HCCA Compliance Institute

April 15, 2018

Exploring CMS's Final Rule on Reporting and Refunding Overpayments

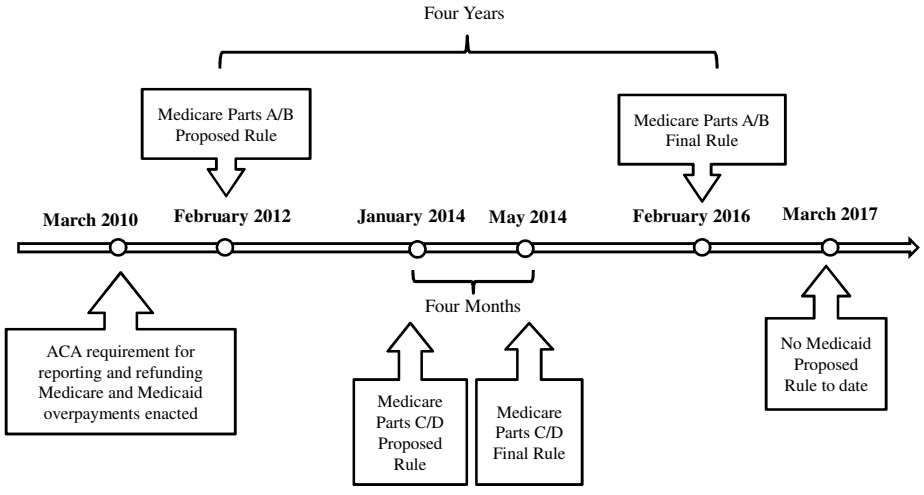
Gary W. Eiland, Partner
King & Spalding LLP
Houston, Texas

Overpayments and Self-Disclosures

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

"Identification" Defined

- 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

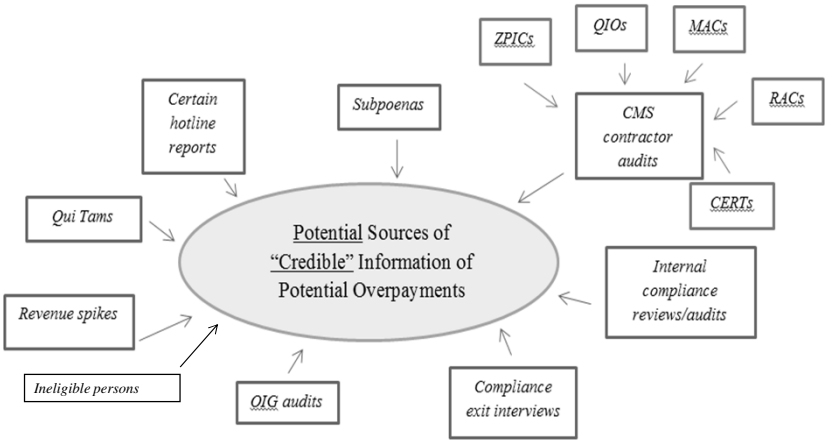
Concept of Reasonable Diligence

- 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*)



Retained Overpayments

- **60-day payment law**
  - Affordable Care Act provision
    - codified under 42 U.S.C. § 1320a-7k(d)(1)(3)
    - Effective March 23, 2010
  - Requires that an overpayment be reported and returned by the latter of:
    - The date which is 60 days after the "date on which the overpayment was identified," or
    - The date on which any corresponding cost report is due, if applicable
  - Can result in "reverse claims" liability

Retained Overpayments

- **When the 60-day payment clock begins**
  - ***U,S, ex rel. Kane v. Contiuum Health Partners, Inc.***
    - NY district court held the 60-day period ran from the date on which defendants were "put on notice that a certain claim may have been overpaid"
    - First judicial guidance on when the 60-day clock begins

  Kane ex rel. New York v. Healthfirst, Inc., No. 11-civ-02325 (S.D.N.Y. Aug. 3, 2015)

Retained Overpayments

- **60-day payment rule, cont.**
  - Applies to Part A and B providers / suppliers
  - Clarifies "identified" overpayment
    - *"… when the person has, or should have through the exercise of reasonable diligence, determined that the person received an overpayment and quantified the amount of the overpayment"*
    - *"if the person fails to exercise reasonable diligence and the person in fact received an overpayment"*
  - *"Reasonable diligence"*
    - Proactive compliance activities
    - Retrospective investigations
      - Timeline: *"at most 6 months from receipt of the credible information, except in extraordinary circumstances"*

— *81 Fed. Reg. 7654 (Feb. 12, 2016)*

Retained Overpayments

60-day payment rule, cont.

- **Contractor overpayment determinations**
  - "Are always a credible source of information for other potential overpayments"
  - Duty to determine whether additional overpayments exist outside of the audit
- **Cost reports**
  - "Overpayment should be returned at the time the cost report is filed"
- **6-year lookback period**
  - Calculated from the date of identified overpayment
  - Does not apply to overpayments reported and returned prior to March 14, 2016
- **Process for reporting and returning overpayments**
  - Claims adjustment
  - Credit balance
  - Self-reported refunded processes
  - "Another appropriate process"

Retained Overpayments

- ***U.S. ex rel. Odumosu v. Pediatric Servs. of Am. Healthcare (PSA); U.S. ex rel. McCray v. PSA***
  - $6.88 M – PSA failed to refund overpayments from 20 state Medicaid programs and TRICARE over 6 years

    "This [FCA] settlement is the first of its kind and reflects the serious obligations of health care providers to be responsible stewards of public health funds."

    John Horn, U.S. Attorney for the Northern District of Georgia Aug. 4, 2015

    U.S. ex rel. Odumosu v. Pediatric Servs. of Am. Healthcare (PSA); U.S. ex rel. McCray v. PSA, No. 1:11-cv-1007 (N.D. Ga.); No. 4:13-cv-127 (S.D. Ga.), (settlements announced Aug. 3, 2015)

Medicare Parts A/B Overpayment Final Rule: Timeline

Final Rule's General Timeframes for Reporting and Returning Medicare A and B Overpayments

Receipt of "Credible Information" of a Potential Overpayment	**No More than 6 Months to Investigate and Quantify Potential Overpayments (*absent "extraordinary circumstances"*)**	**60 days to report and return the Overpayments**

I----------I----------I----------I

Triggers Duty to Investigate

Unless "Extraordinary Circumstances," No More Than 8 Months to Investigate and Report and Refund Medicare Parts A and B Overpayments

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

Questions

Gary W. Eiland, Partner
King & Spalding LLP
Telephone: (713) 751-3207
Email: geiland@kslaw.com