Medicare Overpayment
60-Day Rule

What Your Compliance and Auditing
Departments Need to Know

Objectives

• Review the key legal, operational and technical takeaways
  from the ACA 60-Day Report and Repay Statute.
• Discuss the implications of "reasonable diligence" and
  "credible information" as defined in the clarified rule.
• Review strategies for proactive compliance activities that will
  reduce risk of overpayments and limit exposure of provider.

Key Legal, Operational and
Technical Takeaways

• Key provisions of the 60-Day Rule
• The 60-day "clock"
• Credible information of an overpayment
• Duty to investigate and quantify
• Reasonable diligence—proactive and reactive
• The six-year "lookback" period
• Reporting and refund process
  • Impact of contractor audits
  • Appeals
• Pre-payment probe audits
Statutory Requirement to Report & Repay

• Congress created the new 60-day repayment provision through Section 6402(a) of the Affordable Care Act
• Added section 1128J(d) to the Social Security Act, now codified at 42 U.S.C. 1320a-7k (d)
• Became law March 23, 2010
• CMS asserts that the law has been enforceable since that date, despite the absence of regulations until now, and court decisions support that position

Final 60-Day Rule

• Final rule applies only to overpayments under Parts A and B of Medicare
  ➢ CMS issued a separate rule for Parts C and D of Medicare (May 23, 2014)
  ➢ No rulemaking yet for Medicaid but statute in effect
• Requires providers to investigate with reasonable diligence if credible evidence exists of a potential overpayment
• If an overpayment is identified, the provider has 60 days to report and repay

Definition of “Overpayment”

• An “overpayment” means any funds a person has received or retained to which the person is not entitled
  ➢ This has nothing to do with causation or fault
  ➢ Human error, system error, fraud, contractor error or “otherwise,” it can still be funds to which you are not entitled
  ➢ The amount of the overpayment can be:
    ➢ A portion of the paid claim (e.g., upcoded claims)
    ➢ The whole claim (e.g., medically unnecessary or uncovered service)
Consequences

• Failure to report and repay creates an "obligation" equal to the retained overpayment
• Failure to satisfy an "obligation" is a violation of the False Claims Act
• The FCA is enforceable by the government and whistleblowers, potentially exposing the provider to liability vastly larger than the amount of the overpayment
• Also, violates the Civil Monetary Penalties Law

Identification

• Under the rule, an overpayment is identified when the recipient has, or should have, through reasonable diligence:
  ➢ Determined that it received an overpayment, and
  ➢ Quantified the amount of the overpayment

Credible Information

• CMS: “We believe credible information includes information that supports a reasonable belief that an overpayment may have been received.”
• Examples of when discovery of credible information triggers a duty to investigate:
  ➢ Discovery of unlicensed or excluded individual
  ➢ Certain hotline complaints
  ➢ Local or national coverage policy
  ➢ Contractor audits
  ➢ Internal reviews
  ➢ Unexplained increase in revenue from Medicare
Duty to Investigate & Quantify

- Even a single overpaid claim may create a duty to look further with respect to similar claims
  - Scope of further inquiry depends on nature of the isolated claim
  - Do a “probe” sample, and if that finds more overpayments, then a broader sample
- Only make repayment at conclusion of investigation
- Extrapolation or claim-by-claim review is permissible

Reasonable Diligence

- CMS says that reasonable diligence includes both
  - Proactive compliance activities to monitor for receipt of overpayments, and
  - Investigations in response to “credible information” of a potential overpayment
- Facts and circumstances determine
  - Whether the compliance efforts are “reasonable,” and
  - What rises to the level of “credible information”
- Investigation is expected to take no longer than six months, absent exceptional circumstances

The “Lookback” Period

- Must return overpayments identified within six years of receipt of the funds
  - Originally proposed 10 years
  - Consistent with CMP statute of limitations
- Reopening regulations allow contractors to reopen for only four years (with good cause)
- Final 60-Day Rule extends window for provider-initiated reopenings to six years
The 60-Day Clock

- Under the rule, 60 days begins to run after "identification"
- Identification occurs after reasonable diligence
- Except, if provider has credible information
  - Does not exercise reasonable diligence
  - And there is an overpayment
  - Then you are late after 60 days, not eight months

The Clock (cont.)

- The deadline for refunding overpayments is suspended:
  - If the OIG has accepted a voluntary disclosure under its Self-Disclosure Protocol (kickback cases)
  - If CMS has accepted a voluntary disclosure under its Voluntary Self-Referral Disclosure Protocol (Stark cases)
  - An extended repayment schedule is requested

The Reporting & Refund Process

- Final rule defers to existing refund processes:
  - Claims adjustment
  - Credit balance
  - Voluntary refund to contractor
  - Disclosures through CMS or OIG
- Method of repayment chosen will be based on facts and circumstances of overpayment (e.g., amount, culpability)
- Chosen method may dictate the details necessary for the report
Reporting & Refund (cont.)

- CMS permits and maybe even encourages sampling and extrapolation as part of quantifying overpayments
  - But only the specific claims identified in the sample will get adjusted on the contractor’s books
  - Only those claims specifically identified are appealable
- Reporting and repaying does not insulate provider against future audits

Impact of Contractor Audits

- Results of contractor audits can create duty to investigate further
- Contractors limited to four-year reopening period but providers may have duty to go back additional two years
- CMS allows providers who disagree with results of audit to pursue appeals first before exercising reasonable diligence in investigating additional overpayments

Appeals

- 60-Day Rule does not eliminate appeal rights, even for self-identified overpayments
- Providers may not “game the system” by appealing a subset of claims identified as overpaid to avoid duty to fully investigate or make full repayment
- Appeals of extrapolated amounts are difficult but not impossible
Reduction Risk of Overpayments and Limiting Exposure of Provider

COMPLIANCE AND AUDIT ACTIVITIES

Reasonable Diligence

A provider’s compliance with the new rule will require proactive compliance activities in addition to reactive investigations once “credible information” of an overpayment is received. “Minimal compliance activities” may “expose the provider or supplier to liability” because it may be considered “failure to exercise reasonable diligence.”

A “react and respond” approach will no longer be enough.

Proactive Compliance Activities

• Review compliance plan and assure that the plan is effective in being able to identify, investigate and calculate overpayments for 6 year period
• Ensure monitoring efforts (i.e., self-audits, internal statistical analysis, etc.) are well documented. Potential areas to be monitored:
  • Coding
  • Claim accuracy
  • Secondary payer
  • Medical Necessity documentation
• Assessing 3rd Party Risk (e.g., billing companies, coders, etc.)
• Update policies and systems to handle overpayments
• Ensure that all business units understand the law
Compliance Program Checklist

- Internal process for collecting data on areas that could trigger overpayments - routine billing errors to deliberate Fraud, Waste and Abuse issues.
- Guidelines for investigating potential overpayments - legal involvement, determining look-back period, how to scope audit.
- Tracking system of potential overpayments - date of determination and repayment timelines.
- Regular audits/review (recommend monthly or quarterly) of potential overpayment issues and decisions.
- Procedure for evaluating potential overpayments and who will be the ultimate decision maker for determining if an overpayment has been received.

“PRACTICAL APPLICATION OF 60 DAY RULE THROUGH CASE EXAMPLES- INTERACTIVE DISCUSSION”

Thank You! – Any Questions?