Final Rule—Refund of Medicare Overpayments

HCCA Rocky Mountain Regional
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Agenda

• Brief History
• Key Themes of the Final Rule
  - Identification of Overpayments
  - Applicable Lookback Period
  - Mechanics of Reporting and Returning Overpayments
• Deeper Dive: Impact on Investigations and audits
• Action Items

BRIEF HISTORY
Brief History

- Affordable Care Act (Act) – SSA § 1128J(d)
- Proposed Rule (77 FR 9179; Feb. 16, 2012)
  - “Reckless disregard”, “deliberate ignorance”
  - 10-year lookback period
  - No clear “identification” standard to trigger 60-day clock

Brief History

  - First case involving alleged failure to refund Medicaid overpayments
  - Motion to dismiss denied and court read duty to inquire broadly
  - Settled for $3M in Sept. 2016 (overpayment was ~$850,000)

Brief History

- Final Rule effective March 14, 2016
  - Overpayments under Medicare Parts A and B must be reported and returned within 60 days of identification or the date any corresponding cost report is due
  - An overpayment is “identified” when a provider or supplier has or should have, through the exercise of reasonable diligence, determined that it has received an overpayment and quantified the amount of the overpayment
  - Refund overpayments identified “within six years of the date” overpayment was received
Brief History

- Three key themes:
  - Identification of overpayments
  - Lookback period
  - Mechanics of reporting and returning overpayments

Identification of Overpayments

- An overpayment must be reported and returned by –
  - Claims-based overpayments: 60 days after the date on which the overpayment was "identified"
  - Cost-report-based overpayments: the date any corresponding cost report is due
Claims-Based Overpayments

- Identified when
  - “Has determined [it] received an overpayment and quantified the amount” or
  - Should have determined/quantified “through the exercise of reasonable diligence”
- **Exercise of reasonable diligence** is a multi-step process
  - Credible information
  - Reasonable diligence
  - Identification and quantification
  - Report and return

Claims-Based Overpayments

- **Credible Information**: information that supports a reasonable belief that an overpayment may have been received
  - Triggers duty of “reasonable diligence” inquiry
  - Many potential sources of credible information
    - (Final) Medicare contractor audit findings (e.g., RAC, MAC)
    - Hotline reports
    - Unusual payment patterns

Claims-Based Overpayments

- **Reasonable Diligence**: demonstrated through timely, good faith investigation – “at most six months from receipt of the credible information”
  - Replaces “reckless disregard,” “deliberate ignorance” and “all deliberate speed”
  - Requires proactive and reactive investigative activities
  - Six months is guidance in CMS preamble, not a rule itself
Claims-Based Overpayments

• **Identification & Quantification**
  - An overpayment is “identified” only following reasonable diligence inquiry and quantification
  - No materiality or *de minimus* threshold
  - For probe samples, an overpayment is not “quantified” until the entire claim universe is analyzed

• **Report and Return**
  - Use existing MAC or self-reporting process

Cost Report-Based Overpayments

• Reconcile and refund
  - ✔ At the time the cost report is due
  - ✗ At the time the Notice of Program Reimbursement is issued

• Adjustments made by a MAC on retrospective audit = “credible information”
  - May trigger obligation to review prior years’ cost reports
Lookback Period

- Lookback period is six years
  - Refund overpayments identified "within six years of the date" overpayment was received

- Reopening Rules
  - New § 405.980(c)(4) allows providers to request six-year reopening to address overpayments
  - No change to time periods for contractor-initiated reopenings

- Rule is not retroactive—does not apply to amounts refunded prior to March 14, 2016
The Mechanics

- Clarified the acceptable reporting method
  - MAC voluntary refund process
  - Requesting a claim adjustment or offset
- Clock is tolled for providers/suppliers who
  - Request an Extended Repayment Schedule, or
  - Use another approved disclosure method (e.g., OIG Protocol, CMS Stark Process)
- Repay after full review, not after probe sample

The Mechanics

- Permits MAC voluntary refunds to be submitted with one form with spreadsheet identifying all claims
- Does not require providers/supplies to submit specific data points with each refund
  - Exception: Overpayments calculated through extrapolation must include details of the statistical sampling method

DEEPER DIVE:
IMPACT ON INVESTIGATIONS AND AUDITS
Overpayments

- Overpayments can be discovered through
  - Proactive compliance activities (like routine internal audits)
  - Reactive compliance activities (like investigations)

Proactive Compliance

- Robust and appropriate compliance program
  - More than just policies on paper
  - Buy-in from top of the organization
  - Clear lines of communication / reporting
  - Qualified compliance officer
- Risk Assessments
  - Identify risk areas, determine how to assess, and implement mitigation as needed
- Audit protocols and work plans
  - Plans for what is being audited internally each year
  - Operational departments can review themselves—not just limited to compliance department reviews

Reactive Compliance

- Allegations of noncompliance and overpayment can arise from anywhere
  - Reactive compliance two step: creditable evidence and reasonable diligence
- Creditable evidence—When are you on notice of need to investigate?
  - Externally raised: subpoena, audit request or audit finding, MAC concern
  - Internal reporting (hotline, informal complaints, etc.)
  - Existence of such evidence is a factual determination
Scope of Investigation

- Scope of investigation
  - Have template plans / protocols ready
  - Know your internal resources
  - Review past concerns and understand when you may need outside resources to assist (consultants, auditors, attorneys)
  - Identify your look back period
    - Period when alleged conduct may have occurred
    - May be less than 6 years

- Certain investigations may need to be conducted under the attorney-client privilege
  - Consider at the beginning of the review
  - Use privilege if probability of uncovering significant misconduct

- How much time?
  - Need to be diligent
  - CMS suggest that 6 months should be adequate

ACTION ITEMS
Action Items

- Develop a process to:
  - Identify credible information relating to possible overpayments and the date received
  - Conduct reasonable diligence to identify overpayments
- Update documentation policies, if needed, to support reasonable diligence reviews looking back six years

Action Items

- Establish (or improve) lines of communication between internal audit and external audit response teams
  - Critical as external audit findings (from RACs, MACs, etc.) represent “credible information” and trigger six-month timeline
- Maintain documentation of all refunds including: retraction requests, revised claims, form and check submissions and extrapolation methodologies

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