



Overpayments

Key Issues Physicians Should Consider

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Is it better to ask for forgiveness or to seek permission? Regarding Medicare and Medicaid overpayments, it is better to identify and report any overpayments and comply with the 60-day rule to avoid fraud and abuse liability and the related payment of treble damages and per claim penalties. Given the regulatory climate and increasing enforcement efforts by state and federal agencies, physicians and physician groups should carefully consider the risks and liabilities in not identifying and reporting Medicare and Medicaid overpayments.

In 2010, as part of the Patient Protection and Affordable Care Act (ACA), Congress amended the Social Security Act (SSA) to provide that when a person, including a physician, receives an overpayment, that overpayment must be reported or returned within sixty (60) days after the date on which the overpayment is identified or the date any corresponding cost report is due, whichever date comes later. Congress indicated that a provider who retains an overpayment after the deadline for reporting and returning the overpayment may face potential False Claims Act (FCA) liability. The SSA does not require any wrongdoing in relationship to the receipt of an overpayment. The SSA broadly defines "overpayment" as any funds that a

person receives or retains under the Medicare or Medicaid programs to which the person, after applicable reconciliation, is not entitled under such program. Therefore, even if a provider received an overpayment innocently and without fault, that provider may face potential FCA liability.

The Center for Medicare & Medicaid Services (CMS) issued its proposed rule implementing the 60-day rule for purposes of Medicare Part A and B overpayments on February 16, 2012. The comment period for the proposed rule ended in April 2012, and the proposed rule was due to be finalized by February 16, 2015; however, on February 17, 2015, CMS extended the timeline for publication of the final rule to February 16, 2016. This one



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year delay of the final CMS rule does not mean that health care providers, including physicians and physician practice groups, cannot face liability for violating the 60-day rule. CMS stated in its notice that even without a final regulation, providers are subject to the statutory requirements found in the ACA and could face potential False Claims Act liability, Civil Monetary Penalties Law liability, and exclusion from Federal health care programs for failure to report and return an overpayment.

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