Proskauer

CMS Proposes Additional Modifications to the Overpayment Rule Relating to the Deadline for Reporting and Returning Overpayments

Health Care Law Brief on **August 5, 2024**

In the context of Medicare Advantage ("MA") reform initiatives, we previously addressed the Centers for Medicare & Medicaid Services' ("CMS") December 27, 2022 proposal to amend its regulations set forth at 42 C.F.R. § 401.305(a) regarding the standard for an "identified overpayment" under Medicare Parts A–D, to align such regulations with section 1128J(d)(4)(A) of the Social Security Act, which incorporates by reference the "knowledge" standard from the Federal False Claims Act ("FCA") (the "2022 Proposed Rule"). The 2022 Proposed Rule specifically proposes removing the currently existing "reasonable diligence" standard and, instead, adopting the FCA's definition of "knowing" and "knowingly" as set forth in the FCA, 31 U.S.C. § 3729(b)(1)(A). Aside from a notable omission in the 2024 MA and Part D final rule, the public had been anxiously awaiting any update from CMS about its proposed amendments set forth in the 2022 Proposed Rule—until recently.

On July 10, 2024, in connection with its calendar year 2025 physician fee schedule publication, CMS issued a proposed rule that included, not only retaining its amendment proposals set forth in the 2022 Proposed Rule (discussed above), but also an additional proposal to amend its regulations set forth at 42 C.F.R. § 401.305(b) regarding the deadline for reporting and returning overpayments (the "2024 Proposed Rule"). We note that, as with the 2022 Proposed Rule, the proposals set forth in the 2024 Proposed Rule affect Medicare Part A–D, even though they are couched in the physician fee schedule publication. In the 2024 Proposed Rule, CMS proposes to add a new subsection that specifies the circumstances under which the deadline for reporting and returning overpayments would be suspended to allow time for an investigation and calculation of overpayments. As proposed, the new subsection would suspend the 60-day deadline for returning overpayments (or continue the suspension following the completion of a timely, good-faith investigation) when the following occurs:

1. A person has identified an overpayment but has not yet completed a good-faith investigation to determine the existence of related overpayments that may arise from the same or similar cause or reason as the initially identified overpayment; and
2. The person conducts a timely, good-faith investigation to determine whether related overpayments exist.

In such case, the obligation to return the initially identified overpayment and related payments will remain suspended until the earlier of the date that:

1. The investigation of related overpayments has concluded and the aggregate amount of the initially identified overpayments and related overpayments is calculated; or
2. Is 180 days after the date on which the identified overpayment was identified.

According to CMS, this amendment proposal responds to many of the comments it received relating to the 2022 Overpayment Rule's proposal to remove a perceived six-month time period to investigate all overpayments that was referenced in an example set forth in the 2016 preamble creating the currently existing regulation. As explained by CMS in the 2024 Proposed Rule: The 2022 Proposed Rule "was silent on this [latter] point and did not remove this time period to investigate overpayments. We understand the importance of allowing time to investigate and calculate overpayments. Therefore, we propose to codify this allowance into regulation proposed at [§] 401.30(b)(3)(ii)."

Takeaways

As is evident by the 2024 Proposed Rule, CMS continues to recognize and reinforce the value of suspending the deadline for returning overpayments from self-disclosing parties to CMS pursuant to its Voluntary Self-Referral Disclosure Protocol and to the Office of Inspector General pursuant to its Health Care Fraud Self Disclosure Protocol. Additionally, CMS acknowledges the amount of time potentially needed to investigate and, ultimately, to identify any overpayments to be reported and returned. However, the suspension of the requirements are only allowable pursuant to a *good-faith* investigation. Although CMS has yet to define or explain what it means by *good-faith*, one can likely presume a common sense, diligent approach to such an investigation as being sufficient.

CMS is soliciting comments to the 2024 Proposed Rule until 5 p.m. on September 9, 2024. Proskauer will continue to monitor for developments in the interim.

View original.

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