Cloudy with a Chance of Recovery: What’s on the Radar with the FCA and the 60 Day Overpayment Rule

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Paradigm Shift from Compliance to Recovery

- Most Wanted Health Care Fugitives List
- Medicare Fraud Strike Force
- Health Care Fraud Prevention and Enforcement Team (HEAT)
Paradigm Shift from Compliance to Recovery

- CMS report to Congress June 25, 2014
  - State-of-the-art Fraud Prevention System which employs advanced analytics identified or prevented $210 million in Medicare fee-for-service payments – double the previous year
  - Anti-fraud strategy resulted in a record $19.2 billion in fraud recovery over the past 5 years
  - CMS expects to expand the use of the Fraud Prevention System to identify potential fraud – capability to stop payment of certain improper claims without human intervention
Paradigm Shift from Compliance to Recovery

The Department of Health and Human Services and The Department of Justice Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2013

- Federal government won or negotiated over $2.6 billion in health care fraud judgments and settlements (does not reflect state Medicaid monies recovered as part of any global, Federal-State settlements)

- FY 2013, DOJ opened 1,013 new criminal health care fraud investigations and filed criminal charges in 480 cases. 718 defendants were convicted of health care fraud-related crimes during the year.

- FY 2013, DOJ opened 1,083 new civil health care fraud investigations.
Paradigm Shift from Compliance to Recovery

- In FY 2013, HHS-OIG investigations resulted in 849 criminal actions against individuals or entities and 458 civil actions, which include false claims and unjust-enrichment lawsuits filed in Federal district court, civil monetary penalties (CMP) settlements, and administrative recoveries related to provider self-disclosure matters.

- HHS-OIG also excluded 3,214 individuals and entities.
Beware of the Contractors

- Everyone has heard of the RAC, but what about the ZPIC?
ZPIC:

Zone Program Integrity Contractors
Zone Program Integrity Contractor (ZPIC)

- Formerly known as Program Safeguard Contractor
- Contract with CMS to perform medical review and auditing
- Can utilize data mining and may take referrals from RACs or law enforcement
- Can use statistical sampling and extrapolation techniques
Zone Program Integrity Contractor (ZPIC)

- Primary function to act as a referral source for law enforcement
- Greater criminal slant
What are They Looking At?

- Medically Unnecessary Services
  - Cardiac procedures
  - Inpatient admissions
  - Frequency of visits
  - Number of patients
  - Unnecessary services

- Improperly Coded Procedures
  - Upcoding
  - Clustering
  - Lack of Documentation

- EHRs
FCA
The Federal False Claims Act

- Knowingly submitting or causing to be submitted a false claim to the government (or avoiding an obligation)
- Action may be filed by USAO or private citizen
  - If private citizen – “qui tam”
    - Steps
      - Qui tam relator files suit
      - Government may intervene
      - Qui tam relator entitled to a portion of the proceeds
- Penalties
  - Treble damages
  - Cost of litigation
  - Civil penalties ($5,500 - $11,000) per claim
The Federal False Claims Act

Requisite Mental State – Knowingly
- Actual knowledge
- Reckless disregard
- Deliberate ignorance
Recent Trends: FCA

- Medical Necessity:
  - Condition of Payment- predicated on medical necessity of service
  - Areas of government interest
    - Inpatient admissions
    - Frequency of follow-up
    - Over-utilization
  - Government Audits (RAC, ZPIC, CERT…) have been used as a basis of knowledge
Recent Trends: FCA

- **Worthless Services:**
  - Particularly pointed at long term care recently
  - Easily translatable to other providers
    - Diagnostics
    - Radiology
    - Hospital acquired conditions
  - Government has shown history of using malpractice and negligence litigation as a means of proving mental state
Recent Trends: FCA

- EHRs may facilitate fraud (or at least look like fraud)
  - Cloning (copying and pasting)
    - information may not be accurate
    - inflated claims
    - duplicate claims
  - Overdocumentation
    - Auto-population may support billing higher codes
    - Pre-programmed text may be inappropriate
Recent Trends: FCA

