SUMMARY OF THE 60 DAY OVERPAYMENT FINAL RULE

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Section 6402 of the Affordable Care Act created a new section 1128J(d) of the Social Security Act (the "Act"), which requires the reporting and returning of overpayments by the later of (1) 60 days after the date on which the overpayment was identified, or (2) the date any corresponding cost report was due. On February 12, 2016, CMS published the long-awaited Final Rule regarding the reporting and returning of overpayments. The Final Rule has clarified several key issues addressed in the Proposed Rule, which was published on February 16, 2012. The Final Rule becomes effective on March 14, 2016.

Summary of Key Provisions

- A person (provider or supplier) has identified an overpayment when the person has or should have, through the exercise of reasonable diligence, determined that the person has received an overpayment and quantified the amount of the overpayment.
- The amount of time to conduct reasonable diligence is at most 6 months with an additional 2 months to report and return.
- Overpayments must be reported and returned if the person identifies the overpayment within 6 years of the date the overpayment was received.
- Providers and suppliers must use an applicable claims adjustment, credit balance, self-reported refund, or another appropriate process to satisfy the obligation to report and return overpayments.
- The Final Rule applies to Medicare Parts A and B only (the corresponding rules for Medicare Parts C and D were published in the May 23, 2014 Final Rule 79 FR 29843).

Summary of Commentary

Meaning of Identification

- The Final Rule states that, "a person has identified an overpayment when the person has, or should have through the exercise of reasonable diligence, determined that the person has received an

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overpayment and quantified the amount of the overpayment. A person should have determined that the person received an overpayment if the person fails to exercise reasonable diligence and the person in fact received an overpayment. 'Reasonable diligence' includes both proactive compliance activities conducted in good faith by qualified individuals to monitor for the receipt of overpayments and investigations conducted in good faith and in a timely manner by qualified individuals in response to obtaining credible information of a potential overpayment. The regulation uses a single term – reasonable diligence – to cover both proactive compliance activities to monitor claims and reactive investigative activities undertaken in response to receiving credible information about a potential overpayment."

- Under the Final Rule, there is now time to investigate before the 60-day time period begins to run. The commentary to the Final Rule provides, "We have revised § 401.305(a) and (b) in this final rule to clarify the duty to investigate through a reasonable diligence standard. When a person obtains credible information concerning a potential overpayment, the person needs to undertake reasonable diligence to determine whether an overpayment has been received and to quantify the amount. The 60-day time period begins when either the reasonable diligence is completed or on the day the person received credible information of a potential overpayment if the person failed to conduct reasonable diligence and the person in fact received an overpayment."
- The identification process includes quantifying the amount of the overpayment, which will probably cause identification to occur later than it would have occurred prior to the Final Rule. The commentary to the Final Rule states that, "We have revised the language in § 401.305(a)(2) to clarify that part of identification is quantifying the amount, which requires a reasonably diligent investigation."
- The Final Rule establishes a timeframe of 6 months in which to conduct reasonable diligence. The commentary to the Final Rule provides, "We adopt the standard of reasonable diligence and establish that this is demonstrated through the timely, good faith investigation of credible information, which is at most 6 months from receipt of the credible information, except in extraordinary circumstances. A total of 8 months (6 months for timely investigation and 2 months for reporting and returning) is a reasonable amount of time, absent extraordinary circumstances affecting the provider, supplier, or their community." Extraordinary circumstances may include unusually complex investigations, natural disasters, or a state of emergency.
- Statistical sampling and extrapolation are an appropriate component of reasonable diligence and may be used to determine the amount of an overpayment.
- In the case of an audit or probe sample, it is appropriate to inquire further in order to determine whether there are more overpayments related to the same issue before reporting and returning the overpayment as to the single claim.
- When an overpayment is identified by a contractor or government audit, then the scope of the duty to conduct reasonable diligence is defined by the issues that were audited. The provider or supplier may have credible information to conduct reasonable diligence within the look-back period even beyond the scope of the audited period if the practice existed outside the audited timeframe.

Applicable Reconciliation

- The Final Rule provides that, "[t]he applicable reconciliation for purposes of 1128J(d)(4)(B) [of the Act] is the reconciliation that enables the person to identify funds to which the person is not entitled." If, for

a particular overpayment, the applicable reconciliation is the cost reporting process, the overpayment should be returned at the time the cost report is filed (5 months after the provider's fiscal year-end). However, if the applicable reconciliation occurs later through reasonable diligence, as defined above, the provider or supplier would have 6 months to complete the diligence and an additional 60 days to report and return.

- CMS clarified that Medicare contractors do not audit or "reconcile" every claim and that providers and suppliers cannot rely on Medicare contractors or the OIG to identify overpayments. Rather, providers and suppliers are obligated to identify the overpayments they receive.

Lookback Period

- The 6-year lookback period will be measured back from the date the person identifies the overpayment.
- CMS is amending the reopening rules to provide for a reopening period that accommodates the 6-year lookback.
- The Final Rule is not retroactive. Providers and suppliers who reported and returned overpayments prior to the effective date of the rule and made a good faith effort to comply with section 1128J(d) of the Act are not expected to have complied with each provision of the Final Rule.
- Those who made a good faith effort to comply and reported and returned overpayments through the self-referral disclosure protocol (SRDP), which until now operated with a 4-year lookback are not expected to return overpayments from the fifth and sixth year through other means. Providers and suppliers reporting overpayments through SRDP on or after the effective date of the Final Rule are subject to the 6-year lookback.

How to Report and Return

- Providers and suppliers will use existing voluntary processes to report and return overpayments using a form that each Medicare contractor makes available on its website (see Publication 100-08 Chapter 4, Section 4.16 of the Medicare Program Integrity Manual).
- Providers and suppliers may use additional processes beyond the voluntary refund process to report and return overpayments such as claims adjustment, credit balance, and the self-reported refund process.
- The voluntary SRDP and the OIG Self Disclosure Protocol (SDP) tolls the requirement to report and return within 60 days of identification.
- A report under the SRDP or the SDP satisfies the reporting requirement. If a settlement is not reached under the SRDP or the SDP, then the provider has the balance of the 60-day time period remaining after identification to report and return the overpayment.