Fundamentals and Practicalities of Identifying and Returning Overpayments

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Today’s Presentation

- Types of “overpayments” in hospitals and health systems, including affiliated physician practices
- Impact of “reverse” False Claims Act and the Affordable Care Act on auditing and refund practices
- Case studies in auditing
- Practical tips for refunding overpayments
Overpayments in a Physician Practice or Hospital or Health System Affiliate

- Payments received as a result of—
  - Coding errors
  - Duplicate bills
  - Documentation issues
    - Failure to document medical necessity, including for inpatient stay
    - Failure to adequately support that a service was furnished
  - Failure to comply with Medicare billing and claims submission rules
    - For example, frequency of service limitations

Overpayments under FERA and the ACA

- Section 6402 (§1128J of the Social Security Act) provides that, if an entity has received an overpayment, it is required to report and return the overpayment to the Secretary or the State Medicaid Agency or the appropriate contractor and notify it of the reason for the overpayment.

- The overpayment must be reported and returned within 60 days of the date on which the overpayment was identified, or the date any corresponding cost report is due (if applicable), whichever is later.

- Any overpayment retained past the deadline is an “obligation” (as defined in, and for purposes of, the reverse false claims provision of the False Claims Act).
  - In 2009, FERA made changes to the reverse false claims provision.

- “Overpayment” is defined in section 6402 of the ACA as any funds a person receives or retains under Medicare or Medicaid to which the person, “after applicable reconciliation,” is not entitled.
Auditing and Refund Practices after FERA and the ACA

- REMEMBER: You cannot refund an overpayment until you know that you have received one and how much you owe!
- Designing an audit plan and compliance program
- Purpose of audit
- Scope of audit
  - Coding audit
  - Medical necessity audit
  - Retrospective or prospective review
- Timing of audit

“Simple” Audits

- What is a “simple” audit?
- Why are you auditing? When are you auditing? How are you auditing? Who is doing the auditing?
- Tips for selecting the scope of the audit
  - By CPT code or other method
  - Services of particular physicians or hospital-wide
- Type of audit
  - Internal or external
  - Coding review or medical necessity review
“Simple” Audits

- Analysis of the results
- Identifying the overpayment, if any
  - Extrapolation considerations
    - Formula must be objectively verifiable and capable of explanation to government agency
    - For physician services, Medicare allowable, Medicare actual payment, charges, etc.
      - Similar considerations for Medicaid
  - Claim-by-claim
  - Offset of billable services against overpayment
  - Reopening period

“Simple” Audits

- Making a refund
  - To whom?
    - Contractor
    - Centers for Medicare & Medicaid Services
    - Impact of results on “choice of venue”
    - State Medicaid agency
  - Process
    - Specific contractor rules and forms
    - Cover letters are important
- Impact on physicians who ordered the services that resulted in overpayment
Stark Law Compliance Audits

- What is a “Stark Law Compliance” audit?
- Why are you auditing? When are you auditing? How are you auditing? Who is doing the auditing?

Scope of the audit
- Single arrangement
- Single physician
- Multiple types of arrangements
- Fair market value issues

When is the audit complete?
At what point can you “identify” the overpayment?
Factors to consider in calculating the overpayment
- Medicare FFS vs. other Medicare payment system
- Inpatient services
  - Admitting physician
  - Attending physician
  - Consulting physician
  - Hospitalist
- Outpatient services – ALL are DHS
- Reopening period
Stark Law Compliance Audits

- Physician Fee Schedule: all DHS referred by the physician to the entity
- Inpatient PPS
  - Entire DRG payment?
  - None of the DRG payment if not impacted by the improper referral?
- Hospital OPPS: entire APC payment for improperly referred service
- Impact of Medicare payment system on choice of refund “venue”

Stark Law Compliance Audits

- Making a refund
  - To whom?
    - CMS Self-referral Disclosure Protocol
    - Medicare Contractor
    - OIG Self-disclosure Protocol
  - Process
Response to Government or Payor Investigation

- How does this change the game plan?
- Negotiations with the government over amount of the overpayment and timing of refund obligation

Practical Considerations for Auditing and Refunding Overpayments

- Concurrent/pre-billing review
- Retrospective audits
- Future RAC audits of same issue
- Response to pre-payment review, comparative billing report, or other contractor-generated correspondence and inquiry
- Response to industry news reports
Practical Tips to Reduce Risk

- Develop Billing and Coding Code of Conduct
- Promulgate clear compliance policies on billing, coding, documentation, return of overpayments and physician relationships
- Implement an audit plan
- Conduct regular billing/coding education for key constituencies, including physicians
- Develop protocols for addressing suspected overpayment issues

Protocols for Addressing Potential Overpayments

- Who will spearhead internal investigation/analysis?
  - Roles of in-house counsel, compliance office and billing/finance department
- Preserving the attorney-client privilege and/or work product doctrine
- How to document investigation and follow up
- Identifying and collecting relevant documents
- Procedures for involving outside counsel
- Procedures for engaging experts and consultants
- Procedures for determining nature and scope of audits
- Refunds of overpayments mandated within 60 days of “identification”
Questions?

