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November 20, 2017

Seema Verma, MPH, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS–1678–FC
Mail Stop C4–26–05
7500 Security Boulevard
Baltimore, MD 21244–1850

Re: CMS-1678-FC — Hospital Outpatient Prospective Payment System, Final Rule with Comment Period –Revisions to the Laboratory Date of Service Policy

Dear Administrator Verma:

On behalf of the Coalition for 21st Century Medicine (C21), we are writing to thank the Centers for Medicare & Medicaid Services (CMS) for modernizing the Medicare laboratory date of service billing rules in the Hospital Outpatient Prospective Payment System (HOPPS) Final Rule for Calendar Year 2018. C21 believes the regulatory revisions finalized by the agency to its laboratory date of service policy will remove regulatory barriers to patient access to much needed precision diagnostic tests. We greatly appreciate CMS' attention to this issue and engagement with stakeholder input in developing revised laboratory date of service regulations that will best serve the interests of beneficiaries.

Consistent with its modernization of the date of service regulations, C21 respectfully requests that CMS update its policy for packaging laboratory tests furnished in the outpatient setting, to ensure that all tests with a different pattern of clinical use that make them less tied to the primary outpatient service than the routine laboratory tests that the agency packages are treated equally for purposes of packaging and the new laboratory date of service exception—including all multianalyte assays with algorithmic analyses (MAAAs). In addition, we urge the agency to release the application for designation of a test as an Advanced Diagnostic Laboratory Test (ADLT) under Section 216 of the Protecting Access to Medicare Act (PAMA) of 2014, in order to ensure that this component of the new, market-based payment system is able to take effect in accordance with the regulatory schedule on January 1, 2018.

C21 comprises many of the world's most innovative diagnostic technology companies, clinical laboratories, physicians, venture capital companies, and patient advocacy groups. C21's mission is to improve the quality of healthcare by encouraging research, development, and commercialization of innovative diagnostic technologies that will personalize patient care, improve patient outcomes, and substantially reduce healthcare costs.

I. C21 Strongly Supports CMS Modernization of Laboratory Date of Service Policy

C21 greatly appreciates the agency's efforts to update its laboratory date of service policy in this year's HOPPS rulemaking, and strongly supports the regulatory revisions finalized by the agency in the CY 2018 HOPPS Final Rule. The agency's decision to add a new exception to the Medicare Date of Service regulations at 42 CFR 414.510(b)(5) to require the date of service to be the performance date for molecular pathology tests and some ADLTs performed on outpatient specimens after the encounter will permit the performing laboratory to bill Medicare directly for many precision medicine tests. This will remove regulatory complexities for laboratories and hospitals, which in the past have led to delays in patient access to much-needed precision diagnostics and targeted therapies. Improved access to diagnostic information will drive better health outcomes for patients with complex conditions.

In particular, we thank CMS for its willingness to engage with stakeholders to develop a revised laboratory date of service policy that reflects the state of precision diagnostics in 2017. We appreciate CMS' taking into account stakeholder input on the need to ensure that tests performed on liquid samples are included in any new exception to the date of service regulations. We agree with CMS' decision to eliminate from its finalized regulations the requirement that a test be ordered on or after a certain date for it to be included in the new laboratory date of service exception. We understand that the agency made this change in recognition of the fact that tests performed on liquid samples, such as blood, are generally ordered on or before the date of specimen collection because these sample types are not routinely stored and must be shipped immediately for testing. Finally, we thank the agency for its commitment to continuing to study its laboratory date of service policy in the future and to consider making further revisions to best promote timely patient access to informative precision diagnostics.

II. Exclude All MAAAs from Laboratory Packaging

Consistent with the agency's revision of its laboratory date of service policy to permit the performing laboratory to bill for precision diagnostic tests performed on specimens collected from hospital outpatients, we encourage the agency to update its policies with respect to the packaging of laboratory tests furnished to outpatients. At present, CMS excludes molecular pathology tests (DNA or RNA tests) and ADLTs meeting § 1834A(d)(5)(A) of the Social Security Act from laboratory packaging, assigning these tests status indicator "A". The agency reasons that these tests should be excluded from packaging because they have a different pattern of clinical use that makes them generally less tied to a primary service in the hospital outpatient setting than the more common and routine laboratory tests that are packaged.

The agency's existing laboratory packaging exclusion and its new, corresponding exception to the Medicare date of service policy covers the vast majority of MAAAs, which are performed on DNA and RNA samples. A small group of six MAAAs, however, which are performed on protein samples, continue to be conditionally packaged under status indicator "Q4". The agency has never provided a clinical rationale for conditionally packaging these protein-based MAAAs while excluding DNA- and RNA-based MAAAs from packaging. We are concerned that the effects of this disparate treatment will become more acute in January 2018, as protein-based

MAAAs[1] performed on outpatient samples will continue to be impacted by the existing laboratory date of service policy, which CMS has recognized creates serious issues of patient access to timely test results and treatments.

As with their DNA- and RNA-based counterparts, the pattern of clinical use of these protein-based MAAAs make them relatively unconnected to the primary hospital outpatient service. For instance, Biodesix's VeriStrat assay, described by code 81538,[2] is a protein-based test used by oncologists to guide therapy decisions around prognosis and when choosing between EGFRi targeted therapy and single-agent chemotherapy for patients with advanced non-small cell lung cancer (NSCLC). Physicians need to answer a series of questions when a patient is diagnosed with NSCLC, prior to deciding on a treatment plan for the patient. To answer these questions without delaying therapy more than two weeks after diagnosis (as recommended by guidelines) physicians order a set of tests at the same time so that successive blood draws and analyses are not needed. These tests include DNA- or RNA-based tests such as EGFR, EML-4-ALK, ROS-1, BRAF, and KRAS, as well as VeriStrat. Once the patient's blood is drawn, the samples for all of these tests are shipped to Biodesix's laboratory in Boulder, Colorado. If the patient is EGFR-negative after the performance of the DNA- and RNA-based tests, Biodesix performs the VeriStrat test per the Medicare coverage policy for VeriStrat.

