Health Care Reform Update: Center for Medicare and Medicaid Services to Recoup Overpayments

By Kristin Nealey Meier

60-day Requirement for Reporting of Overpayments

Medicare and Medicaid providers and suppliers have always had an obligation to refund overpayments from federal healthcare programs. However, Section 6402 of the ACA (42 U.S.C. § 1320a-7k(d)) creates liability under the Federal False Claims Act for persons who fail to disclose and refund Medicare or Medicaid overpayments within the later of 60 days after the date the overpayment is identified or the date the next applicable cost report is due. Section 6402 is self-implementing. Therefore, all providers, suppliers and other persons covered by the Act have an obligation to report and refund overpayments within the timeframe set out in the statute.

In February 2012, the Center for Medicare and Medicaid Services (“CMS”) proposed a regulation implementing Section 6402 for Medicare providers and suppliers. Although, this regulation has not been finalized it provides useful insight into how CMS is likely to interpret providers’ obligations under Section 6402. The proposed regulation defines key statutory terms and provides guidance as to how overpayments should be handled once they are identified. Importantly, the proposed regulations acknowledge the overlap between the Section 6402 requirement to report and refund overpayments and existing avenues for resolving overpayment liability under Office of Inspector General (“OIG”) Self-Disclosure Protocol and the CMS Self-Referral Disclosure Protocol (collectively, the “SDPs”).

In its commentary to the proposed regulation, CMS acknowledged that, “the provider’s initial decision of where to refer a matter involving non-compliance with program requirements should be made carefully.” This is something of an understatement given that reporting and refunding an overpayment under Section 6402 cannot resolve any potential liability under the Federal False Claims Act, or other fraud and abuse laws, that might arise from the conduct that led to the overpayment. Disclosure pursuant to one of the SDPs, on the other hand can lead to settlement agreements in which the provider is released from civil and administrative liability arising from the overpayment and related conduct.

The Language of the Statute

Section 6402 requires any person who has received an overpayment under Medicare or Medicaid to:

(A) report and return the overpayment to the Secretary, the State, or intermediary, a carrier or a contractor, as appropriate, at the correct address; and

(B) notify the Secretary, the State, intermediary, carrier or contractor to whom the overpayment was returned in writing of the reason for the overpayment.

42 U.S.C. § 1320a-7k(d)(1). The overpayment must be reported and returned within 60 days after the date on which it was identified or the date any corresponding cost report is due. 42 U.S.C. § 1320a-7k(d)(2).

Overpayment means “any funds that a person receives or retains under [Medicare] or [Medicaid] to which the person, after appropriate reconciliation is not entitled.” 42 U.S.C. § 1320a-7k(d)(4)(B). Person means a provider or supplier, a Medicaid managed care organization, a Medicare Advantage organization or a PDP sponsor, but does not include a beneficiary under Medicaid or Medicare. 42 U.S.C. § 1320a-7k(d)(4)(C).
The statute further provides that an overpayment retained by a person after the deadline for reporting and returning the overpayment is an obligation for purposes of Section 3729 of the Federal False Claims Act, 31 U.S.C. § 3729. Section 3729(a)(1)(G) provides for civil penalties of up to $11,000 plus three times the amount of the government’s damages against a person who “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.” When an overpayment results from numerous claims, the Government could seek to impose a separate penalty for each claim that resulted in an overpayment.

Section 6402 also defines the words “knowing” and “knowingly” at 42 U.S.C. § 1320a-7k(d)(4(A) as having the same meanings set forth in the Federal False Claims Act. In other words, a person acts with knowledge if the person has actual knowledge of information or acts in reckless disregard or deliberate ignorance of the truth or falsity of such information. 31 U.S.C. § 3729(b).

Relationship between Section 6402 and the Self Disclosure Protocols

In its commentary to the Proposed Regulation, CMS recognized that there are “intersections” between the obligation to report and return overpayments under Section 6402 and the Self-Referral Disclosure Protocol (“SRDP”) and OIG Self-Disclosure Protocol (“OIG SDP”). As noted at the outset, CMS has acknowledged that the decision whether to report overpayments under Section 6402 or under the SRDP or OIG SDP “should be made carefully.” This is in part because, other than liability that would have arisen if the provider had retained the overpayment, providers cannot resolve any False Claims Act or Civil Money Penalty liabilities solely by reporting and returning overpayments under Section 6402. In contrast, the SRDP and the OIG SDP both offer providers an opportunity to resolve potential civil and administrative liabilities in addition to resolving the resulting overpayment.

Providers and suppliers may use the SRDP to report potential violations of the Federal Physician Anti Self-Referral Law (“Stark Law”) and any resulting overpayments. Under the SRDP, CMS may reduce the amount due and owing for potential violations of the Stark Law. Accordingly, providers and suppliers who have identified a potential “pure” Stark violation should carefully consider whether to report the resulting overpayment solely under Section 6402, or whether to use the SRDP to attempt to resolve any Stark liability as well as the overpayment liability. CMS proposes that if a provider makes a disclosure under the SRDP, it will still be required to report the overpayment to the MAC, but the obligation to return the overpayment within 60 days would be suspended.

The OIG SDP allows providers and suppliers an opportunity to resolve civil and administrative liabilities arising from violations of the False Claims Act and Civil Money Penalties Law that do not arise from violations of the Stark Law. Importantly, a provider that enters the OIG SDP may enter a settlement agreement with the OIG that results in a release of liability for civil money penalties as well as the OIG’s permissive exclusion authority. CMS proposes that a provider’s obligation to return an overpayment is suspended when the OIG acknowledges that the provider has submitted a disclosure under the OIG SDP. Moreover, unlike the SRDP, a provider’s disclosure under the OIG SDP satisfies the provider’s obligation to report the overpayment under Section 6402.

While the SRDP and OIG SDP offer providers the opportunity to resolve additional liability beyond the amount of the overpayment, many providers may view the SDPs as more invasive than the refund process required by Section 6402 and the Proposed Regulation. In many cases disclosure under Section 6402 may be sufficient to resolve overpayment issues. CMS provides the following examples of issues that might be resolved through disclosure under Section 6402:

- Medicare payments for non-covered services
- Medicare payments in excess of the allowable amount for an identified covered services
- Errors and non-reimbursable expenditures in cost reports
- Duplicate payments
- Receipt of Medicare payment with another payor had the primary responsibility for payment

However, providers should be aware that MACs have the discretion to refer a voluntary refund under Section 6402 to the OIG if the MAC believes the circumstances warrant a referral. Accordingly, a provider may disclose an overpayment appropriately under Section 6402 only to face additional investigation and possible enforcement actions based upon a referral of the matter to the OIG. Thus, if a provider wishes to obtain certainty regarding the possibility of any future enforcement actions (e.g., where the provider believes that there could be a potential whistleblower, or where a buyer...
wishes to have potential liability fixed prior to closing a transaction), the provider may wish to make a submission through the applicable SDP.

**Fiscal Cliff Legislation Gives CMS Up to Five Years to Recoup Medicare Overpayments**

CMS will now have up to five years to recoup Medicare overpayments resulting from coding mistakes or other claims errors. The increase in the statute of limitations for recovery of non-fraudulent Medicare overpayments was part of the American Taxpayer Relief Act of 2012 – signed into law by President Obama January 2 and commonly known as the “fiscal cliff” legislation – which also extended existing income tax rates for many Americans and delayed planned cuts in numerous federal programs.

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