

Expanding False Claims Act Liability

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Proposed 60 Day Repayment Rule Increases Compliance Burden on Providers

In a move that **expands potential False Claims Act liability**, CMS recently issued a long-awaited proposed rule defining **provider obligations to report Medicare and Medicaid overpayments within sixty days of identification**. The proposal adds definition to the general obligation included in Section 6402 of the Patient and Program Protection Act, and contains an onerous look back period of ten years. If approved, the rule will have a significant effect on providers compliance activities.

The sixty day rule is troublesome because it does not provide enough time for providers to respond appropriately. In this short window of time, providers must identify the problem, consult with all individuals involved, and notify the Board of Directors. In addition, providers must collect all of the information prescribed by the government.

The sixty day clock begins ticking when the overpayment has been identified, meaning when (i) there is actual knowledge that an overpayment exists, and (ii) there is a reckless disregard or deliberate ignorance that an overpayment exists. The meaning of both of these standards is unclear, and will certainly depend on the individual facts in each case.

A failure to report an identified overpayment within sixty days exposes the provider to substantial financial penalties under the False Claims Act penalties of three times the actual amount of the overpayment, plus between \$5,000 and \$11,000 per claim. If a provider discovered a systematic error that may have led to a significant number of claims being overpaid, the amount of financial exposure under the False Claims Act can be even more substantial.

The proposed rule also requires reporting of all overpayments made within the past ten years. The government is likely to focus on the past six years of payments, but can look back ten when assessing financial damages. If CMS finds a pattern of bad behavior and systemic billing problems, the imposed penalty grows exponentially. For many providers, the requirement to provide ten years of records is extremely difficult, if not impossible.

If passed, the proposed rule greatly increases the consequences for systematic billing errors. Accordingly, providers of all sizes must adopt a culture of high-mindedness around compliance. Employees must be trained and fortified with confidence that the organization will support them in the case of an error, which in most cases, was merely a mistake. Providers must have the systems in

place to identify problems quickly as there is a short window of opportunity to correct the overpayment by returning the money or unwinding a lease. In essence, providers must be able to prevent these errors from happening in the first place, and be able to flush them out efficiently if and when they do occur.

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