Health Care Compliance Association

HCCA Update: 60-Day Overpayment Rule Considerations

November 18, 2016
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Goals of Session

- Overview of Enforcement and Compliance Environment
- Mechanics of the 60-Day Rule
- Operationalizing the 60-Day Rule: Key Questions and Considerations
- Questions

Enforcement and Compliance Environment
**Complex Enforcement and Compliance Environment**

- Expanding Universe of “Examiners”
- Using More Sophisticated Investigation and Auditing Techniques
- Enhanced Expectations for Effective Risk Mitigation and Compliance Program Expectations

**Enforcement Environment**

- Increased *Qui Tam* cases.
- Increased FCA penalties.
  - The *minimum* per claim penalty increased to $10,781, and the *maximum* increased to $21,563.
- New breed of whistleblower.
- *Universal Health Services, Inc. v. United States ex rel. Escobar.*
- Enhanced Medicaid enforcement.

**FCA Enforcement of 60-Day Rule**

  - 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
FCA Enforcement of 60-Day Rule

- August 2015: Pediatric Services of America Settlement
  - $6.88 million settlement to resolve allegations that provider, among other things, failed to investigate credit balances on its book to determine whether the credit balances resulted from overpayments made by federal healthcare programs.
  - DOJ described the settlement as “the first of its kind” and “precedent-setting.”

OIG Audit – NY Pres. (August 2016)

- OIG released audit findings for New York Presbyterian Hospital.
- Published by OIG in August 2016 but audit period covered calendar years 2011 and 2012.
- Sample of 285 claims resulted in findings of an alleged overpayment of over $800K.
  - On the basis of that sample, OIG extrapolated to a universe of 3,884 claims, resulting in a total alleged overpayment of over $14 million.

OIG Audit – NY Pres. (Cont’d)

- OIG recommended that the hospital “exercise reasonable diligence to investigate the potential overpayments outside of the Medicare reopening and recovery periods and work with the Medicare contractor to return any identified overpayments . . . in accordance with the 60-day repayment rule.”
- Hospital’s response:
  - All claims reviewed were subject to statutory and administrative finality limitations;
  - Time-barred claims are not Overpayments; and
  - Claims for which the hospital disagreed with OIG’s findings were not “identified” overpayments under the 60-day rule.
Individual Accountability: 1 Year Post Yates Memo

• Yates Memo Overview
  – On September 9, 2015, Deputy Attorney General, Sally Quillian Yates, issued a memorandum (the Yates Memo) regarding individual accountability for corporate wrongdoing.
  – Provides guidance for both civil and criminal investigations.
  – Emphasizes the need to hold individuals who perpetrated corporate wrongdoing accountable.

• Discuss Impact of Yates Memo

1 Year Post Yates Memo: Enforcement Examples

1 Year Post Yates Memo: Enforcement Examples (cont’d)
OIG’s Focus on Individual Accountability: CIA Developments

4. Management Certifications

I have been trained on and understand the compliance requirements and responsibilities as they relate to [insert name of department], as set under any supervision. My job responsibilities include ensuring compliance with regard to the [insert name of department] with all applicable Federal health care program requirements, obligations of the Corporate Integrity Agreement, and I have taken steps to promote such compliance. To the best of my knowledge, except as otherwise described herein, [insert name of department] is in compliance with all applicable Federal health care program requirements and the obligations of the Corporate Integrity Agreement. I understand that this certification is being provided to and relied upon by the United States.

Escalating Compliance Program Expectations

- Mandatory Compliance Programs (ACA § 6401(a)(8))
- DOJ Compliance Counsel
- CIA Trends
  - Enhanced Board Oversight
  - Compliance Expert
  - Active Risk Assessment and Mitigation

CIAs: Risk Assessments

E. Risk Assessment and Internal Review Process

Within 120 days after the Effective Date, [ ] shall develop and implement a centralized annual risk assessment and internal review process to identify and address risks associated with the submission of claims for items and services furnished to Medicare and Medicaid program beneficiaries. The risk assessment and internal review process shall include: (1) a process for identifying and prioritizing potential risks; (2) developing an assessment plan to evaluate and respond to potential risks, including internal auditing and assessment of the potential risk areas; (3) developing action plans to remediate potential risks; and (4) tracking results to assess the effectiveness of the risk assessment and internal review process, including any recommendations from [ ] partners. The risk assessment and internal review process shall require compliance, legal,
CIAs: Board Resolutions

At a minimum, the resolution shall include the following language:

The Board of Directors (or a duly authorized committee of the Board) has made a reasonable inquiry into the operations of the Compliance Program including the performance of the Compliance Officer and the Compliance Committee. Based on its inquiry and review, the Board or a committee of the Board has concluded that, in the exercise of such inquiry and review:

1. The compliance program has been implemented and is effective in promoting compliance with Federal health care program requirements and the obligations of the CIA.