As this clinical vignette makes clear, VeriStrat is performed as part of a sequential "process of elimination" for determining appropriate cancer therapy, a process that also includes several molecular pathology tests. Insofar as VeriStrat's pattern of clinical use is inseparable from these molecular pathology tests such as EGFR, it follows that it is equal to these molecular pathology tests in its lack of connection to the primary outpatient service. It is inconsistent that VeriStrat, and the other protein-based MAAAs that are as similar to molecular pathology tests in pattern of clinical use, should be packaged and subject to hospital billing requirements when the specimen is collected in the outpatient setting.

We are aware that CMS indicates in the HOPPS Final Rule that protein-based MAAAs may apply for ADLT designation under section 1834A(d)(5)(A) of the Social Security Act and, if designated as ADLTs, will have their status indicators updated to "A" on a quarterly basis and will fit within the new exception to the date of service policy at 42 CFR 414.510(b)(5). However, because the rationale for excluding tests from packaging and allowing the performing laboratory to bill for non-packaged tests should apply with equal force to protein-based MAAAs as to their nucleic acid-based counterparts, we do not believe that it is appropriate for protein-based MAAAs to be required to apply for ADLT designation while molecular pathology tests are not. As the application for ADLT designation has not been released to date, no tests are yet able to utilize this pathway. Laboratories offering protein-based MAAAs should be permitted to weigh the benefits and drawbacks of ADLT designation rather than being compelled to apply in order to be permitted to bill for the tests they perform.

Finally, we understand that CMS has incorrectly conditionally packaged certain molecular pathology tests by assigning them status indicator Q4. These include the following:

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[1] These assays are described by the following CPT codes: 81490, 81503, 81535, 81536, 81538, and 81539.

[2] Oncology (lung), mass spectrometric 8- protein signature, including amyloid a, utilizing serum, prognostic and predictive algorithm reported as good versus poor overall survival.

- **81541** Oncology (prostate), mRNA gene expression profiling by real-time RT-PCR of 46 genes (31 content and 15 housekeeping), utilizing formalin-fixed paraffin-embedded tissue, algorithm reported as a disease-specific mortality risk score
- **81551** Oncology (prostate), promoter methylation profiling by real-time PCR of 3 genes *(GSTP1, APC, RASSF1)*, utilizing formalin-fixed paraffin-embedded tissue, algorithm reported as a likelihood of prostate cancer detection on repeat biopsy

These codes are used to report molecular MAAA tests comprising analysis of DNA or RNA and, as such, should be assigned status indicator A under OPPS.

III. Publish Application for ADLT Designation

Lastly, C21 respectfully requests that CMS publish the application for tests to be designated ADLTs under Section 216 of PAMA and its implementing regulations. We strongly support the New ADLT payment category set out in 42 CFR 414.522, which will apply to a limited set of advanced, sole-source diagnostics and promote innovation in precision medicine. We are concerned, however, that more than three years after the enactment of PAMA and one year after the issuance of the Medicare Clinical Diagnostic Laboratory Tests Payment System Final Rule, the application for ADLT status has not been released. This is particularly problematic considering that the New ADLT payment category is required by regulation to go into effect along with the rest of the new private payor rate-based payment amounts on January 1, 2018, and laboratories have long expected their tests to apply and be designated New ADLTs as of that date. To meet this deadline, it is necessary for CMS to release the New ADLT application immediately and put in place an expedited designation process for the fourth quarter of 2017.

Moreover, the need for the ADLT application has become more acute with the release of the HOPPS Final Rule, which maintained the conditional packaging of protein-based MAAAs and made exclusion from packaging necessary for a test to be included in the new exception to the laboratory date of service policy. This has left ADLT designation as the only option for protein-based MAAAs to be excluded from packaging and for the laboratories performing those tests to be able to bill for the tests they perform. Indeed, in the HOPPS Final Rule the agency specifically pointed to the availability of ADLT designation as a reason why protein-based MAAAs do not need to be excluded from packaging at this time. However, as noted above, this pathway remains unavailable as long as the ADLT application has not been released.

IV. Conclusion

C21 thanks the agency for the opportunity to comment on the CY 2018 HOPPS Final Rule. In particular, we appreciate the agency's revisions to the laboratory date of service policy and its diligence in working with stakeholders to protect beneficiary access to precision diagnostics by removing unneeded regulatory complexities. To ensure beneficiary access to all precision diagnostics, we respectfully request that the agency take the following actions:

- Release the application for ADLT designation in time for tests to be designated as New ADLTs prior to January 1, 2018

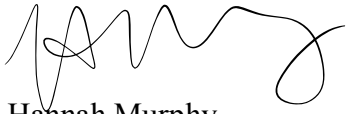
- Change the status indicators for the protein-based MAAAs described by CPT codes 81490, 81503, 81535, 81536, 81538, and 81539 from "Q4" to "A" effective January 1, 2018

- Address that the exclusion of these protein-based MAAA tests from packaging should result in their being included within the exception to the Date of Service regulation at 42 CFR 414.510(b)(5), and

- Change the status indicators for two RNA/DNA-based MAAA codes 81541 and 81551 from Q4 to A consistent with CMS policy and precedent effective January 1, 2018

Thank you for considering our comments and for your continued efforts to promote personalized medicine. Please contact me at Hannah Murphy at hmurphy@c21cm.org should you have any questions or if we can provide you with further information.

Sincerely,



Hannah Murphy
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