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KATHLEEN L. DEBRUHL & ASSOCIATES, L.L.C.
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Contact Us:

Kathleen L. DeBruhl & Associates, L.L.C.

614 Tchoupitoulas Street

New Orleans, Louisiana 70130

Phone: (504) 522-4054

Our Attorneys:

Kathleen L. DeBruhl*

*Licensed in Louisiana and New York

CMS ISSUES PROPOSED RULE ON RETURN OF MEDICARE OVERPAYMENTS

BY GILBERT F. GANUCHEAU, ESQ.

Among the myriad issues addressed by the Patient Protection and Affordable Care Act healthcare reform bill passed in 2010 is a provision which requires anyone who has received an overpayment from Medicare to return the overpayment to CMS or the appropriate CMS contractor and to include a written explanation of the reason for the overpayment. The overpayment must be returned within sixty days of the date on which the overpayment was "identified" or on which a cost report is due for overpayments related to cost reporting. If a person fails to return an overpayment within the sixty day period, that failure can be considered a false claim under the federal False Claims Act which has penalties of three times the amount of the overpayment and penalties of between $5,000 and $10,000 per claim. After nearly two years since the enacting of the law, CMS has issued proposed regulations setting forth policies and procedures for reporting and returning overpayments.

CMS published the proposed rules on February 16, 2012. Interested parties may comment on the proposed rules through April 16, 2012. Final regulations will be promulgated at a later date after consideration of the public comments received.

The proposed regulations define an overpayment as "any funds that a person receives or retains under title XVII (the Medicare Program) … to which the person, after applicable reconciliation, is not entitled under such title." Among the examples CMS gives of overpayments are: 1) payments for non-covered services; 2) payments in excess of the allowable amount for the services; 3) duplicate payments; and 4) payments from Medicare when another payor was primarily responsible for payment. Credit balances due Medicare would be considered an overpayment under the proposed regulations.

The proposed regulations adopt the current voluntary refund process, which uses a form available from any Medicare contractor on their websites. This form requires information regarding the provider and the claims so that the contractor can identify the claims on which the refund is being made. The form additionally requires an explanation of the reasons for the overpayment. CMS gives examples of some reasons for the existence of an overpayment which include: 1) incorrect service date; 2) duplicate payment; 3) incorrect CPT code; 4) insufficient documentation; and 5) lack of medical necessity.

One of the uncertainties surrounding the law, which CMS attempted to address in the proposed regulations, is when is an overpayment "identified." This date is important because the date of identification of the overpayment triggers the sixty day refund and reporting period. CMS proposes that "a person has identified an overpayment if the person has actual knowledge of the existence of the overpayment or acts in reckless

kdebruhl@md-law.com

Gilbert F. Ganucheau*

*Licensed in Louisiana and Texas

gganucheau@md-law.com

Lindsey E. Surratt*

*Licensed in Louisiana and Mississippi

lsurratt@md-law.com

disregard or deliberate ignorance of the overpayment." CMS believes that this definition gives providers an incentive to determine if an overpayment exists.

The proposed regulation's definition still leaves questions about when "actual knowledge" of the overpayment occurs. CMS indicates that if a provider has information that an overpayment may exist, the provider has a duty to conduct a reasonable inquiry to determine if an overpayment has been received. Failure to make that inquiry can be considered reckless disregard or deliberate indifference which would then start the sixty pay refund period. However, CMS does not answer the question of when a suspicion of, or some information about, a possible overpayment becomes actual knowledge. CMS does provide examples to assist the understanding of when an overpayment has been identified. These include knowledge obtained in a review of billing records that a service has been coded incorrectly, knowledge that the services were provided by an unlicensed or excluded provider, or conducting an internal audit that discovers an overpayment.

It is expected that the definition of "identified" will be the subject of several public comments; and hopefully, CMS in the final rule will provide a more bright line test. In the meantime, providers who suspect an overpayment has occurred should work diligently to determine the amount and reason for the overpayment and refund and report that overpayment as quickly as possible.

ABOUT THE AUTHORS

Kathleen L. DeBruhl & Associates, L.L.C., is a regional healthcare law firm with a national client base which offers its physician and other healthcare provider clients strategic and legal expertise on their healthcare business needs including corporate organization, joint ventures, mergers and acquisitions, and contractual and financial arrangements. The Firm counsels and defends clients on highly complicated healthcare regulatory matters involving physician ownership and financial relationships, reimbursement, fraud and abuse, and compliance with the myriad of laws and regulations imposed upon the healthcare industry by both federal and state governments.

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