

HCCA Compliance Institute

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Exploring CMS's Final Rule on Reporting and Refunding Overpayments

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Overpayments and Self-Disclosures

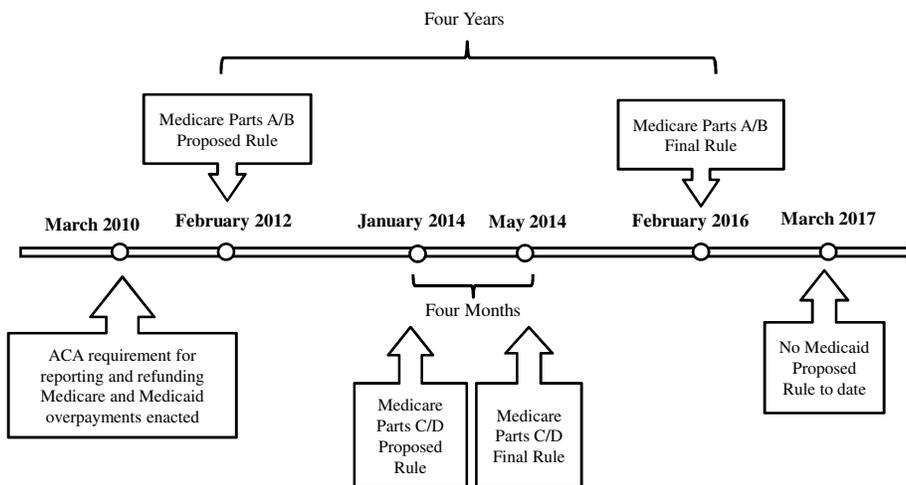


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The Affordable Care Act Law

- March 23, 2010: Enactment of the Affordable Care Act (ACA)
- Section 6402(a) of the ACA (now codified at 42 U.S.C. § 1320a-7k(d)):
 - A person who has received an overpayment must report and return the overpayment within either 60 days after the date on which the overpayment was **identified** or on the date any corresponding cost report is due, whichever is later.
 - The term “overpayment” means any **Medicare** or **Medicaid** funds that a person receives or retains to which the person, after **applicable reconciliation**, is not entitled.

Timeline of Significant Overpayment Developments



“Identification” Defined: A/B Final Rule

- Medicare Parts A /B Final Rule: New regulatory definition in 42 C.F.R. § 401.305(a)(2)
 - An overpayment is identified “when the person **has, or should have** through the **exercise of reasonable diligence, determined** that the person has received an overpayment and **quantified** the amount of the overpayment.”
- This definition includes two key concepts:
 1. Concept of reasonable diligence
 2. Quantification

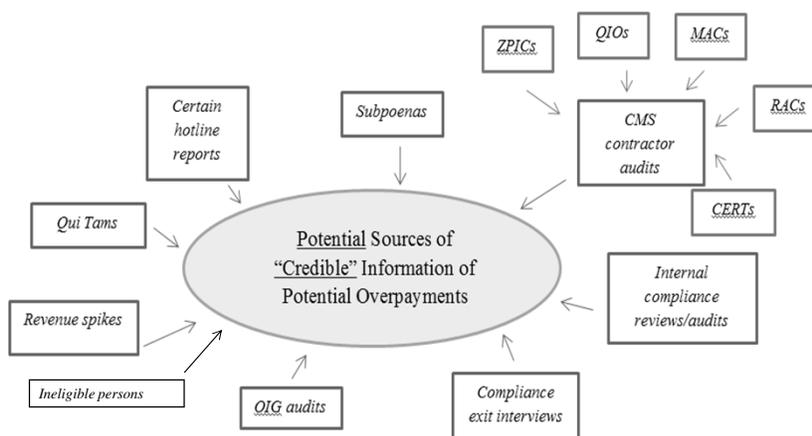
Concept of Reasonable Diligence

- The finalized definition of “identification” incorporates concept of “**reasonable diligence**.”
- In the Final Rule, CMS stated that reasonable diligence includes both **proactive** compliance activities and **reactive** investigative activities.
 - Size and scope of compliance programs will vary, but having no compliance activities may expose the provider to liability.
- When does the 60-day clock begin to tick?
 1. When the exercise of reasonable diligence is completed, *or*
 2. If there is a failure to exercise reasonable diligence, on the day *when the person received credible information of a potential overpayment*.

