

Eli's Hospice Insider

Compliance: Are You Complying With The 60-Day Rule For Overpayments?

You're still on the hook for six-year-old overpayments.

With all the changes and burdens hospices have shouldered in the past year, an important regulation affecting your Medicare payments may be putting you at risk without you even realizing it.

Serious consequences for not returning Medicare overpayments within 60 days were finalized a year ago. Here's what you need to know to stay out of hot water with the **Centers for Medicare & Medicaid Services** as the regulation approaches its one-year implementation anniversary.

On Feb. 12, 2016, CMS published in the Federal Register the much-debated final rule on Medicare overpayments – the so-called "60-day rule" – that requires providers to report and return overpayments within 60 days of their identification. The final rule would subject providers and suppliers that retain overpayments beyond the 60-day time period to the reverse false claims provision under the False Claims Act, says a summary by **Ropes & Gray**.

The 60-day rule arose from language in the 2010 Affordable Care Act requiring providers to identify, report and return Medicare overpayments or else face false claims liability, Civil Monetary Penalties, or even exclusion from Medicare.

Beware: "This rule makes the retention of an innocent overpayment a potential basis for a False Claims Act or exclusion or other horrible outcome for an organization," warns attorney **Lawrence Vernaglia** with **Foley & Lardner**. "Determining whether in fact you were overpaid through a highly complex Medicare regulatory scheme – and even if you were, how much you need to give back – is just not that easy."

The final rule applies to Medicare Parts A and B, and a separate May 2014 rule applies to overpayments under Parts C and D. Although CMS has not published a final rule addressing Medicaid, some states have developed their own related guidance and requirements, Ropes & Gray explains.

Lookback Time Frame Shortened

Under the final rule, you must report and return overpayments only if you identify the overpayment within six years of the date you received the overpayment.

"This six-year lookback period is down from the 10-year period reflected in the proposed rule," note attorneys **Stephanie Sprague Sobkowiak** and **Daniel Kagan** with **Murtha Cullina** in a recent analysis. "This change aligns the final rule with similar state and federal record-retention requirements and helps to address providers' concerns regarding the burden and cost of a 10-year lookback period."

The six-year lookback is not retroactive and was effective as of March 14, 2016. But CMS advises providers and suppliers that the ACA statutory requirements have been in effect since 2010.

Translation: "This means that all providers and suppliers reporting and returning overpayments on or after March 14, 2016 – even overpayments received prior to March 14, 2016 – must comply with the new regulatory requirements," states an analysis by **Foley & Lardner**.

Follow this process: Although the proposed rule suggested that providers and suppliers use the voluntary refund process when reporting and returning overpayments, the final rule provides further explanation, according to Ropes & Gray. "CMS has now clarified that providers and suppliers may use the claims adjustment, credit balance, self-reported refund process, or other appropriate process to report and return overpayments."

CMS hopes this approach will provide an array of familiar options from which providers and suppliers can choose for returning overpayments. And the final rule grants CMS the right to change this process or create new processes in the future as it sees fit.

Also, the final rule does not limit you to reporting a self-identified overpayment using either the CMS-managed or the **HHS Office of Inspector General**-managed Self-Referral Disclosure Protocol. Instead, CMS will consider you to be in compliance with the 60-day rule's provisions as long as you're actively engaged in either protocol.

Important: "Regardless of the process used, the refund should include an explanation of the statistical sampling methodology used if an overpayment was calculated by extrapolation," Ropes & Gray notes.

Note: See the rule online at <https://federalregister.gov/a/2016-02789>.