CMS Proposes Changes to Medicare Overpayment Rule

January 18, 2023

Buried in a proposed rule largely related to Medicare Advantage released on December 27, CMS proposes to change the standard for an "identified overpayment" for Medicare Parts A, B, C, and D from one requiring "reasonable diligence" to one that adopts a "knowledge" standard. Click here for the proposed rule – see page 79559 for the discussion. Comments are due by February 13, 2023.

The Patient Protection and Affordable Care Act (ACA) required Medicare enrollees (providers) who have received an overpayment to report and return the overpayment by the later of:

1) The date which is 60 days after the date on which the overpayment was identified; or
2) The date any corresponding cost report is due, if applicable.

The ACA did not define what it meant to "identify" an overpayment, so CMS developed a "reasonable diligence" standard. This new proposed rule would remove the following language at 42 C.F.R. § 401.305(a)(2):

- A person has identified an overpayment when the person has, or should have through the exercise of reasonable diligence, determined that the person has received an overpayment and quantified the amount of the overpayment. A person should have determined that the person received an overpayment and quantified the amount of the overpayment if the person fails to exercise reasonable diligence and the person in fact received an overpayment.

The above language would be replaced with the new proposed 42 C.F.R. § 401.305(a)(2):

- A person has identified an overpayment when the person knowingly receives or retains an overpayment. The term "knowingly" has the meaning set forth in 31 U.S.C. 3729(b)(1)(A) False Claims Act.

"Knowingly" and "knowing" are defined in 31 U.S.C. 3729(b)(1)(A) as "has actual knowledge," "acts in deliberate ignorance of the truth or falsity of the information," or "acts in reckless disregard of the truth or falsity of the information."

In the preamble to the 2016 rule (click here), CMS acknowledged that timely good faith investigations of credible information could take up to six months or longer under certain circumstances. Whether this consideration would still apply is not explicitly addressed in the proposed rule and may merit comment.

We encourage you to discuss the potential implications of the proposed rule with your internal team and let us know if you have any questions or require assistance with comments.

For additional information, please contact our General Counsel Diane Turpin at diane.turpin@shcare.net or 202-578-5444. *This information is offered for the general education and knowledge of our clients. It is not offered as legal advice.*