CIAs: Retention of a Compliance Expert

The resolution shall state an individual or entity with expertise in compliance with Federal health care program requirements (Compliance Expert) to perform an on-site review of the effectiveness of the Compliance Program Review (Compliance Program Review Report). The Compliance Expert shall submit a work plan for the Compliance Program Review and prepare a written report absent the Compliance Program Review Report. The written report (Compliance Program Review Report) shall include a summary of the findings and recommendations with respect to PSA/J compliance program.

The Board shall review the Compliance Program Review Report as part of its review and oversight of PSA/J compliance program. A copy of the Compliance Program Review Report shall be submitted to the Board by the Compliance Expert, along with minutes of any meetings between the Compliance Expert and the Board, shall be made available to the OIG upon request.

Focus on Voluntary Self-Disclosures

• Recent Remarks from OIG Inspector General At HCCA Compliance Institute (April 2016)
  — **Self-disclosure** is now the mark of an effective compliance program.
  — **Self-correction** was specifically emphasized by Daniel Levinson as a pillar in the pursuit of the establishment of a strong healthcare institution.

• At its core, the 60-day overpayment rule is a combination of self-disclosure and self-correction.
Updated OIG Permissive Exclusion Authority

• Confluence of industry developments reflected in updated OIG permissive exclusion guidance.

• On April 18, 2016, OIG issued a revised policy statement containing the new criteria that OIG intends to use in implementing its permissive exclusion authority under 42 U.S.C.A. § 1320a-7(b)(7) (Revised Policy).

Updated OIG Permissive Exclusion Authority (cont’d)

• Examples of Key Aspects of the Revised Policy
  
  — Individual Accountability
    — In the case of an individual, if the individual organized, led, or planned the unlawful conduct, this indicates higher risk.
    — In the case of an entity, if individuals with managerial or operational control at or on behalf of the entity organized, led, or planned the unlawful activity, this indicates higher risk.
    — If the person’s cooperation resulted in criminal, civil, or administrative action or resolution with or against other individuals or entities, this further indicates lower risk.
  
  — Internal Investigations
    — If the person initiated an internal investigation before becoming aware of the Government’s investigation to determine who was responsible for the conduct, and shared the results of the internal investigation with the government, this indicates lower risk.
    — If the person self-disclosed the conduct cooperatively and in good faith as a result of the internal investigation, prior to becoming aware of the Government’s investigation, this indicates lower risk.

Updated OIG Permissive Exclusion Authority (cont’d)

• Examples of Key Aspects of the Revised Policy (cont’d)
  
  — Compliance Program
    — The existence of a compliance program that incorporates the seven elements of an effective compliance program does not affect the risk assessment.
    — The absence of a compliance program that incorporates the seven elements of an effective compliance program indicates higher risk.
    — If the entity has devoted significantly more resources to the compliance function, this indicates lower risk.
  
  — History of Self Disclosures
    — If the person has a history, prior to becoming aware of the investigation, of significant self-disclosures made appropriately and in good faith to OIG, CMS (for Stark law disclosures), or CMS contractors (for non-fraud overpayments), this indicates lower risk.
Mechanics of the 60-Day Rule

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.

Failure to report and return an overpayment can result in False Claims Act (FCA) and Civil Monetary Penalties (CMP) liability, as well as exclusion from participation in federal health care programs.
**Timeline of Significant Overpayment Developments**

- March 2010: ACA requirement for reporting and refunding Medicare and Medicaid overpayments enacted
- February 2012: Medicare Parts C/D Proposed Rule
- January 2014: Medicare Parts C/D Final Rule
- May 2014: No Medicaid Proposed Rule to date
- October 2016: Four Months
- February 2016: Medicare Parts A/B Final Rule
- October 2016: Four Years

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**“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

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**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)

