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CLIENT ALERT:

CMS Releases Proposed Regulations Regarding
Reporting and Returning Medicare Overpayments

The Patient Protection and Affordable Care Act (the "Act") enacted on March 23, 2010 made a number of changes to enhance efforts to recover overpayments and combat fraud, waste and abuse in the Medicare program. Section 6402(a) of the Act requires a person who has received an overpayment to report and return such overpayment by the later of:

- 60 days from the date the overpayment was identified; or
- the date any corresponding Medicare cost report is due, if applicable.

CMS recently released proposed regulations to facilitate implementation of the requirements of Section 6402(a) of the Act as they apply to Medicare Part A and Part B providers and suppliers. However, Section 6402(a) of the Act is in effect even without the regulations.

If enacted, the proposed regulations would require providers and suppliers to update their policies and procedures to ensure that they actively investigate potential overpayments. Failure to actively investigate potential overpayments with "deliberate speed" under the proposed regulations could result in liability because of a provider or supplier's reckless disregard or deliberate ignorance of a potential overpayment. Further, the proposed regulations substantially increase the burden on providers and suppliers with a new ten year look back period for overpayments. The current reopening rules contemplate a four to five year look back period.

The proposed regulations address the following questions:

What is an overpayment?

- Any funds that a provider or supplier receives or retains, after applicable reconciliation, to which the provider or supplier is not entitled under the Medicare program.

- Examples:
    - Payments for noncovered services;
    - Payments in excess of the allowable amount for a covered service;
    - Errors and nonreimbursable expenditures in cost reports;
    - Duplicate payments; or
    - Receipt of payment when another payor is responsible.

If you file a Medicare cost report the proposed regulations recognize that interim payments may be made to you and that an overpayment does not exist until after an applicable reconciliation takes place (including DSH and outlier reconciliations).

When are you required to report and return overpayments?

- 60 days after the date on which an overpayment is "identified", unless the claim is submitted to Medicare in the form of a cost report, or where the cost report is relevant to whether actual overpayment exists. Most claim-related return of overpayments will fall into the 60-day category.

    o An overpayment is identified when a person has "actual knowledge of the existence of an overpayment, or acts in reckless disregard or deliberate ignorance of the overpayment".

    o The 60-day clock does not run until after there has been a "reasonable inquiry" into the basis of the alleged overpayment. CMS does not define "reasonable inquiry". This gives providers flexibility as the 60-day clock arguably will not start running merely upon an allegation or suspicion of overpayment.

- Examples of when an overpayment has been identified include:
    o Discovery of a billing record that was incorrectly coded;
    o Learning that services have been provided by an unlicensed or excluded individual;
    o Being informed by a governmental agency of an audit or performing an internal audit that revealed a potential overpayment; or
    o Discovery of a significant reimbursement increase for no apparent reason.

- 2 proposed exemptions that toll the 60-day period:

    o Medicare Self-Referral Disclosure Protocol ("SRDP")
    o OIG's Self-Disclosure Protocol ("OIG SDP")

    In both instances, the obligation to return an overpayment is suspended as of the date of acceptance into the SRDP or the OIG SDP until such time a settlement agreement is effective or the provider withdraws or is removed from the SRDP or OIG SDP. Whereas, timely reporting of any overpayments is required under the SDRP, meeting the requirements of the OIG SDP will satisfy the overpayment reporting requirement.

How do you report?

- The report is submitted to your Medicare Contractor. CMS proposes that providers and suppliers use the existing voluntary refund process (to be renamed the "self-reported overpayment refund process") for the refund, and submit a "check the box" form that can be found on the Medicare Contractor's website.

    CMS intends to create a uniform self-reported overpayment refund process form to streamline this process.

    NHIC, Inc., the Medicare Administrative Contractor covering Massachusetts (Jurisdiction 14) for Part A and B providers, currently uses these forms for the voluntary overpayment process:

Part A: http://www.medicarenhic.com/providers/billing/PartAOverpaymentRefundForm.pdf
Part B: http://www.medicarenhic.com/ne_prov/forms/PartBOverpaymentRefundForm.pdf

- Overpayments are to be returned in one lump sum. If additional time is needed due to financial constraints, CMS proposes using the existing Extended Repayment Schedule ("ERS") process, which requires providers to submit documentation in order to verify that the timely repayment of the overpayment represents a true financial "hardship".

How far back do you need to look back for overpayments?

- 10 years - CMS proposed this time period because it is consistent with the outside statute of limitations under the federal False Claims Act. CMS also recommended amending the current Medicare reopening regulations which limit the look-back to three or four years for simple overpayments (i.e. no fraud, provider integrity issue or similar fault) to ten years.

What are the risks if my company does not report?

- Failure to report and return identified overpayments could result in liability under the federal False Claims Act, administrative or civil monetary penalties and/or exclusions from federal healthcare programs.

CMS is accepting comments on the proposed regulations that are submitted on or before April 16, 2012.

A copy of the proposed regulations is available at the following link:
http://www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-3642.pdf

Please contact Attorney Robert Griffin (rgriffin@kb-law.com), Attorney Jennifer Gallop (jgallop@kb-law.com) or Attorney Emily Kretchmer (ekretchmer@kb-law.com) with any questions or concerns about the proposed regulations.