



College of American Pathologists
325 Waukegan Road, Northfield, Illinois 60093-2750
800-323-4040 • <http://www.cap.org>

Advancing Excellence

Direct Response To:
DIVISION OF ADVOCACY
1350 I Street, NW, Suite 590
Washington, DC 20005-3305
202-354-7100 Fax: 202-354-7155
800-392-9994 • cap.org

August 27, 2008

Kerry Weems
Acting Administrator
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Attention: CMS-1403-P
Room 445-G
Hubert H. Humphrey Building
200 Independence Avenue, SW.
Washington, DC 20201

Subject: CMS-1403-P Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2009; Proposed Rule

Dear Mr. Weems:

The College of American Pathologists (CAP) appreciates the opportunity to comment on the proposed rule CMS-1403-P entitled "Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2009." We are also submitting comments on the physician self-referral and anti-markup issues provisions contained in this proposed rule in a separate letter. The CAP is a national medical specialty society representing more than 17,000 physicians who practice anatomic and/or clinical pathology. College members practice their specialty in clinical laboratories, academic medical centers, research laboratories, community hospitals and federal and state health facilities.

The CAP comments in this letter focus on the following issues: 1) Malpractice RVUs related to the technical component; 2) Elimination of the budget neutrality Work RVU adjustor in the indirect practice expense formula; 3) PQRI information to be used in a public reporting system; and 4) Updating high cost supplies.

Malpractice RVU (PC/TC)

In the 2008 Physician Fee Schedule proposed rule, CMS noted that the AMA Relative Value Update Committee (RUC) PLI workgroup had brought to their attention the fact that there are approximately 600 CPT codes where the technical component (TC) malpractice (MP) RVUs are greater than the professional component (PC). The RUC recommended the MP RVUs for the technical component be set to zero, and the RVUs be redistributed to all codes in the fee schedule through the conversion factor.

CMS indicated that the agency does not feel it is appropriate to do so since the professional part of the MP RVUs have undergone a resource-based review, and are derived from actual data. CAP agrees that the malpractice TC RVUs should not arbitrarily be set to zero, as CAP believes there are malpractice costs associated with the TC. CAP supports CMS' plan of hiring an outside contractor to research available data sources for the MP costs associated with the TC codes.

Section 133. Expanding Access to Primary Care Services [BN adjustor application]

CAP was pleased with the MIPPA legislation that requires the budget neutrality (BN) adjustor be applied to the conversion factor rather than the Work RVUs. CAP commented in both their 2007 and 2008 NPRM letter to CMS that CAP believes the BN adjustor should be applied equally across all RVUs (i.e., Work, PE and Malpractice). CAP was particularly opposed to CMS' use of the adjusted work RVUs in the indirect practice expense formula. For 2009, CAP urges CMS to remove the BN adjustor from the work RVU indirect practice expense formula, to ensure the intent of the law is carried out.

Physician Quality Reporting Initiative (PQRI)

In section 6 - Uses of PQRI Information – CMS requests feedback on how PQRI data may be used by physicians, consumers, and other stakeholders in a public reporting system. The CAP believes it is premature to report PQRI performance data on the participation of physicians in a public reporting system for the following reasons:

- Currently, the PQRI measures do not cover all of physician practice. Many physicians cannot participate in the PQRI because there are no applicable measures.
- Public reporting of participation might imply a lack of interest in quality of non-participants, when in fact they may be very committed to quality but simply do not practice in the medical specialty areas in which PQRI performance measures are available (cytopathology, for example). Additional performance measures have been developed by the CAP, however it will require considerable time for them to be processed through the existing approval and endorsement process system. A method for

indicating that the system was not adequate to measure a particular physician will be needed.

- The validity of the system in assessing physician quality needs to be verified before a reporting system is put in place. Also, physicians should have an opportunity to review the data and appeal mistakes prior to publication of any PQRI performance data.
- Pathologists who bill through Independent Laboratories (POS = 81 or supplier specialty 69) are not able to participate in PQRI because CMS is currently unable to capture the data needed due to this unique billing situation. CAP requests that CMS provide a fix to this Independent Laboratories billing issue so that physicians' NPI numbers can be linked to reporting data provided by suppliers. This would then allow pathologists who bill through Independent Laboratories to report quality performance measures. CAP is willing to work with the agency to address this matter, which excludes pathologists who work in independent laboratories from participating in this program.

Updating High Cost Supplies

CAP welcomes the opportunity to provide updated supply costs related to pathology services. Of the high cost supplies identified in Table 24 of the NPRM, five items are associated with pathology; SL209 array kit, GenoSensor; SA092 kit gene, MLL fusion; SA093 kit, priming, random; SL225 gas, nitrogen, ultra-high purity (compressed), grade 5.0; and SL055 DNA stain kit (per test).

In reviewing the items in Table 24, an error was noted in regard to CMS supply code SL055 DNA stain kit. Under the Quantity per Procedure column, the quantity is 1. The actual quantity is .1 (1/10), which changes the Cost per Procedure to \$15 instead of \$150. This must be a clerical error since the correct quantity and cost per procedure appear in both the RUC database and CMS' 2009 NPRM Supplies Direct file.

It should be noted that the GenoSensor array kit, supply code SL209 is no longer being produced by Abbott Laboratories. At this time, Abbott Laboratories does not have a replacement for this product, but a suitable replacement for this supply was found by contacting pathologists who are currently providing this service (CPT code 88386 *Array-based evaluation of multiple molecular probes; 251 through 500 probes*). Included as enclosures, is current pricing information for each supply as deemed acceptable by CMS.

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Kerry Weems
August 28, 2008
Page 4

The College of American Pathologists is please to have the opportunity to comment on issues and appreciates your consideration of these comments. Questions regarding issues related to the Medicare physician fee schedule should be directed to Kim Chisolm at (202) 354-7118 (kchisol@cap.org), and questions regarding the physician quality reporting initiative should be directed to Fay Shamanski at (202) 354-7113 (fshaman@cap.org).

Sincerely,

Jared N. Schwartz MD PhD FCAP

Jared N. Schwartz, MD, PhD, FCAP
President

Enclosures