Quantifying a Potential Overpayment

- For Medicare Parts A/B, an overpayment is not “identified” until **quantified** (although there are time constraints for quantifying).
- Prior to the issuance of the final Medicare Parts A/B rule, there was significant discussion in the industry regarding quantification issue.
- Quantifying an overpayment can present numerous complexities and can involve significant effort.
  - Can use “statistical sampling, extrapolation methodologies and other methodologies as appropriate to determine the amount of the overpayment, rather than identifying every claim.”
  - Must explain in an overpayment report how the amount of the overpayment was calculated if statistical and extrapolation methods are used.
Medicare Parts A/B Overpayment Final Rule: Timeline

<table>
<thead>
<tr>
<th>Event</th>
<th>Timeframe</th>
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<tbody>
<tr>
<td>Receipt of “Credible Information” of a Potential Overpayment</td>
<td>No More than 6 Months to Investigate and Quantify Potential Overpayments</td>
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<tr>
<td>Triggers Duty to Investigate</td>
<td>No More than 8 Months to Investigate and Report and Refund Medicare Parts A and B Overpayments</td>
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<tr>
<td>No More than 60 Days to Report and Return the Overpayments</td>
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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

Operationalizing the 60-Day Rule:

**Key Questions and Considerations**
How to Effectively Implement the 60-Day Rule?

High Stakes -- Darling of Gov't/Whistleblowers
Complex Organization / Numerous Impacted Stakeholders
Complex law and regulation -- many gray areas
How to prioritize limited resources

Who is charged with development and deployment?

Compliance
Partnership
Legal
Input from Key Stakeholders

Information Technology
Finance
Internal Audit
Revenue Integrity
Others

What is Considered an Overpayment under the 60-Day Rule?

- Overpayment is defined to include “any funds that a person receives or retains under sub-chapter XVIII or XIX to which the person, after applicable reconciliation, is not entitled under such subchapter.” 42 U.S.C. § 13201-7.
- Consider potential scenarios involving funds that arguably could be received outside of sub-chapter XVIII or XIX
- Certain research grants provided by the National Institute of Health.
- CMS explicit that cause of overpayment does not impact the provider’s obligations to report and return.
- Overpayments must be returned even if provider not at fault.
What Falls Under the 60-Day Rule Overpayment Umbrella?

- Payments for non-covered services
- Duplicate payments
- Medicare payments when another party responsible for payment
- Inappropriate coding or upcoding
- Payments received in violation of AKS or Stark
- Medicare and Medicaid HMO payments
- EHR incentive payments
- Value-based program payments
- Accountable Care Organization shared savings

Note: This list is not exhaustive.

Credible Information – Application to Multi-Hospital Systems?

Who determines what is “credible information” of potential overpayment?

- Who at your organization has the authority to determine what is “credible information”?
- Who is responsible for documenting all important decisions regarding the investigation of potential overpayments, including whether (and when) certain information was ultimately determined to be a “credible” source of information?
How are potential sources of “credible information” analyzed?
• What standards are used?
• How is this analysis documented?

Who keeps an eye on the 60-day timelines?
• Who determines when the timeline for the 60-day analysis is triggered?
• Who is responsible for tracking the 60-day and 6-month investigation timeframes?
• What tools are used to keep track of these deadlines?

Timeline Considerations: What is Subject to the Initial 6-Month Deadline?
### Policies, Procedures and Protocols

**Assessment of Key Policies**

- **Overpayment policy**
  - All payors?
  - Separate policy for Federal payors?

- **Internal investigations policy**
  - Important in light of 6 month investigation timeline articulated in Final Rule
  - Lookback period considerations – who determines investigation look-back period?

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### Policies, Procedures and Protocols

**Assessment of Key Procedures and Protocols**

- Audit protocols
- Self-disclosure processes
- Others

**Who at your organization is responsible for leading assessment of policies, procedures and protocols?**

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### Additional Considerations

- **Appeals/Contractor Denials.**
  - CMS stated that it believes that “contractor overpayment determinations are always a credible source of information for other potential overpayments.”
  - Given this commentary, consider evaluating who within the organization reviews appeal decisions and makes determinations regarding whether to appeal particular decisions.
Additional Considerations (cont’d)

- Consider industry recognized error rates
  - For example, QIO patient status reviews
  - Government and qui tam relators may attempt to use error rates as a sword:

Additional Considerations (cont’d)

- Refunding Logistics/Documentation
  - Consider overpayment refund strategies with relevant payors
    - How much information regarding efforts to comply with the 60 day rule will be provided?

Additional Considerations (cont’d)

- Providers may face challenges in ensuring contractors process voluntary refunds.
  - Consider potential need for follow-up.
  - Consider advantages of providing certain voluntary refunds through checks, rather than electronic processing.
  - How are refunds documented?