- Retention of overpayments
  - Government may be searching for a good first case to intervene
    - PPACA / 60 Day Rule
    - “Know it when [they] see it”
The 60 Day Overpayment Rule

- Reporting and returning Overpayments
  - Return overpayment
  - Notify in writing the reason for the overpayment
The 60 Day Overpayment Rule

- **Deadline for reporting and returning overpayments**
  - 60 days after the date on which the overpayment was identified
  - the date any corresponding cost report is due, if applicable.
The 60 Day Overpayment Rule

**Enforcement**

- Any overpayment retained after the deadline for reporting and returning the overpayment becomes an obligation under the FCA

*obligation = an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment*
The Proposed Rule

- CMS published a Proposed Rule to provide clarification to the 60 Day Overpayment Rule
  - Overpayment “identified” when a provider has “actual knowledge” or acts in “reckless disregard” of the existence of an overpayment
  - Provider must make a “reasonable inquiry” and conduct an “appropriate reconciliation”
  - 10 year look-back
Many Questions Still Remain

- When is an overpayment “identified?” (When does the clock start to run?)
- What is a “reasonable inquiry” and when is it required?
- What are the “look-back” obligations?
- When does the failure to conduct further inquiry constitute “reckless disregard” triggering FCA liability?
- Is a 60-day requirement realistic?
When is an Overpayment “Identified”? 

When does the Clock begin to Run?
When is an Overpayment “Identified”?

- **Proposed Rule:** Identified = FCA Mental State
  - FCA Mental State =
    - Actual Knowledge;
    - Reckless Disregard; or
    - Deliberate ignorance
  - Essentially, per proposed rule, liability attaches, when liability attaches!

- **The real question…**
  - When does reckless disregard or deliberate ignorance occur?
“Identification”: Various Interpretations

- Once overpayment is suspected, inquiry must be completed and liquidated amount must be reported and repaid within 60 days

  VS

- 60 days does not begin until inquiry is completed and every penny of overpayment is determined
“Reasonable Inquiry”: Determining Whether Further Inquiry is Required

- When are you required to look back?
  - OIG Essential Elements of a Compliance Plan
    - Benchmark analysis
    - Is it systemic?
    - Education
    - Show increased compliance
  - OIG Corporate Integrity Guidance
    - In the original sample review, what is the financial impact?
    - What steps are being taken to increase compliance?
  - What financial ramifications do you see?
  - What is the likelihood of this being the “tip of the iceberg?”
  - Totality of the circumstances
What Should the Inquiry Look Like?
What Should the Inquiry Look Like?
What Makes an Inquiry “Reasonable”?

- What constitutes “reasonable inquiry”?
  - How far are you required to look back?
    - OIG Self Report Protocols
      - Identify the cause
      - How did it happen?
      - Who or what caused the overpayment?
      - What has been done to correct?
      - What has been done to insure it won’t happen again?
  - Other Factors to consider:
    - What gave rise to the systemic overpayment?
    - Record retention requirements?
    - RAC/SUR look-backs?
    - Re-opening statutes?
The Look-Back

- 10 year look back comes from the high end of the FCA statute of limitations
- FCA statute of limitations = 6 years from violation, or 3 years from government discovery whichever is later, but not exceeding 10 years
- Therefore, under the proposed Rule, an FCA complaint could conceivably be filed up to 20 years after a claim was submitted
- 10 year look back is onerous burden and it would be surprising if it survives to final rule.
- Whatever look-back is employed, it must be justifiable.
When is Inquiry Unreasonable: Constituting “Reckless Disregard” or “Deliberate Ignorance”?

- There is a spectrum on which the inquiry exists
- Providers must decide when to cease its inquiry and on what parameters
- The question is: where does the line exist on the spectrum which determines whether the inquiry is reasonable; or the provider is acting in reckless disregard?

