# *Evaluating "Credible Information" Under the 60-day Overpayment Rule*

***Brian D. Roark***

BASS BERRY SIMS PLC
CENTERED TO DELIVER.

*Look for money*
*you're not owed.*
*Pay it back in 60*
*or you'll get snowed.*
*The end.*

BASS BERRY SIMS PLC

## Overpayments: Statutory Requirement

- Affordable Care Act (Mar. 23, 2010)
  - Added Section 1128J(d) of the Social Security Act
  - An overpayment must be reported and returned within 60 days after the date on which it was "identified" or it becomes an "obligation."
- CMS publishes proposed rule (Feb. 16, 2012)
  - Does not define "identified"
  - But statutory requirement was self-executing

BASS BERRY SIMS PLC

## Final CMS Overpayment Rule

- Effective Mar. 14, 2016
  - 81 Fed. Reg. 7654 (Feb. 12, 2016)
  - 42 C.F.R. 401.305(a)(2).
  - Applicable to Medicare A and B



## Final CMS Overpayment Rule

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."

## "Identification" of Overpayments

- The 60-day clock to repay is triggered when:
  - Reasonable diligence is completed
    - Confirming overpayment and quantification
  - Or, if no reasonable diligence, then on the day the provider received "credible information"
- Receipt of credible information does not trigger the 60-day repayment period
  - But does trigger the obligation to exercise reasonable diligence

BASS BERRY SIMS PLC

## "Reasonable Diligence"

- Proactive
  - Proactive compliance activities conducted in good faith by qualified individuals to monitor for receipt of overpayments
- Reactive
  - Timely, good faith investigations of "credible information" of potential overpayments

BASS BERRY SIMS PLC

## *Reasonable Diligence* – Proactive



## *Reasonable Diligence* – Reactive

- Reactive
  - Timely, good faith investigations of "credible information" of potential overpayments
- Failure to make a reasonable inquiry into credible information may amount to reckless disregard or deliberate ignorance of an overpayment
  - Depends on facts and circumstances

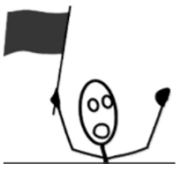
## "Credible Information"

- Receipt of credible information triggers a duty to investigate
- What is "credible information"?
  - Not specifically defined, but includes information that "supports a reasonable belief that an overpayment has been received."
  - "In some cases, a provider . . . may receive information concerning a potential overpayment that creates a duty to make a reasonable inquiry to determine whether an overpayment exists."

BASS BERRY SIMS PLC

## "Credible Information"

- Potential sources of "credible information"
  - Government or contractor audits
  - Internal compliance reviews
  - Exit interviews
  - Excluded individuals
  - Local or national coverage determinations
  - Unexplained revenue increases
  - A single overpaid claim
  - Qui tams
  - Hotline reports
  - Government requests for information (subpoenas, CIDs)



BASS BERRY SIMS PLC

## How Long to Investigate?

- A good faith investigation should be completed within six months from receipt of "credible information," absent "extraordinary circumstances"
  - After the six-month period to investigate, you have 60 days to report and return the overpayment
  - This period of time will be considered presumptively reasonable
- After a provider becomes aware of credible evidence of receipt of an overpayment, the provider generally has up to eight months to repay the government.

BASS BERRY SIMS PLC

## "Extraordinary Circumstances"

- "Unusually complex" investigations
- Stark Law violations
- Natural disasters or state of emergency

BASS BERRY SIMS PLC

## How Long to Investigate and Repay


BASS BERRY SIMS PLC

## Look-back Period

- Six years from receipt of overpayment
- Length of look back is governed by "reasonable diligence"

BASS BERRY SIMS PLC

## Options for Reporting and Returning

- Medicare contractor process
- OIG Self-Disclosure Protocol
- CMS Voluntary Disclosure Protocol
- DOJ

BASS BERRY SIMS PLC

## Enforcement of 60-day Rule

- *U.S. ex rel. Kane v. Healthfirst, Inc.*, 120 F.Supp.3d 370 (S.D.N.Y. 2015).
  - Construed proposed rule and held that 60-day clock begins ticking when provider is put on notice of potential overpayment rather that moment an overpayment is conclusively ascertained
  - Defendants agreed to pay $2.95 million to settle allegations that Defendants willfully delayed repayment of over $844,000 in Medicaid overpayments.
- *U.S. ex rel. Keltner v. Lakeshore Med. Clin. Ltd.*, 2013 WL 1307013 (E.D. Wis. Mar. 28, 2013)
  - Large physician practice conducted audits, repaid claims identified in audits, but did not review additional claims for doctors with issues and later stopped auditing altogether
  - Court denied motion to dismiss – practice "ignored audits disclosing a high rate of upcoding"
  - Allegations "plausibly suggest that defendants acted with disregard for the truth and submitted some false claims"

BASS BERRY SIMS PLC

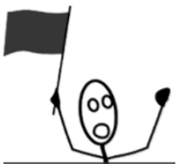
## Enforcement of 60-day Rule

- Pediatric Services of America Healthcare
  - Provider of home nursing services to children agreed to pay $6.88 million to settle allegations that, among other things, it failed to investigate credit balances and return overpayments
- *U.S. ex rel. Graves v. Plaza Med. Ctrs., Corp.*, 2017 WL 1115904 (S.D. Fla. Feb. 27, 2017)
  - Court denied summary judgment – reports from physician practice that certain diagnoses codes had been reported in error raised factual issue of knowledge of overpayment
- First Coast Cardiovascular Institute
  - Large cardiology practice based in Jacksonville, FL paid $440,000 to settle allegations that practice did not repay known overpayments



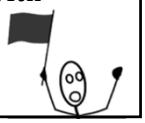
## Assessing "Credible Information"

- Potential sources of "credible information"
  - Government or contractor audits
  - Internal compliance reviews
  - Exit interviews
  - Excluded individuals
  - Local or national coverage determinations
  - Unexplained revenue increases
  - A single overpaid claim
  - Qui tams
  - Hotline reports
  - Government requests for information (subpoenas, CIDs)



## Assessing "Credible Information"

- Examine your proactive efforts to search for potential overpayments.
  - Implement periodic billing and coding audits
    - Tailored to particular risks of your organization
    - Tailored to OIG work plan and other guidance
- What mechanisms are in place for analyzing whether there is "credible information?"
  - Exit interviews; government audits; unexplained jumps in revenue
  - Do compliance/legal/billing/appeals communicate with each other



BASS BERRY SIMS PLC

## Assessing "Credible Information"

- Assessing whether to investigate includes weighing source and content of information
  - One hotline complaint versus multiple
  - Person who complains frequently versus first-time complaint
  - What is reasonable under the circumstances
  - Develop "precedent"
  - Document your work
- Properly interrogate potential issues that are identified
  - Don't stop at "what"; you may need to answer "why"
  - Is it necessary to go beyond the probe sample
  - Mistakes/errors vs. fraud

BASS BERRY SIMS PLC

# *Questions?*

Brian Roark
(615) 742-7753
broark@bassberry.com

**www.bassberry.com/healthcare-fraud**

BASS BERRY + SIMS PLC