Published on *The National Law Review* https://natlawreview.com

IMPACT: Cabinet officials signal crackdown on Medicare billing abuse

Article By:

Fred Schulte

Joe Eaton

Top federal officials are stepping up scrutiny for doctors and hospitals that may be cheating **Medicare** by using electronic health records to improperly bill the health plan for more complex and costly services than they deliver.

U.S. Health and Human Services Secretary Kathleen Sebelius and Attorney General Eric Holder notified five medical groups of their intention to ramp up investigative oversight, including possible criminal prosecutions, by letter on Monday.

Health and Human Services Secretary Kathleen Sebellius, with attorney general Eric Holder. Jacquelyn Martin/AP

The government action follows **The Center for Public Integrity**'s "Cracking the Codes" series, published last week. The year-long investigation found that thousands of medical professionals have steadily billed higher rates for treating seniors on Medicare over the last decade — adding $11 billion or more to their fees.

The Center's probe uncovered a broad range of costly billing errors and abuses that have plagued Medicare for years—from confusion over how to pick proper payment codes to outright overcharges. The findings indicated that Medicare billing problems are worsening as doctors and hospitals switch to electronic health records.

"There are troubling indications that some providers are using this technology to game the system, possibly to obtain payments to which they are not entitled," the letter states, adding: "There are also reports that some hospitals may be using electronic health records to facilitate 'upcoding' of the intensity of care or severity of patients' condition as a means to profit with no commensurate improvements in the quality of care."

The letter said that "false documentation of care is not just bad patient care; it's illegal." The Centers for Medicare and Medicaid Services, which oversees the program "is specifically reviewing billing through audits to identify and prevent improper billing." The letter went on to say that CMS is "initiating more extensive medical reviews to ensure that providers are coding…accurately."

The letter adds that "law enforcement will take appropriate steps to pursue health care providers who misuse electronic health records to bill for services never provided. The Department of Justice, Department of Health and Human Services, the FBI and other law enforcement agencies are monitoring these trends and will take action where warranted."

Most of the five groups sent the letter on Monday had no comment. The American Hospital Association said it agreed that upcoding should not be tolerated, but added that "more accurate documentation and coding does not necessarily equate with fraud." The group also asked federal officials to develop national guidelines for hospital emergency department and clinic visits —a request the group said it hade made 11 times since 2001.

The group said it does not question the need for auditing to identify billing errors, but added that "the flood of new auditing programs…is drowning hospitals with a deluge of redundant audits, unmanageable medical record requests and inappropriate payment denials."

The suggestion that digital medical gear has fueled a rise in potentially improper medical billing is a touchy one for the Obama administration, which has championed electronic health records as a means to both improve the quality of medical care and cut costs. The administration is spending more than $30 billion in economic stimulus funds to help doctors and hospitals purchase the gear. More than half the nation's hospitals have received some payments from the program, according to HHS.

But critics have also noted that digital medical and billing equipment can with the touch of a button create an exquisitely detailed medical file and thus present a challenge to government auditors concerned about preventing fraud.

The letter sent Monday was the first acknowledgment by top federal officials that the digital era may spawn more costly Medicare fraud and billing abuse. In the past, federal officials have largely accepted the explanations of doctors and hospitals that higher-level billings are mainly the result of patients on Medicare getting sicker and older and taking more time to treat—even though there's little evidence to back that view.

Sebelius and Holder took aim at the common practice of using electronic health record software to "clone" documentation from previous medical visits "in order to inflate what providers get paid."

“We will not tolerate health care fraud,” the letter states. “The President initiated in 2009 an unprecedented cabinet-level effort to combat health care fraud and protect the Medicare trust fund and we take those responsibilities very seriously,” the letter states.

Medicare’s shaky finances also have emerged as a presidential campaign issue, with both Barack Obama and Mitt Romney promising to tame its spending growth while protecting seniors. But there’s been little talk about the impact of billing and coding practices in driving up costs, and what to do about them.

Medicare pays doctors for office visits using five escalating payment codes, which range from a minimal visit of about five minutes for about $20 to about $140 paid for more complex treatments that generally take 40 minutes or more of face-to-face time with the doctor. Federal officials expect doctors to report a range of the five codes because some patients require more time and effort to treat than others. Medicare uses the scales to pay for more than 200 million office visits each year and other doctor services that cost taxpayers more than $33 billion.

But doctors over the past decade have increasingly spurned lower-level codes for ones that pay better —even though there’s little hard evidence that they spent more time with patients or that patients were sicker and required more complicated and time-consuming care. Hospitals also use the billing codes, and the Center found similar problems with billing for emergency room services.

More than 7,500 physicians billed the two top-paying codes for three out of four office visits in 2008, a sharp rise from the numbers of doctors who did so at the start of the decade, the Center’s data analysis found. Officials said such changes in billing can signal that some doctors are billing for more complex services than they delivered, a practice known as “upcoding.”

As the government has invested more heavily in electronic health records, hundreds of technology firms have begun marketing digital records system, often doing so by promising doctors and hospitals that they can significantly boost revenues with the devices.

Most manufacturers and the hospitals using the gear contend that the digital gear merely allows them to more efficiently bill for their services, which in the past were often done by hand.

In 2010 alone, Medicare paid for more than six million more patient visits at the second highest level code, 99214, than the year before. That upsurge cost Medicare more than $1 billion, government records show.

CMS acting Administrator Marilyn Tavenner earlier this year confirmed that the agency planned to contact as many as 5,000 doctors it identified as billing outside norms, but said the effort was “not intended to be punitive or sent as an indication of fraud.”

She said the agency would focus on the top ten high billers in each Medicare region as a first step, but that it might cost the agency more to investigate suspicious claims than it could collect.

The agency, Tavenner wrote in a letter published in a May Inspector General’s report , “must take into account the respective return on investment of medical review activities.”

The five medical groups sent the letter are: the American Hospital Association, the Association of Academic Health Centers, the National Association of Public Hospitals and Health Systems, the Federation of American Hospitals.

The association of public hospitals said in a statement that it “shares the government’s goal of a health care system that offers high-quality, affordable care. Our hospitals and health systems adhere to high ethical standards and reject practices that might result in fraudulent or improper claims. We stand ready to help regulators understand fully the many aspects of electronic health record use in the hospital setting as they consider actions to ensure proper billing practices.”

National Law Review, Volume II, Number 272