

April 17, 2012

Health Law Client Newsletter

Self Reporting Law Creates Duty to Investigate Possible Overpayments and Report and Repay Identified Overpayments Within 60 Days

Section 6402(a) of the Affordable Care Act requires recipients of Medicare and Medicaid overpayments to report and (absent a showing of “hardship”) refund the amounts within 60 days of the “identification” of the overpayment (or the date any cost report is due, if applicable). Such overpayments could result not only from claims errors, but also from violations of the federal self-referral and anti-kickback laws.

Under the law, a “knowing” failure to comply may result in civil monetary penalties and/or exclusion from participation in Medicare and Medicaid programs. A “knowing and improper” failure also constitutes a violation of the federal False Claims Act, which can be enforced by private whistleblowers in “*qui tam*” proceedings. The law defines “knowing” about the overpayment to include acting in “deliberate ignorance” or “reckless disregard” of the overpayment.

The Centers for Medicare and Medicaid Services (“CMS”) recently proposed regulations that equate “identification” of an overpayment with “knowing” that it occurred, effectively incorporating the “deliberate ignorance or reckless disregard” standard into the reporting obligation. Under the regulations, if a provider or supplier has reason to believe there *may have been* an overpayment, it must make “reasonable inquiry” into the matter “with all deliberate speed.” The result is that a failure to investigate questions may result in a violation if an overpayment would have been identified.

In the preamble to the proposed regulations, CMS listed the following examples of situations that would require “reasonable inquiry”:

A review of payment records indicates that the billing party may have incorrectly coded certain services

A billing party learns that the patient died prior to the service date on a claim that has been submitted for payment.

A billing party learns that services were provided by an unlicensed or excluded individual.

A billing party performs an internal audit and discovers that overpayments exist.

A billing party is informed by a government agency of an audit that discovered a potential overpayment.

A billing party experiences a significant increase in Medicare revenue and there is no apparent reason--such as a new partner added to a group practice or a new focus on a particular area of medicine--for the increase.

The regulations apply to overpayments identified within 10 years after receipt of the payment. The 60-day deadline will be automatically suspended if the party files a self-disclosure with CMS under the Self-Referral Disclosure Protocol or with the Office of Inspector General (“OIG”) under the OIG Self-Disclosure Protocol. The regulations apply to “providers” and “suppliers” under Medicare Parts A and B, including physicians. (A later regulation will apply to other entities such as prescription drug plans and managed care organizations.)

The proposed regulations are not yet effective; however, CMS stated in the preamble that since the regulations are merely an interpretation of the statute, providers could be liable for noncompliance even before they are finalized.

For this reason, all providers and suppliers should conduct educational programs to ensure that employees know that (1) if they have reason to *suspect* an overpayment, they should bring the matter to the immediate attention of the organization’s compliance officer or other appropriate person, and (2) any identified overpayment must be repaid within 60 days.

Shumaker Attorneys Recognized by Corporate Counsel Magazine

We are pleased to note that Erin Smith Aebel, Jenifer A. Belt, Ronald A. Christaldi, Mark A. Connolly, Edwin G. Emerson, William G. Fischer, and Dennis P. Witherell have been selected for inclusion in Corporate Counsel’s “2012 Top Rated Lawyers Guide to Healthcare.” Corporate Counsel is the business magazine for chief legal officers and in-house counsel at corporations throughout the nation.

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If you have questions concerning this newsletter, please call Dennis Witherell or Jenifer Belt at 800-444-6659, or Ron Christaldi or Erin Aebel at 800-677-7661.

This newsletter is designed to provide general information on matters of interest to health care providers and practitioners and is not intended to constitute legal advice.