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Reporting and Returning Medicare and Medicaid Overpayments

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If Overpayment Is Suspected, Contact Legal Counsel or an Appropriate Advisor Immediately

As discussed in our previous column, Section 6402 of the Patient Protection and Affordable Care Act of 2010 (PPACA)[1] clarified amendments to the federal False Claims Act (FCA) contained in the Fraud Enforcement Recovery Act of 2009 (FERA),[2] which require the return of known overpayments from the Medicare and Medicaid programs. Under FERA and PPACA, providers, suppliers, and other persons must report and return Medicare and Medicaid overpayments within 60 days from the date that the overpayment was identified or by the date a corresponding cost report was due, whichever is later. Failure to comply with the deadline creates potential liability under the FCA for a reverse false claim and raises the possibility of civil monetary penalties.

IDENTIFYING OVERPAYMENTS

Overpayments are broadly defined by FERA and PPACA as any amount received under the Medicare or Medicaid programs to which the provider, supplier, or person is not entitled. An overpayment includes payment that should not have been made and payments made in excess of the appropriate amount. Overpayments may result when a payment was inappropriate according to statute, regulation, or contract or when the factual basis on which payment was sought is later determined to be incorrect.

Typically, overpayments fall into one of the following categories: (1) at the time of the service, the individual receiving the service was not eligible for Medicare or Medicaid; (2) Medicare or Medicaid mistakenly paid as primary where another third-party payer was properly primary; (3) the payment amount was miscalculated and excessive; (4) the service did not fall within one of the statutory benefits or was subject

to a statutory exclusion; or (5) the service was not medically necessary.

Reporting and Returning Overpayments

The provider, supplier, or other person receiving an overpayment is required to report and return the overpayment to the correct authority and notify that authority of the reason for the overpayment within the later of 60 days of being identified or by the date a corresponding cost report is due. If a provider, supplier, or person knows it has received an overpayment, that provider, supplier, or person may be obligated to return the overpayment even if the payment resulted from an error by the Centers for Medicare & Medicaid Services (CMS), a state Medicaid agency, or a contracted agent, and generally irrespective of when the payment was received.[3]

Notwithstanding the above, it is not apparent from CMS guidance when precisely the 60-day reporting and returning timeframe begins or what procedures should be followed when CMS has been notified of an overpayment but has not provided a mechanism to return the monies. The term "identified" has not yet been defined by relevant statute or regulation and has not yet been addressed by the courts. In addition, when CMS has built a "true up," such as a cost reporting period, into its payment mechanism, the applicable reporting requirements and repayment procedures for claims still subject to reconciliation are unclear.

That said, to avoid potential liability, Medicare providers, suppliers, and other persons should consult their legal counsel and consider contacting CMS as soon as possible after an overpayment is discovered. The U.S. Court of Appeals for the Eighth Circuit has held that a person that is open with the government regarding the circumstances that make up the basis for a potential FCA claim and that engages in a cooperative effort with the government to find a solution lacks the intent necessary to establish an FCA violation.[4]

Consequences of Failing to Report and Return Overpayments

If an overpayment is not reported and returned within the later of 60 days of being identified or by the date a corresponding cost report was due, the provider, supplier, or person may be subject to federal FCA liability of treble damages and penalties of up to $11,000 per claim, civil money penalties of $10,000 per item or service, liability under state FCAs, or exclusion from participating in federal health programs, including Medicare and Medicaid. Moreover, under the federal FCA and many state FCAs, employees, vendors, and other private parties with knowledge that an overpayment has been wrongfully retained may bring a lawsuit to recover damages on behalf of the government and may share in the government's recovery, resulting in a powerful monetary incentive to sue.

A federal FCA violation occurs where a person "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government…" This statutory language means that a reverse false claim can be committed by (1) knowingly making, using, or causing to be made or used a false record or statement material to an obligation to pay or transmit money or property to the government; (2) knowingly concealing an obligation to pay or transmit money or property to the government; and (3) knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the government.

Several definitions are essential to understanding potential liability for reverse false claims in overpayment situations. "Knowingly" encompasses actual knowledge, deliberate indifference, or reckless disregard. "Material" is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of mon-

ey or property." Finally, "obligation" means "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee based or similar relationship, from statute or regulation, or from the retention of any overpayment."

This latter definition makes it clear that reporting and returning overpayments is an obligation under the FCA and failure to report and return overpayments within the 60-day timeframe raises the specter of potential reverse false claim liability. It is also worthwhile to note that many states have false claims statutes that impose similar responsibilities and create near identical liabilities as the FCA.

Conclusion and Recommendations

To summarize, in light of the changes brought about by FERA and PPACA, Medicare and Medicaid providers, suppliers, and other persons who receive payments from the government (whether directly or through a contractor) should monitor closely this developing area of the law and the reimbursement they receive. If an overpayment is suspected, they should contact legal counsel or other appropriate advisor for investigation and analysis of their reporting and repayment obligations, if any.

To properly monitor and identify overpayments, Medicare and Medicaid providers, suppliers, and other persons should implement a detailed compliance plan or update their current one, possibly in consultation with legal counsel or a compliance specialist. Due to the possibility of large civil monetary penalties and potential liability under the FCA, it is critical to properly and quickly report and return to the Department of Health and Human Services any and all confirmed overpayments.

Endnotes:

1. Signed into law by President Obama on March 23, 2010.
2. Signed into law by President Obama on May 20, 2009.
3. Note that impact of FERA's retroactive date of June 7, 2008 to claims paid prior to that date is uncertain. That said, the FCA's statute of limitations is generally six years.
4. *United States ex rel. Costner v. United States*, 317 F.3d 883 (8th Cir. 2003).

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