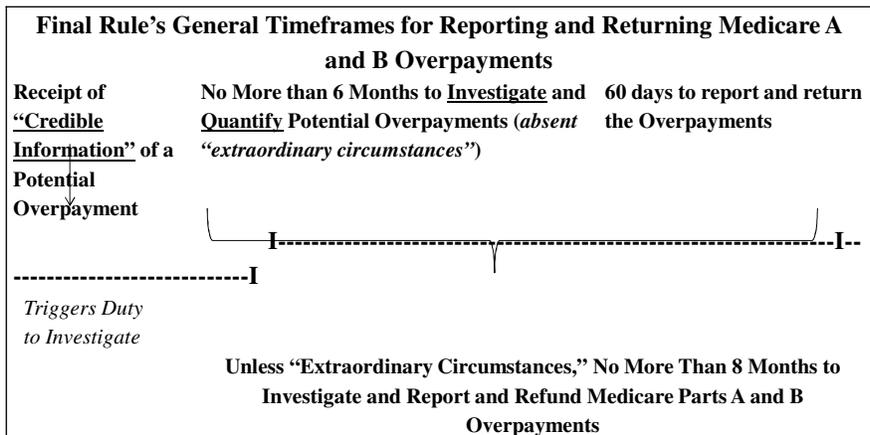
Credible Information of Potential Overpayments

- Keyword—Potential Overpayments.
- Receipt of “credible information” triggers a duty to investigate.
 - “Credible information” is not specifically defined, but includes information that **“supports a reasonable belief that an overpayment may have been received.”**
 - CMS specifically rejected an evidentiary standard— instead adopted credible “information” standard.

Potential Sources of “Credible” Information (Not Exhaustive)



Medicare Parts A/B Overpayment Final Rule: Parts A/B Overpayment Final Rule: Timeline



Lookback Period

- Pursuant to the Medicare Parts A/B Final Rule, Medicare Parts A/B overpayments must be reported and returned “only if a person identifies the overpayment within **six years** of the date the overpayment was received.”
- **Maximum Threshold** - providers should not be foreclosed from using a more limited lookback period if justified by the relevant circumstances (coverage change or EHR system conversion).
- Practical challenges of lookback period:
 - Recordkeeping difficulties
 - Evolving regulatory standards
 - Audit resources
 - Potential need for statistical sampling resources

FCA Enforcement of 60-Day Rule

- *Kane ex rel. New York v. Healthfirst, Inc.*, 11 CIV. 2325 (ER) (S.D.N.Y. Aug. 3, 2015)
 - Healthcare provider erroneously submitted claims to Medicaid for payment due to a software error. The provider failed to fully investigate and identify all overpayments until two years later.
 - The court interpreted “identification” to include situations where *“a person is put on notice that a certain claim may have been overpaid.”*
- Parties settled for **\$2.95 million** on August 23, 2016

Retained Overpayments

- *U.S. ex rel. Odumosu v. Pediatric Servs. of Am. Healthcare (PSA)*; *U.S. ex rel. McCray v. PSA*
 - Home healthcare provider to pay \$6.88 M to settle allegations that it failed to refund overpayments from TRICARE and 20 state Medicaid programs between 2007 and 2013

“First of its kind” settlement stemming from a provider’s failure to “actively investigate whether they have received overpayments and, if so, promptly return the overpayments”

John Horn, U.S. Attorney
Northern District of Georgia
(Aug. 4, 2015)

No. 1:11-cv-1007 (N.D. Ga.); No. 4:13-cv-127 (S.D. Ga.), (settlements announced Aug. 3, 2015)

Questions

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