| 8 physicians at 100% each = | 800% |                      |
|-----------------------------|------|----------------------|
| 1 physician at<br>80% =     | 80%  |                      |
| 1 physician at<br>10% =     | 10%  |                      |
|                             | 890% | divided by 10<br>89% |

Thus, in this example, 89 percent of the total of the time spent by these physicians is devoted to services billable by the group practice. The issues of group practice billing numbers and part-time physicians are discussed below.

Comment: One commenter suggested that the calculations for substantially all services be made, at the election of the practice group, with respect to either the previous fiscal year of the practice group or the previous 12-month period, which is the approach used by the safe harbor regulations. The commenter believed that a 12-month period is appropriate for this purpose in order to avoid short term fluctuations that might otherwise distort the determination.

Response: We agree that a 12-month period is appropriate for use in determining compliance with the ''substantiaĬly all'' criterion. We will allow a group practice (as defined in section 1877(h)(4)) to elect whether to use the calendar year, its fiscal year, or the immediately preceding 12-month period to determine whether it complies with the standard. Furthermore, we will allow any new group practice (one in which the physicians have only recently begun to practice together) or any other group practice that has been unable in the past to meet the requirements of section 1877(h)(4) (including the "substantially all" criterion to initially look forward 12-months, as described below, to determine compliance with the standard. These groups would also be able to elect whether to use the calendar year, fiscal year, or the next 12months. Finally, once any group has chosen whether to use its fiscal year, the calendar year, or another 12-month period, the group practice must adhere to this choice.

In new 411.360, each group practice must submit to its carrier an initial attestation that the group has met the "substantially all" criterion (75 percent of patient care time) in the 12-month period it has chosen. New group practices or other groups that wish to initially use future months to meet the "substantially all" criterion must attest that they plan to meet the criterion within whatever upcoming 12-month period they have chosen and will take

measures to ensure the standard is met. After this 12-month period is over, the group must attest that it did meet the standard during that period.

The attestation must contain a statement that the information furnished in the attestation is true and accurate and must be signed by a representative for the group. It must be mailed to the carrier within 90 days after the effective date of this final rule, that is, 120 days after the date of publication of this rule in the Federal Register. We are requiring this initial attestation so the carriers will be able to determine whether payment for laboratory services should be continued. After their initial attestation (whether it is retroactive or prospective), group practices must submit updated attestations to the carrier each year at the end of the period they have chosen to use to measure this standard.

If a group practice using an initial prospective period does not meet the 'substantially all" criterion at the end of its chosen 12-month period, the group would not qualify as a group practice. As such, an overpayment could exist from the beginning of the period in which the group has claimed that it would meet the "substantially all" standard.

This approach does have paperwork burden implications for group practices. However, we do not believe that the burden is significant. It should be a relatively easy task for most group practice physicians to assess the amount of their patient care time that is spent on services that can be billed in the name of the group.

## b. Member of a Group

Comment: Several commenters indicated that we should define more precisely what is meant by a "member" of a group practice because the "substantially all" criteria apply to physicians who are "members" of a group practice. For example, one commenter suggested that for part-time members of a group practice, only that percentage of time/services/income devoted by the member to the group should be assigned to the group for the purpose of calculating the total time/ services/income of the group.

Several commenters indicated that the term "member" of the group practice should have a restrictive definition, such as one that is limited to principals of the practice, for example, shareholders, partners, or officers.

Another commenter indicated that the term "member" can be broadly interpreted to include all physician employees or even independent contractor physicians of the group

practice, and that how the term is defined can have significant impact. Yet another commenter recommended that the term "member" be defined to include physician owners as well as full- and part-time employed physicians.

One commenter recommended that the definition exclude any physician who is not a shareholder, partner, or employee of the group, or an independent contractor providing more than a certain number of hours of service per week (for example, 20 hours) for the group. The commenter stated that such a rule is supported by common sense, as it is doubtful that physicians who furnish services on a sporadic basis would consider themselves to be members of a group or qualify for the various benefits associated with being a member of the group.

On the other hand, another commenter stated that, if the term "member" is given a restrictive definition, limited to principals of the group practice, the practice will be able to circumvent the 85 percent aggregate services requirement simply by ensuring that no physician who provides substantial services outside the group becomes a principal of the group. The commenter believed that limiting the definition, however, might restrict the numbers of physicians who may supervise laboratory testing under the in-office ancillary services exception because it applies to only services furnished by or supervised by physicians who are "members" of the same group practice. The commenter also suggested that it might affect where that testing may take place. Under section 1877(b)(2)(A)(ii), testing may be done in a building in which the referring physician (or another physician member of the group practice) has a practice or in another building which is used for the centralized provision of the group's clinical laboratory services. Particularly in multi-site group practices, the referring physicians could be physicianemployees or independent contractors who would not be "members." Thus, their laboratory tests would have to be performed in a building in which a member personally supervises the laboratory services. This, however, would not seriously impede the group practice, in this commenter's view, as most group practices could readily set themselves up in a manner that allows for at least one principal to be available for supervision. This commenter further stated that a broader definition of the term "member" that includes all physician employees and/or