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### CMS PROPOSES CHANGES IN STARK AND REASSIGNMENT RULES IN 2007 PROPOSED PHYSICIAN FEE SCHEDULE

By: *Deborah J. Williamson*

On August 8, 2006, Centers for Medicare and Medicaid Services ("CMS") released its proposed changes to the Medicare Physician Fee Schedule ("PFS") for 2007. In its proposed PFS rule, CMS has proposed changes to the reassignment and self-referral (Stark) regulations to address what CMS perceives as program abuse by certain physicians billing for diagnostic tests.

Specifically, CMS has proposed to amend the reassignment regulations to clarify that any reassignment pursuant to the contractual arrangement exception is subject to program integrity safeguards that relate to the right to payment for diagnostic tests. CMS has proposed to amend the Stark regulations to place restrictions on what types of space ownership or leasing arrangements will qualify the in-office ancillary services exception or the physician services exception under Stark.

Prompting these rule changes was a perception by CMS that a recent change to Medicare reassignment rules (which were revised to permit reassignment by an independent contractor regardless of whether the services were performed on the premises of the billing entity) may have led to over-utilization.

CMS noted its concern over the recent growth of "pod" or "condo" labs, that involve an entity leasing space in a medical building, subdividing the space into cubicles equipped with microscopes that are supervised by a single pathologist, and subleasing each cubicle to a different physician group. These physician groups, which may be located many miles away, pay the "pod lab" a fee for every slide, and bill Medicare for the entire service.

To address these concerns, CMS has clarified that the revised reassignment rules do not permit a physician to avoid the historic prohibition against diagnostic test markups. In other words, if a

physician group bills for the technical component of a diagnostic test performed by an independent contractor, the physician group's charges to Medicare cannot exceed the independent contractor's net charge to the physician group. CMS has also proposed that in order for a physician to bill for the technical component, the physician must have performed the interpretation.

CMS is also soliciting comments on whether the anti-markup provision should also apply to the reassignment of the professional component of diagnostic tests, which would prohibit a physician group from billing more than it paid for a "read" or interpretation performed by an independent contractor.

CMS has proposed to revise the Stark regulations to change the definition of "centralized building" under the in-office ancillary services and physician services exceptions. CMS is proposing to revise the definition of "centralized building" to include a minimum square footage requirement of 350 square feet. This revision is intended to address the above-described "pod labs." Currently, the definition includes no minimum square footage requirement. CMS' proposed minimum square footage requirement would not apply to space owned or leased in a building in which no more than three group practices own or lease space in the "same building," as defined under Stark, and share the same "physician in the group practice."

Almost every physician or group practice performing diagnostic services in-house has to meet either the in-office ancillary services exception or the physician services exception in order for their in-house services to comply with Stark. This CMS proposal is a reminder to physicians that all contractual arrangements, particularly those involving Stark designated health services, must be scrutinized to ensure compliance with these complex rules.