



CMS Issues Proposed Rules on Reporting and Returning of Overpayments Under Medicare

March 6, 2012

The Centers for Medicare and Medicaid Services (CMS) recently issued its [Proposed Rules](#) for implementing provisions of the Patient Protection and Affordable Care Act (Act) on reporting and returning overpayments made under Medicare. The Act made a number of changes to Medicare that enhanced the program's ability to recover overpayments and combat fraud, waste and abuse.

Section 6402(a) of the Act requires a person who has received an overpayment to return and report it to the Secretary of the U.S. Department of Health and Human Services; the state; an intermediary; a carrier; or a contractor, as appropriate; and to notify such entity in writing of the reason for the overpayment. To implement this particular section of the Act, CMS, on February 16, 2012, proposed certain rules with respect to:

- identifying overpayments;
- deadlines for reporting and returning overpayments;
- the contents of reports involving overpayments;
- the process for reporting;
- enforcement; and
- establishing a look-back period

It is important to note that at this time these proposed reporting requirements only relate to Medicare Part A and Part B providers and suppliers.

An overpayment under the Act means any funds that a person receives or retains under Medicare to which the person, after applicable reconciliation, is not entitled. Examples of overpayments in the proposed regulations are: Medicare payments for noncovered services; Medicare payments in excess of the allowable amount for identified covered services; errors and nonreimbursable expenditures in cost reports; duplicate payments; and receipt of Medicare payment when another payor has a primary responsibility for payment.



Under the applicable proposed regulations, an overpayment does not have to be reported until 60 days after it is identified. An important concern is what is meant by “identified.” CMS takes the position that an overpayment is identified at the time a person acts with actual knowledge of, in deliberate ignorance of, or with reckless disregard to the overpayment’s existence.

The proposed regulations require that the report must be in writing and include, among other things:

- a written description of the reasons for overpayment;
- a description of the corrective action plan to ensure that the error does not occur again;
- an indication as to whether the organization has a corporate integrity agreement with the Office of the Inspector General;
- an indication as to whether a statistical sample was used to determine the overpayment amount, and, if so, a description of the statistically valid methodology used to determine the overpayment.

If the above are part of the final rules, they would impose significant new requirements on providers for any overpayment.

Under the proposed enforcement provision, any person who knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government may be found liable under the False Claims Act (FCA). Additionally, any person who knows of an overpayment and does not report and return it in accordance with the requirements may be found liable under the Civil Monetary Penalties Act.

It is important to note that the regulations have a “look-back period.” Under the proposed regulations, CMS proposes that overpayments must be reported and returned only if a person identifies the overpayment within 10 years of the date the overpayment was received. It was indicated in the commentary that the 10-year term was selected because that is the outer limit of the FCA statute of limitations.

CMS, in its proposed rules, has not taken a position that clearly identifies when the 60-day time period begins to run. For instance, does it start once the problem is identified, or after there has been a reasonable inquiry into the scope of the problem and the provider has the ability to quantify the amount of any associated overpayment?



If the proposed rule is enacted as currently written, providers will have significant reporting burdens, and may have significant uncertainty with respect to identifying overpayments and when the report must be made. Interested parties have until April 16, 2012, to submit comments to CMS.

For further information, please contact [Michael P. Davidson](#), [Roy M. Bossen](#), [Dan Purdom](#), [Tom H. Luetkemeyer](#) or your local [Hinshaw attorney](#).

Hinshaw & Culbertson LLP prepares this publication to provide information on recent legal developments of interest to our readers. This publication is not intended to provide legal advice for a specific situation or to create an attorney-client relationship. We would be pleased to provide such legal assistance as you require on these and other subjects if you contact an editor of this publication or the firm.

Copyright © 2012 Hinshaw & Culbertson LLP. All Rights Reserved. No articles may be reprinted without the written permission of Hinshaw & Culbertson LLP, except that permission is hereby granted to subscriber law firms or companies to photocopy solely for internal use by their attorneys and staff.

ATTORNEY ADVERTISING pursuant to New York RPC 7.1. The choice of a lawyer is an important decision and should not be based solely upon advertisements.