Client Alert.

February 23, 2012

CMS Issues Proposed Rule for Reporting and Returning Overpayments to Medicare

By Ryan G. Hassanein

On February 16, 2012, the Centers for Medicare & Medicaid Services ("CMS") published a proposed rule implementing a provision of the Patient Protection and Affordable Care Act ("PPACA") that requires health care providers and suppliers to self-report and return overpayments to Medicare, or face liability under the False Claims Act ("FCA"). CMS's proposed rule provides much-needed guidance on the precise timing of when an overpayment must be reported and refunded to Medicare. Comments to the proposed rule are due by April 16, 2012.

What Is the Statutory Obligation that the Proposed Rule Implements?

Section 6402(a) of the PPACA requires providers and suppliers to "report and refund" an "overpayment" by the later of "60 days after the date on which the overpayment was identified" or "the date any corresponding cost report is due, if applicable." The PPACA also expressly makes the reporting and returning of overpayments an "obligation" under the FCA, so that the failure to return an overpayment within the applicable deadline is itself an FCA violation. An "overpayment" is broadly defined as any funds received from Medicaid or Medicare to which a person is not entitled. Section 6402(a) applies to Medicare Part A and B providers and suppliers, Medicare Advantage Organizations, Medicaid Managed Care Organizations, and Medicare Part D Prescription Drug Plans.

When Does the 60-Day Reporting Period Apply?

The proposed rule clarifies that the 60-day reporting period applies to all "claims related" overpayments. Overpayments that result from the inaccurate coding of claims, for example, must be returned within 60 days of identification. As CMS explains in the proposed rule, "[w]e do not believe that Congress intended to create a loophole that would allow providers to delay reporting and returning an identified overpayment until a cost report is due if the overpayment would not ordinarily be reconciled on the cost report." Entities that submit cost reports must, therefore, report an overpayment within 60 days of its identification so long as the overpayment is claims related.

When Does the 60-Day Reporting Period Begin to Run?

The trigger date for commencing the 60-day reporting period, under Section 6402(a), is the date when the overpayment is "identified," but the PPACA does not define the term "identified." According to CMS's proposed rule, an overpayment is "identified" when the provider or supplier has "actual knowledge" of the existence of the overpayment, or acts in "reckless disregard" or "deliberate ignorance" of the overpayment. This definition is consistent with the FCA's definition of the term "knowingly."

What Must I Do to Identify Overpayments?

The proposed rule explains that when a provider or supplier receives information about a potential overpayment, it must conduct a "reasonable inquiry" to determine whether an overpayment, in fact, exists. Although CMS acknowledges that time is needed to conduct a "reasonable inquiry," the proposed rule warns that the failure to conduct an inquiry "with all deliberate speed" could result in the provider or supplier being found to have acted in reckless disregard or deliberate ignorance of an overpayment.

Does the Proposed Rule Provide Concrete Examples of When an Overpayment Has Been Identified?

Yes, CMS sets forth several examples of when an overpayment has been identified. For instance, an overpayment has been identified when a provider or supplier reviews its billing records and learns that it incorrectly coded certain claims, resulting in increased reimbursements from Medicare. Other examples include the discovery of an overpayment during an internal audit, and the failure to conduct a reasonable inquiry into whether an overpayment exists "when there is reason to suspect an overpayment." The proposed rule specifies that when a provider or supplier experiences a significant increase in Medicare revenue for no apparent reason, it has "reason to suspect an overpayment" and thus a duty to conduct a reasonable inquiry. CMS emphasizes that the examples provided in the proposed rule are not an exhaustive list of situations where an overpayment has been identified.

How Far Back Do I Have to Look to Identify Overpayments?

Consistent with the outer limit of the FCA's statute of limitations, CMS's proposed rule adopts a 10-year "lookback" period. Overpayments must be reported and returned if a person identifies the overpayment within 10 years of the date on which the overpayment was received. To effectuate this 10-year lookback period, CMS has proposed amending its reopening rules, which currently only allow Medicare contractors to reopen claims within four years absent wrongdoing. CMS is particularly interested in hearing comments on the proposed length of the lookback period.

Conclusion

Although the proposed rule only applies to overpayments identified by Medicare Part A and B providers and suppliers, CMS emphasizes that Medicare Advantage Organizations, Medicaid Managed Care Organizations, and Medicare Part D Prescription Drug Plans still have a statutory obligation under Section 6402(a) to report and return overpayments. When such entities receive information concerning potential overpayments through a compliance hotline complaint or otherwise, they should conduct a "reasonable inquiry" with "all deliberate speed." If the proposed rule becomes final, the failure to act quickly when investigating potential overpayments may itself amount to an FCA violation.

Contact:

Ryan G. Hassanein
(415) 268-6606
rhassanein @mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer*'s A-List for eight straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.