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Insights

CMS's Proposed Government Overpayment Rule Sure to Make You Sleep Less

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The Centers for Medicare & Medicaid Services (CMS) recently issued a **proposed rule** that would eliminate the "reasonable diligence" requirement that Medicare Part A and Part B providers had to investigate and quantify Medicare repayments under 42 C.F.R. § 401.305. This reasonable diligence period, which was interpreted by CMS to be no longer than six months, allowed providers and suppliers adequate time to investigate and quantify any Medicare overpayments that may have been received within the six-year lookback period. The elimination of the reasonable diligence standard substantially increases the risk of providers and suppliers incurring liability under the False Claims Act (also known as the reverse False Claims Act) and should be of concern to those affected by this change. CMS is accepting comments on the proposed rule until February 13, 2023.

These increased stakes arise from the new language CMS proposes to add in place of the "reasonable diligence" standard. Existing law requires Medicare and Medicaid providers to repay a Medicare or Medicaid overpayment within 60 days of "identification," and their failure to do so creates potential liability under the False Claims Act. CMS passed regulations stating that a Medicare provider or supplier has "identified" an overpayment when it has exercised "reasonable diligence" to identify it. CMS regulations also stated that a provider is deemed to have identified an overpayment if it fails to exercise "reasonable diligence" to identify a Medicare overpayment according to the regulations. CMS's proposed change would eliminate the reasonable diligence standard, potentially increasing the risk of providers incurring liability under the False Claims Act if they take too long to quantify and refund a Medicare overpayment. The proposed rule would read as follows:

- A person has identified an overpayment when the person knowingly receives or retains an overpayment. The term "knowingly" has the meaning set forth in 31 U.S.C. 3729(b)(1)(A).

This proposed rule raises many questions and challenges for Medicare suppliers and providers. For instance, if an overpayment is 'identified" when it is received, does CMS expect the provider to conduct a full investigation and refund within a period of 60 days? If the existence of an overpayment is known, but the full amount is not known, is such amount knowingly received? Will states adopt similar standards for investigating and repaying Medicaid overpayments? CMS does not explain its changes or offer any answers to such questions. We will continue to monitor the proposed rule as more clarity may be forthcoming. What is clear is that the proposed rule, if passed, is sure to make Medicare providers and suppliers sleep even less.

Please contact **Brandon W. Shirley** or **Meghan M. Linvill McNab** if you have questions regarding your billing compliance and overpayment obligations.

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