On cuts and consequences, pathologists make their case

Berna Diehl

October 2013—James Richard, DO, directs CAP-Lab, an independent laboratory in Lansing, Mich., where he manages the business and does everything from signing off on pathology reports to paying the mortgage on the building. But among the many issues he tackles running his practice and in the midst of a shift in health care in the U.S., a single rule proposed by the Centers for Medicare and Medicaid Services is what's keeping him awake at night.

Dr. Richard isn't alone. CMS proposal 1600-P, a rule that would cut payments to physicians by changing the current fee schedule used to reimburse them for their services, has galvanized physicians around the nation and across disciplines.

The CAP analyzed the implications of the CMS' proposed rule for several months. According to the analysis, the rule, as drafted, would inflict drastic cuts to 39 of the most common pathology services used to diagnose tissue biopsies.

Dr. Kathryn Knight with U.S. Rep. Phil Gingrey (R-Ga.) on Sept. 18. "They are out of bounds and need to withdraw the rule," she says of CMS. [Photo: Kaye Evans-Lutterodt]

The rule's legal grounding is questionable. An analysis conducted by law firm Sidley Austin LLP on behalf of the CAP says the proposal violates the statutory requirement that Medicare practice expenses be resource-based. It "relies on faulty assumptions and inapplicable facility resource data," the analysis says, and "does not reflect actual resource costs in the non-facility setting—contrary to law and regulation and CMS' stated policies and past practices." The analysis continues, "Application of CMS' proposed OPPS/ASC [Outpatient Prospective Payment System/Ambulatory Surgical Center] payment cap in the non-facility PE RVU methodology is not resource-based for the practice setting and is unlawful."

Or, as Dr. Richard puts it, "CMS isn't just coloring outside the lines here. They're coloring off the page."

Since the CMS introduced in July its revisions to the proposed 2014 Medicare physician fee schedule, it has received a deluge of comments from stakeholders. It is expected to issue its final rule by Nov. 1.

For its part, the CAP has led a multifaceted advocacy effort to have the rule withdrawn. It has met with CMS officials and organized discussions on Capitol Hill between pathologists and members of Congress. Alone and as an advocacy coalition member, the CAP submitted four letters to CMS administrator Marilyn Tavenner on proposed rules related to physician payment.

Many CAP members contributed to the CAP's advocacy efforts, submitting comments, sending letters, traveling to Washington to meet with members of Congress, and discussing issues related to the rule with the media. Several CAP members also conducted meetings in their home states with their members of Congress.

On the coalition front, the CAP and AMA and other organizations, including leaders of the Clinical Laboratory Coalition, have met with the CMS many times to express concerns about the proposed cuts.

"CMS is receiving tremendous pushback on the proposed rule, with 10,220 comments posted on the rule to date," says John Scott, CAP vice president of advocacy. "CAP members have done an excellent job of making their voices heard and have made clear how important it is for CMS to withdraw this dangerous rule."

Dr. Richard arrived in Washington on Sept. 18 to participate in an organized Capitol Hill fly-in with other CAP members and representatives of the American Clinical Laboratory Association.

For Dr. Richard, taking time from the practice to visit lawmakers is not easy. "It's tempting to think of it as someone else's job," he said just before catching a cab for his first meeting on the Hill. "But given what's at stake, there's no question. I have to be that 'someone else.'"

CAP members say that the damage the proposed CMS rule would inflict isn't hypothetical. They know this because the pathology community is still reeling from cuts that took place when the CMS lowered the technical component of surgical pathology code 88305 by 52 percent on Jan. 1. The change altered the global payment for code 88305, which had been projected to decrease by 33 percent as a result of the revaluation.

Since the cuts went into effect, Dr. Richard says they've resulted in staff layoffs and stagnant or reduced salaries and increased the cost of health benefits for employees. "Those salary consequences were felt by everyone at our lab, including my partners and me," he says.

John Moad, MD, of Dayton, Ohio, whose laboratory provides dermatopathology services, says the 2013 cuts have had a decisive impact. His practice has already lost a significant amount of revenue. The cuts have made his group's efforts to innovate and bring the latest in testing technologies to patients all the more difficult.

"We know the hard road that people with melanoma face, so last year we decided to bring the very best we could offer in pathology services for those patients," he says. Dr. Moad's laboratory went through the long process of developing and validating in-house FISH testing to facilitate accurate diagnosis of the most difficult melanocytic neoplasms.

"CMS reimbursement wouldn't even cover the cost of the tests," Dr. Moad says. "For patients, it means they won't be able to get these important tests from us, and since all labs are in the same boat, I'm not sure patients will be able to get it from anyone else either. It may mean that those breakthroughs and innovations that people with melanoma so desperately need will sit on the shelf."

Dr. Moad said the loss of innovative testing technologies will mean different things to different stakeholders. "The health system may shrug and say 'good, we reduced spending,' but for the patient, it's a tragedy, no question."

Kathryn Knight, MD, a pathologist from Dalton, Ga., and chair of the CAP's Federal and State Affairs Committee, says pathologists have made the most persuasive case they can to the CMS. "The negative impact on the patient is unambiguous, and the legal analysis is thorough and clear. They are out of bounds and need to withdraw the

rule."

Dr. Knight, who met with several members of Congress, including U.S. Rep. Phil Gingrey (R-Ga.) and U.S. Rep. Marsha Blackburn (R-Tenn.), says she and other CAP members drove home to the lawmakers and their staffs that the rule will harm patient care and that Congress has an important oversight role. "We think they are paying attention to the issue and are poised to weigh in," she says.

In all, 113 congressional offices agreed to sign on to a joint letter by Reps. Jim Gerlach (R-Pa.) and Bill Pascrell Jr. (D-NJ) calling on the CMS to withdraw the proposed rule. The two congressmen delivered it to the CMS on Oct. 9. An additional letter was set to be circulated within the Senate this month, with Sen. Johnny Isakson (R-Ga.) serving as the lead signatory for Senate Republicans and discussions ongoing at press time with potential Democratic senators to lead the letter.

CAP governor Stephen Sarewitz, MD, of Renton, Wash., who flew to Washington last month to meet with lawmakers, said, "My main goal was to make sure members of Congress and their staff clearly understand that this isn't about the CMS rule translating into 'less money for us.' This is about being sure that critical tests continue to be available to patients"—tests patients need so treatment for cancer and other serious disorders can be determined, he says. "This is about keeping laboratories open; it is about preserving jobs."

With the rule set to be issued soon and go into effect Jan. 1, 2014, "There is no time for anyone to fix this after the fact," Dr. Sarewitz says. "It's got to be right on Nov. 1, or patients will quickly feel the pain of this poorly conceived rule."

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