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APPENDIX A

Stark Self-Referral Disclosure Protocol
Stark Self-Referral Disclosure Protocol

- Conditions for entering the SRDP
- Effect of the SRDP on previously paid claims
- The interplay of the SRDP and the mandatory reporting and refunding of overpayments
- How to participate in the SRDP
- What type of resolution disclosing parties can expect
- Limitations of the SRDP
- Words of warning regarding the SRDP

SRDP Background and Necessity

- CMS traditionally has had limited (or no) authority to compromise or waive Stark sanctions (or any other claims liability)
  - Under 42 CFR §405.376, claims can be compromised (including compromised to zero) only for certain reasons, which arguably did not encompass Stark violations
  - §405.376 may be amended only with concurrence of DOJ and Treasury
- OIG has broad discretion regarding whether to impose CMP/assessment, the amount of CMP/assessment, and whether to impose exclusion (and length of exclusion)
  - See §1128A(a) of the Social Security Act; 42 CFR Part 1003
- In March 2009, OIG announced it would no longer take Stark-only potential or actual violations into its self-disclosure protocol
Stark Self-Referral Disclosure Protocol

- Substantive requirements for the submission include a thorough description of the parties, the type of financial relationship, the time periods that the arrangement was out of compliance, the DHS at issue, and an explanation of the roles of the individuals involved in the matter.
- Disclosing party must perform an analysis of the application of the Stark law to the conduct at issue, including which elements of an exception were met and not met.
  - Can lead to odd results
- Disclosing party must perform a complete financial analysis, identifying the 100% overpayment amount.
  - Can include alternate theories of the overpayment amount.
  - CMS uses the term "look back" period, which likely means period of noncompliance, NOT the reopening period or FCA liability window.
- Describe compliance efforts prior to and since the discovery of the Stark violation.

Conditions for Entering the SRDP

- Agree that no appeal rights attach to claims relating to the conduct disclosed.
  - Appeal rights may be available if the disclosing party withdraws or is removed from the SRDP.
Effect of the SRDP on Previously Paid Claims

- If you are denied acceptance into the SRDP, the reopening rules in 42 C.F.R. § 405.980 through 405.986 will apply from the date of the initial disclosure.
  - The passage of time does not eliminate claims from the universe subject to reopening.

The Interplay of the SRDP and the Mandatory Reporting and Refunding of Overpayments

- Electronic submission of your disclosure stays the 60-day window for the refund of overpayments.
  - Until a settlement agreement is entered, the disclosing party withdraws from the SRDP, or CMS removes the party from the SRDP.
  - No (express) similar benefit under the OIG protocol.
- CMS suggests placing the proffered overpayment in an interest-bearing escrow account.
  - CMS directs parties NOT to pay any money to CMS or its contractors.
    - This is to keep a disclosing party from arguing that CMS accepted the overpayment and it has, therefore, satisfied its obligation with respect to the Stark violation.
  - No mention of which party is entitled to the interest.
How to Participate in the SRDP

- Parties must submit electronically and send signed hard copies to CMS
  - Acknowledgement of receipt of electronic submission will be sent by automatic email response
  - Acceptance into the SRDP will be documented in a letter from CMS
- Numerous technical requirements regarding information that must be included in the disclosure

How to Participate in the SRDP

- Substantive requirements for the submission include a thorough description of the parties, the type of financial relationship, the time periods that the arrangement was out of compliance, the DHS at issue, and an explanation of the roles of the individuals involved in the matter
- Disclosing party must perform an analysis of the application of the Stark law to the conduct at issue, including which elements of an exception were met and not met
- Disclosing party must perform a complete financial analysis, identifying the $100\%$ overpayment amount
  - CMS uses the term “look back” period, which appears to mean period of noncompliance, NOT the reopening period
- Describe compliance efforts prior to and since the discovery of the Stark violation
What Type of Resolution Disclosing Parties Can Expect

- CMS has the authority to accept a reduced overpayment (i.e., less than 100%)
- CMS is clear to point out that it is under no obligation to accept the disclosing party’s calculation of its financial liability or to compromise the overpayment at all
- There are no limits on the reduction that CMS may make
  - Theoretically, CMS could reduce the overpayment to $0

Limitations of the SRDP

- Parties have no guarantee of acceptance into the SRDP
- CMS provided no guidance regarding how it views certain types of noncompliance
  - For example, is a missing signature on a written agreement as problematic as compensation that is not consistent with FMV?
- CMS will not waive the “refund to individuals” requirement in section 1877 of the Social Security Act which requires refund of any amounts collected that were billed in violation of the Stark law
- Does not prohibit intervention by law enforcement
Words of Warning Regarding the SRDP

- CMS demands access to all financial statements, notes, disclosures, and other supporting documents without the assertion of privileges or limitations on the information produced
  - This statement is unclear: does CMS suggest that parties cannot assert privilege or that it will demand access to all information that is not privileged (i.e., “without the assertion of privileges”)
- CMS is clear that referrals to law enforcement may be made based on information contained in the disclosure
- CMS may use the information contained in the disclosure to make a referral to OIG and DOJ for resolution of FCA liability, CMP liability, or other issues