Medicare Overpayment 60-Day Rule

What Your Compliance and Auditing Departments Need to Know

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Objectives

- Review the key legal, operational and technical takeaways from the ACA 60-Day Report and Repay Statute.
- Discuss the implications of "reasonable diligence" and "credible information" as defined in the clarified rule.
- Review strategies for proactive compliance activities that will reduce risk of overpayments and limit exposure of provider.

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Key Legal, Operational and Technical Takeaways

- Key provisions of the 60-Day Rule
- The 60-day "clock"
- Credible information of an overpayment
- Duty to investigate and quantify
- Reasonable diligence—proactive and reactive
- The six-year "lookback" period
- Reporting and refund process
  - Impact of contractor audits
  - Appeals
- Pre-payment probe audits

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Statutory Requirement to Report & Repay

- Congress created the new 60-day repayment provision through Section 6402(a) of the Affordable Care Act
- Added section 1128J(d) to the Social Security Act, now codified at 42 U.S.C. 1320a-7k (d)
- Became law March 23, 2010
- CMS asserts that the law has been enforceable since that date, despite the absence of regulations until now, and court decisions support that position

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Final 60-Day Rule

- Final rule applies **only to overpayments under Parts A and B of Medicare**
  - CMS issued a separate rule for Parts C and D of Medicare (May 23, 2014)
  - No rulemaking yet for Medicaid but statute in effect
- Requires providers to investigate with reasonable diligence if credible evidence exists of a potential overpayment
- If an overpayment is identified, the provider has 60 days to report and repay

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Definition of "Overpayment"

- An "overpayment" means any funds a **person** has received or retained to which the **person** is **not entitled**
  - This has nothing to do with **causation or fault**
  - Human error, system error, fraud, contractor error or "otherwise," it can still be funds to which you are not entitled
  - The amount of the overpayment can be:
    - A portion of the paid claim (e.g., upcoded claims)
    - The whole claim (e.g., medically unnecessary or uncovered service)

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Consequences

- Failure to report and repay creates an **"obligation"** equal to the retained overpayment
- Failure to satisfy an "obligation" is a violation of the False Claims Act
- The FCA is **enforceable by the government and whistleblowers**, potentially exposing the provider to **liability vastly larger** than the amount of the overpayment
- Also, violates the Civil Monetary Penalties Law

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Identification

- Under the rule, an overpayment is **identified** when the recipient **has**, or **should have,** through **reasonable diligence:**
  - **Determined that it received** an overpayment, and
  - **Quantified the amount** of the overpayment

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Credible Information

- CMS: "We believe credible information **includes** information that supports a **reasonable belief** that an overpayment **may** have been received."
- Examples of when discovery of credible information triggers a duty to investigate:
  - Discovery of unlicensed or excluded individual
  - Certain hotline complaints
  - Local or national coverage policy
  - Contractor audits
  - Internal reviews
  - Unexplained increase in revenue from Medicare

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Duty to Investigate & Quantify

- Even a **single overpaid claim** may create a duty to look further with respect to **similar claims**
  - Scope of further inquiry depends on nature of the isolated claim
  - Do a "**probe**" sample, and if that finds more overpayments, then a broader sample
- Only make repayment at conclusion of investigation
- Extrapolation or claim-by-claim review is permissible

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Reasonable Diligence

- CMS says that reasonable diligence includes both
  - "**Proactive compliance activities**" to monitor for receipt of overpayments, and
  - Investigations **in response to "credible information"** of a potential overpayments
- Facts and circumstances determine
  - Whether the compliance efforts are "reasonable," and
  - What rises to the level of "credible information"
- Investigation is expected to take no longer than six months, absent exceptional circumstances

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The "Lookback" Period

- Must return overpayments identified within six years of receipt of the funds
  - Originally proposed 10 years
  - Consistent with CMP statute of limitations
- Reopening regulations allow contractors to reopen for only four years (with good cause)
- Final 60-Day Rule extends window for provider-initiated reopenings to six years

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The 60-Day Clock

- Under the rule, 60 days begins to run **after "identification"**
- Identification occurs after reasonable diligence
- **Except**, if provider **has** credible information
  - Does **not** exercise reasonable diligence
  - And there **is** an overpayment
  - Then you are late after 60 days, not eight months

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The Clock (cont.)

- The deadline for refunding overpayments is **suspended**:
  - If the **OIG** has accepted a voluntary disclosure under its Self-Disclosure Protocol (kickback cases)
  - If **CMS** has accepted a voluntary disclosure under its Voluntary Self-Referral Disclosure Protocol (Stark cases)
  - An **extended repayment schedule** is requested

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The Reporting & Refund Process

- Final rule defers to existing refund processes:
  - Claims adjustment
  - Credit balance
  - Voluntary refund to contractor
  - Disclosures through CMS or OIG
- Method of repayment chosen will be based on facts and circumstances of overpayment (e.g., amount, culpability)
- Chosen method may dictate the details necessary for the report

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Reporting & Refund (cont.)

- CMS permits and maybe even encourages sampling and extrapolation as part of quantifying overpayments
  - But only the specific claims identified in the sample will get adjusted on the contractor's books
  - Only those claims specifically identified are appealable
- Reporting and repaying does not insulate provider against future audits

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Impact of Contractor Audits

- Results of contractor audits can create duty to investigate further
- Contractors limited to four-year reopening period but providers may have duty to go back additional two years
- CMS allows providers who disagree with results of audit to pursue appeals first before exercising reasonable diligence in investigating additional overpayments

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Appeals

- 60-Day Rule does not eliminate appeal rights, even for self-identified overpayments
- Providers may not "game the system" by appealing a subset of claims identified as overpaid to avoid duty to fully investigate or make full repayment
- Appeals of extrapolated amounts are difficult but not impossible

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Reducing Risk of Overpayments and Limiting Exposure of Provider

COMPLIANCE AND AUDIT ACTIVITIES

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Reasonable Diligence

A provider's compliance with the new rule will require ***proactive compliance activities*** in addition to ***reactive investigations*** once "credible information" of an overpayment is received. "Minimal compliance activities" may "expose the provider or supplier to liability," because it may be considered "failure to exercise reasonable diligence."

A ***"react and respond"*** approach will no longer be enough.

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Proactive Compliance Activities

- Review compliance plan and assure that the plan is effective in being able to identify, investigate and calculate overpayments for 6 year period
- Ensure monitoring efforts (i.e., self-audits, internal statistical analysis, etc.) are well documented. Potential areas to be monitored:
  - Coding
  - Claim accuracy
  - Secondary payer
  - Medical Necessity documentation
- Assessing 3rd Party Risk (e.g., billing companies, coders, etc.)
- Update policies and systems to handle overpayments
- Ensure that all business units understand the law

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Compliance Program Checklist

- Internal process for collecting data on areas that could trigger overpayments - routine billing errors to deliberate Fraud, Waste and Abuse issues.
- Guidelines for investigating potential overpayments - legal involvement, determining look-back period, how to scope audit.
- Tracking system of potential overpayments- date of determination and repayment timelines.
- Regular audits/review (recommend monthly or quarterly) of potential overpayment issues and decisions.
- Procedure for evaluating potential overpayments and who will be the ultimate decision maker for determining if an overpayment has been received.

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"PRACTICAL APPLICATION OF 60 DAY RULE THROUGH CASE EXAMPLES- INTERACTIVE DISCUSSION"

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