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Fiscal Cliff Legislation Expands Potential Medicare Overpayment Liability




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In a largely unnoticed provision buried in the so-called fiscal cliff legislation, Section 638 of the American Taxpayer Relief Act of 2012 ("the Act") potentially adds two years to the period during which providers remain liable for overpayment recovery, even in the absence of fraud.

This provision's impact on providers and others in the health care industry likely would not have been fully apparent because these significant changes were enacted through a brief amendment to Section 1870 of the Social Security Act.

However, this amendment could have a very significant impact on providers given that the Congressional Budget Office has estimated the change will save the federal government $500 million over 10 years by permitting the collection of overpayments previously not subject to recovery.

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Background

The government's ability to recover a Medicare overpayment made to a provider is governed by a complex interaction among various statutes, regulations, and other guidance.

Among the key factors impacting a provider's potential repayment obligation is the time period during which the provider is subject to a potential recovery action which largely is governed by the interaction between two sets of rules: the reopening rules and the recovery rules.

Those rules generally seek to find an appropriate balance between ensuring that Medicare payment amounts are accurate and legally appropriate, and providing administrative finality in the processing of Medicare claims.

The Reopening Rules

The reopening rules were established under the authority of Section 1869(b)(1)(G) of the Social Security Act, 42 U.S.C. § 1395ff(b)(1)(G), ("Sec. 1869") which gives the secretary of health and human services the authority to establish regulations controlling the reopening or revision of any initial or reconsidered payment determination.

Pursuant to this authority, the Secretary has promulgated regulations for claims determinations that allow a Medicare contractor to reopen an initial determination or redetermination within one year from the date of the applicable determination for any reason, within four years from the date of the applicable determination for good cause,[1] or at any time if there is reliable evidence[2]

[1] *See* 42 C.F.R. § 405.986.

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that the initial determination was procured by fraud or similar fault.[3]

With regard to cost reports, the Secretary has issued regulations providing that a final cost report determination may be reopened only up to three years after the date of the determination, unless the determination was procured by fraud or similar fault.[4]

The Recovery Rules

The recovery rules govern the ability of Medicare contractors to recover overpayments after a claim determination has been reopened. Section 1870(b) of the Social Security Act, 42 U.S.C. § 1395gg(b), (''Sec. 1870'') generally limits overpayment liability for providers who are determined to be ''without fault.''

Prior to its amendment, the statute deemed providers to be ''without fault'' and therefore not liable for an overpayment, in the absence of evidence to the contrary, if the determination of the overpayment was made more than three years following the year in which notice of payment was sent.

Section 638 of the Act (''the without fault amendment'') significantly expands the period during which providers remain liable for overpayment recovery from three years to five years.

It appears that the amendment was prompted by a May 2012 HHS Office of Inspector General (''the OIG'') report examining the Medicare program's success rate in collecting overpayments identified by the OIG.[5]

The report found that of more than $400 million in overpayments identified by the OIG over a 30-month period, the Medicare program did not collect approximately $332 million. The OIG identified the statutory ''without fault'' provision as one of the barriers to collecting those overpayments.

Specifically, the report noted that the Medicare reopening rule at 42 C.F.R. § 405.980 permits contractors to reopen claims for good cause for up to four years after the initial payment determination (''the reopening period''), but Sec. 1870 generally limited recovery to three years after the year in which payment was made (''the recovery period'').

As a result, the OIG recommended that the Centers for Medicare & Medicaid Services (''CMS'') should pursue legislation to ensure that the recovery period would exceed the reopening period. Congress has now adopted the OIG's recommendation and amended Sec. 1870 accordingly.

Potential Implications

Despite statements in the report, the ultimate impact of this change is somewhat difficult to ascertain. First, it is important to recognize that Congress did not alter the Medicare reopening rules. Although the overpayment recovery period has now been extended to five years, absent fraud or similar fault, contractors still generally have just four years to reopen and adjust paid claims.

Thus, as a practical matter, the amendment to the Act appears to give Medicare contractors one additional year to recover overpayments (rather than the two-year change indicated in the statutory language).

In addition, it is unclear whether and how the change to the overpayment recovery period affects cost report overpayments because cost report determinations are still subject to the three-year year reopening period specified by 42 C.F.R. § 405.1885(b), and there is some authority that the recovery rule limitation set forth in Section 1870(b) does not apply to cost report overpayments.[6]

Moreover, other statutory provisions, including section 1879 of the Social Security Act, remain unchanged and also may limit liability for providers and suppliers who are ''without fault'' in certain circumstances.

Further, while the ''without fault'' amendment did not change this part of Sec. 1870, it also is important to note that a provider is deemed without fault only in the absence of evidence to the contrary. CMS has indicated that evidence of a pattern of billing errors can constitute such evidence.[7]

Other examples of situations where a provider may be liable include failing to report certain relevant facts, misapplying the deductible or coinsurance requirement, calculating charges incorrectly (i.e., committing a mathematical or clerical error), not submitting sufficient documentation, billing for services when the provider had reason to believe the beneficiary was not entitled to benefits, or billing for services that the provider knew were not covered.[8]

The new amendment to Sec. 1870 may have other significant implications as well. The Affordable Care Act enacted a requirement that providers and others must report and return an overpayment within 60 days after its identification.[9] However, the law did not specify the appropriate ''look-back'' period for overpayment return. CMS proposed regulations in February 2012 that would have imposed a 10-year look-back period,[10] but those regulations were heavily criticized and have not been finalized. As a result, providers have relied on other regulations, such as the current claims reopening and without fault rules, to determine the appropriate look-back period for overpayment returns.

It remains to be seen whether and how this new amendment to the without fault statute will impact the final look-back period for overpayment returns.

Similarly, it is possible that the without fault amendment will lead to a reconsideration of the look-back period used by Recovery Audit Contractors (''RACs'').

Conclusion

As a result of the complex (and frequently confusing) interactions among the various statutes and regulations governing reopening, recovery, and reporting periods, providers and suppliers should consult with experi-

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[2] ''Reliable evidence'' and ''similar fault'' are defined at 42 C.F.R. § 405.902. *Also see Medicare Claims Processing Manual*, chapter 34, § 10.11.1.

[3] 42 C.F.R. § 405.980(b).

[4] 42 C.F.R. § 405.1885(b). Because cost reports often are not finalized for many years, the effective look-back period for cost reports often exceeds three years.

[5] Department of Health and Human Services Office of Inspector General, ''Obstacles to Collection of Millions in Medicare Overpayments,'' A-04-10-03059 (May 2012) (''the Report'').

[6] *Medicare Financial Management Manual*, Ch.3, § 70.

[7] *Id.* at § 80.

[8] *Id.* at § 90.1.

[9] Patient Protection and Affordable Care Act § 6402(d), Pub. L. No. 111-148, 124 Stat. 119 (2010); 42 U.S.C. 1320a-7k(d).

[10] 77 Fed. Reg. 9179 (Feb. 16, 2012).

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enced legal counsel before disclosing or agreeing to any repayment obligation.

Providers (and their counsel) also should keep a close eye on CMS to see whether the passage of the without fault amendment leads to additional changes that could impact providers' potential overpayment obligations.