COMPLIANCE ALERT 12-10

CMS Issues Proposed Rule Requiring Repayment for Medicare Overpayments within 60 days or Cost Report Date

EXECUTIVE SUMMARY: The Proposed rule implements and reinforces previous information about Section 6402(a) of the Affordable Care Act and would "require providers and suppliers receiving funds under the Medicare program to report and return overpayments by the later of the date which is 60 days after the date on which the overpayment was identified; or any corresponding cost report is due, if applicable. " These new regulations could lead to civil penalties as well as federal False Claims Act liability. The proposed rule includes a limitation of 10 years after the date it was received for returning a credit balance that has been identified.

Comments on the Proposed Rule are due by April 16, 2012.

OVERVIEW: This proposed rule enacts Section 6402(a) of the Affordable Care Act that required a person who has received an overpayment to report and return the overpayment to the HHS Secretary, the State, an intermediary, a carrier, or a contractor as appropriate and to include the reason for the overpayment. This must be done with the time period specific above.

The proposed rule characterizes an overpayment retained by a person after the deadline as a "reverse" false claim under the False Claims Act; and Incorporates by reference the False Claims Act definitions of when a person "knows" that an overpayment has occurred—acting with either deliberate ignorance or in reckless disregard of the truth or falsity.

KEY DEFINITIONS: The following are key definitions of terms as provided in the proposed rule:

"Knowing" and "Knowingly" mean that a person "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information" 31USC 3729(b).

"Identify" was not specifically defined in the law or the proposed rule. The rule proposes that a "person has identified an overpayment if the person has actual knowledge of the existence of the overpayment or acts in reckless disregard or deliberate ignorance of the overpayment. " CMS says that providers must "exercise reasonable diligence to determine whether an overpayment exists.

Davis Wright and Tremaine summarize the examples that CMS gives of when an overpayment has been identified:

A provider *learns* that:
> ➢ A review of billing or payment records discloses incorrect coding.
> ➢ A patient death occurred prior to the service date on a claim that has been submitted for payment.
> ➢ Services were provided by an unlicensed or excluded individual on its behalf.

An internal audit *discovers* that overpayments exist.
> ➢ A provider is informed by a government agency of an audit that discovered a potential overpayment and the provider or supplier fails to make a reasonable inquiry.
> ➢ A provider of services or supplier experiences a significant increase in Medicare revenue and there is no apparent reason, and fails to make a reasonable inquiry into whether an overpayment exists.

If the overpayments source cannot be determined within the 60-day deadline, providers must use the existing Extended Repayment Schedule (ERS) process that is outlined in the CMS Financial Management Manual. The ERS is the only means by which extended repayment of an overpayment will be permitted.

LOOK BACK PERIOD: CMS is proposing "that overpayments must be reported and returned only if a person identifies the overpayment within 10 years of the date the overpayment was received." This was done as this is the outer limit of False Claim Act statute of limitations and allows providers a reasonable period for which to close t heir books and not have ongoing liability.

ACTION NEEDED: HHSC Administrators must continue to pursue active resolution of all potential credit balances so that actual Medicare overpayments are returned within the mandated 60 days or cost report deadline.

Source: http://www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-3642.pdf
           http://www.dwt.com/LearningCenter/Advisories?find=460901