to render it useless as a tool to fight physician markups of anatomic pathology services.

Impact of Self Referral on Health Care Costs and Clinical Decisions

A number of studies have found that patient referrals for services in which the provider has a financial interest encourages overutilization and increases costs. In 2007, as part of investigations by U.S. Department of Health & Human Services (HHS) into potentially abusive pathology billing arrangements, the Office of the Inspector General (OIG) published three audits of urology physician group practices. These audits found that in the year after the urology groups entered into contractual arrangements to profit on their referrals, *their utilization of pathology services dramatically increased, increasing 699%, 230%, and 26% respectively.* One group practice increased its use of pathology services from one unit of service per patient to almost 9 specimens, on average. *This represents a cost increase of almost \$800 per patient* since Medicare provides about \$100 per specimen as reimbursement. *OIG found that all of the audited physician groups billed significantly more biopsies than Medicare carriers paid on average to other providers—124%, 65%, and 58% respectively.* Simply put, self referral needlessly increases Medicare costs.

Another study, by the Center for Health Policy Studies, found laboratory charges per enrollee under private health insurance programs were 41 percent higher in states lacking direct billing laws, which deter markups. This study also found that laboratory test utilization is higher in non-direct billing states. These findings are similar to those uncovered by OIG in the seminal study that led Congress to prohibit self-referral. That study found that physicians with a financial interest in the lab tests for which they “referred Medicare patients [ordered] 45 percent more laboratory services than did physicians who did not have such financial interests.”³

Problems Associated with Abusive Anatomic Pathology Billing Practices

The problems caused by markups, self-referral, and similar abusive billing practices like kickbacks all rely on the same economic incentive to profit on patient referrals. Like kickbacks, these practices can distort rational medical decisions, lead to the overutilization of health care services and higher medical costs for patients and third party payers, and “cause unfair competition by freezing out competitors” unwilling to engage in such practices.^{4, 5, 6, 7} They can adversely affect patient welfare and clinical laboratories as well as undermine patient trust in the medical profession.^{2, 8, 9} These arrangements “can also adversely affect the quality of patient care by encouraging physicians to order services or recommend supplies based on profit rather than the patients’ best medical interests.”¹⁰

The Simple Solution to Billing Abuses Involving Anatomic Pathology

When Congress established the IOASE, it did so to allow for services that are ancillary to a physician specialty, in other words while the patient waits. Unlike true “ancillary services,” such as x-rays and basic lab tests, anatomic pathology services cannot be furnished during a patient visit. Moreover, few office-based physicians possess the qualifications needed to interpret pathology specimens. Many physician practices have been, as Congressman Griffith noted, using the IOASE to “structure business arrangements that could compromise the quality of care, constrain patient choice from the full range of treatment options and may result in overutilization of certain treatments” and diagnostic services, such as pathology services.

To stop the proliferation of arrangements designed to profit on the IOASE for anatomic pathology, ASCP believes now is the time for Congress to remove AP from the IOASE. Additionally, members of Congress should urge CMS to fix the anti-markup rule to prevent abusive billing by physicians marking up the cost of anatomic pathology services.

For more information on preventing physician markups, contact Matthew Schulze, Senior Manager of Federal and State Affairs for ASCP at (202) 347-4450.

¹ Congressman Parker Griffith, MD. Correspondence to Chairman John Spratt, House Committee on Budget. March 19, 2009.

² 72 Federal Register 38179, Thursday July 12, 2007, Proposed Rule. Proposed Revisions to Payment Policies Under the Physician Fee Schedule. Centers for Medicare and Medicaid Services, U.S. Department for Health and Human Services.

³ Impact of Direct Billing Requirements for Laboratory Tests on Laboratory Charges, Utilization and Costs, Center for Health Policy Studies. March 1993. p. 3.

⁴ Special Advisory Bulletin: Contractual Joint Ventures. Office of the Inspector General. U.S. Department of Health and Human Services. April 2003. p. 2.

⁵ Report to the Congress: Medicare Payment Policy. The Medicare Payment Advisory Commission. March 2005. p. 143.

⁶ 63 Federal Register 1662, January 9, 1998, Proposed Rule, Medicare and Medicaid Programs, Physician Referrals to Health Care Entities With Which They Have Financial Relationships.

⁷ Goodell, S. Physician Self-referral and Physician Owed Specialty Facilities. Research Synthesis. Policy Brief 15. Robert Wood Johnson Foundation, June 2008. p.1.

⁹ Casalino, LP, Physician Self-referral and Physician Owed Specialty Facilities. Research Synthesis. Report 15. Robert Wood Johnson Foundation, June 2008.

¹⁰ Benjamin, R. Report of the Council of Ethical and Judicial Affairs: CEJA Report 1-I-08. American Medical Association. November 12, 2008. p. 2.

¹¹ Office of the Inspector General, U.S. Department of Health and Human Services, Special Fraud Alert: Rental Of Space In Physician Offices By Persons Or Entities To Which Physicians Refer.

<http://oig.hhs.gov/fraud/docs/alertsandbulletins/office%20space.htm>