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When is Inquiry Unreasonable: Constituting “Reckless Disregard” or “Deliberate Ignorance”?

- Ultimately, there is no bright-line rule, as of yet as to the extent of the inquiry and the lengths providers must go to look back at previous years.
- The question is: have you seen enough that if you were to not look further, you would be operating in reckless disregard or deliberate ignorance?
- Totality of the circumstances – “know it when [they] see it”
- In performing compliance duties, it is imperative that providers document defensible positions with the rationale behind the lengths of inquiry they employed and provide a narrative of the increased compliance seen.
Scenario 1

- Part B provider of laboratory services
- By regulation, physician order required prior to provision of laboratory service for reimbursement eligibility
- During compliance audit, uncovered that physician orders weren’t being obtained
Scenario 1: Factors to Consider

- Limited to one clinic of 5 physicians who weren’t forwarding orders
- Phone call with Clinic reveals this problem began occurring when new clinic staff hired on 2 ½ years ago.
- Lab provider has hired new scheduling staff within past 1 ½ years
Scenario 2

- RHC
- Physician with high utilization of comprehensive E&M codes
- Audit of physician’s documentation reveals routine practice of upcoding 1-2 levels
Scenario 2: Factors to Consider

- Physician contract with RHC?
  - per encounter?
  - based on procedure?
- Overall utilization?
- FMV?
Scenario 3

- Physician clinic practice
- Audit by MAC reveals one physician is outlier for level 4 E&M
- MAC and self audit confirm that physician is clustering at level 4
- Self audit shows that physician should be billing most services at level 3; some services, however, should have been billed at level 5
- Physician employed at clinic for 5 years
- Physician has assignment to Clinic; Clinic receives remittance.
Scenario 3: Factors to Consider

- How robust is your compliance plan?
- How was the overpayment identified? Compliance plan? or some other source?
- What is the financial impact?
- Can you show education and track improvement?
Proactive Recognition of FCA Claims

- If brought as a Qui Tam, the case is filed under seal while government investigates, therefore, you will not be notified.

  HOW DO YOU KNOW ITS AN FCA CLAIM?
Proactive Recognition of FCA Claims

UNDER SEAL: HOW DO YOU KNOW ITS AN FCA CLAIM?

- OIG or DOJ involvement
- OIG subpoena (probably the most valuable tool for determining the allegations of the qui tam)
- Former employees interviewed
- Any involvement by DOJ/OIG investigators
Proactive Recognition of FCA Claims

From the outset:

- Always operate from the assumption it is either FCA or criminal investigation
- Ask whether anyone is a target or person of interest in a criminal matter
- Remember: compliance with health oversight is required, but the end goal is to present a defensible position
Proactive Recognition of FCA Claims

- Responding to investigation – Subpoena
  - Try to ascertain what the allegations of the Complaint are by the requests in the subpoena
  - At the outset, begin establishing the theory of defense
  - Make the compliance with the subpoena packaged in light of the defensible position to the allegation
  - In most cases, get in front of the AUSA to discuss the allegations – establish the defense early
    - Approximately 95% of cases end in recovery when government intervenes
    - Only 6% of Relators succeed in cases without government intervention
Proactive Recognition of FCA Claims

MAKE THE GOVERNMENT’S DECISION NOT TO INTERVENE AN EASY ONE
- Conduct your own investigation simultaneously
- Begin discussions early
- Offer cooperation
- Ask AUSA to get case unsealed as soon as possible
- Ask AUSA to consult prior to intervention decision
- Present your defense

One Caveat:
- Do not make the government’s decision *to intervene* an easy one.
Proactive Recognition of FCA Claims

Other issues to consider:
- Beware of CIDs
- Use shields already in place
  - Compliance Plans
  - Routine audits
- Government endorsement
  - No estoppel in FCA, but knowing mental state can be negated by past government audits and communications that endorse practice
- RACs (and CERTs) appear to be one avenue the government is using to establish knowledge
  - Be aware when making decision whether or not to appeal.
QUESTIONS?