



Health Reform Imposes New 60 Day Deadline for Reporting Self-Discovered Overpayments to Governmental Payors

CLIENT ADVISORY

Medicare and Medicaid participating providers have always had an obligation to report and return discovered overpayments to the applicable governmental payor. However, prior to the passage of the Patient Protection and Affordable Care Act (the Health Reform Bill), providers had some flexibility with regard to when they reported discovered overpayments. Under the Health Reform Bill, providers for the first time will have only 60 days to report identified overpayments to the applicable payor. If the provider does not meet the 60 day repayment provision, the failure to report and repay may constitute a violation of the civil False Claims Act and result in the imposition of hefty monetary penalties. Importantly, this new 60 day provision went into effect on the day the Reform Bill was signed into law, March 23, 2010, meaning that the clock has already started ticking for previously identified overpayments.

Section 6402 of the Health Reform Bill requires that providers both 1) provide the applicable payor (e.g. the state Medicaid agency; or the Medicare Fiscal Intermediary, Carrier, or Medicaid Administrative Contractor) with written notification as to the reason the overpayment occurred and 2) report and return the overpayment to the payor within 60 days after the date on which the overpayment was identified. The Department of Health and Human Services (HHS) has not yet provided any guidance regarding when an "overpayment is identified" for purposes of the new reporting deadlines. However, absent regulations to the contrary, the

provider community generally believes an overpayment is "identified" once the provider has both confirmed an overpayment was received and quantified the amount of the overpayment refund due to the governmental payor.

To ensure identified overpayments are properly quantified, disclosed, and refunded to the applicable payor, we recommend that providers adopt an internal investigation policy for use whenever an overpayment is suspected. Once a provider has completed its internal investigation in accordance with this protocol, we recommend the provider compose a letter to the applicable payor containing:

- A description of the identified error;
- The scope of the audit review;
- The manner in which the overpayments were calculated; and
- The corrective measures put in place.

The letter should also include arrangements to repay the applicable payor for any corresponding overpayments. Payment is typically made by attached check, but can also be made by recoupment from future payments or other electronic remittances, with the permission of the payor.

If a provider does not meet the 60 day repayment provision, the failure to report and repay may constitute a violation of the civil False Claims Act. The civil False Claims Act is the primary civil statute used for prosecution of health care fraud related to billing issues. The Act



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allows for recovery of damages of \$5,500 to \$11,000 per claim plus treble damages and possible exclusion from participation in federal health care programs. Because of the extensive penalties available under the False Claims Act, providers should take care to make disclosure and repayment of all overpayments within 60 days of identification.

Providers should be aware that the new 60 day overpayment reporting deadline is part of a larger fraud and abuse enforcement effort underway in both the Medicare and Medicaid programs. For example, the Health Reform Bill also authorized significant expansions to the existing Medicare Recovery Audit Contactor (RAC) audit programs. By December 31, 2010, the RAC programs will be expanded to

cover state Medicaid claims as well as Medicare Parts C and D.

If you have any questions regarding the scope or implementation of the new 60 day overpayment disclosure deadline, or the increased Medicare and Medicaid auditing efforts, please do not hesitate to contact Mary C. Malone, Emily W.G. Towey or Rachel J. Suddarth at (804) 967-9604, or by email mmalone@hdjn.com, etowey@hdjn.com, or rsuddarth@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at www.hdjn.com.

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