Fear and Loathing: Mandatory Refund of Identified Overpayments

Colleen Fusetti
Health Care Consultant

Howard Young, Esq.
Morgan Lewis & Bockius, LLP

October 15, 2012
HCCA Clinical Practice Conference
Philadelphia, PA

Objectives

♦ Provide Overview of Historical and Current Legal Framework for Medicare Refunds.
♦ Present practical suggestions on steps to take when presented with overpayment scenario.
♦ Case Study Reviews and Lessons.

Agenda

♦ A brief overview of a long history
♦ ACA and HHS Regulations
♦ Case Studies
♦ Tips/Strategies
A Brief Overview of a Long History

Medicare and Medicaid – Pay and Chase

- 1990s
- Fewer billing/chart audits
- Find and Fix approach
- Different mentality – “they paid, it’s my money now”

OIG and HCFA/CMS Program Integrity

- 1997 – 2000: The rise of compliance programs, OIG compliance program guidance, self-disclosures, Corporate Integrity Agreement standards for refunds
- Medicare contractors develop Medicare refund forms
- OIG Compliance Program Guidance for Small Physician Practices stress self audits and refunds
- Medicaid programs remain largely silent
1998 HCFA Proposed Rules and Regulatory Foundation

- Proposed rules never finalized.
- Continuation of the past?
- Medicare reopening rules (42 C.F.R. § 405.980) – Contractors may "reopen" paid claims (initial determinations) within:
  - 1 year for any reason,
  - up to 4 years for good cause, and
  - at any time for fraud or similar fault.
- Rise and continued use of False Claims Act

Physician Practice Self-Disclosures (2000-2010)

- Various physician organization settlements
- Rise of compliance programs and self-audits
- Decade of mixed compliance and clarity
  - How far back?, various disclosure options, rise of program integrity contractors (PSCs, RACs, ZPICs)
- Affordable Care Act (2010) and Medicaid Program Integrity

ACA Section § 6402(a)

- § 6402(a) of PPACA (effective Mar. 23, 2010)
- For first time, disclosure and repayment is express legal requirement
- Report/refund within 60 days after “identifying” an overpayment
- Must include written explanation for overpayment
Mandatory Repayment of Medicare and Medicaid Overpayments (ACA § 6402)

- Report and return to contractor or State, as appropriate
- Overpayments retained after 60 days are subject to False Claims Act liability
- Also OIG CMP for knowing failure to report and possibly permissive exclusion

CMS Proposed Regulations

- Proposed Rule published February 16, 2012 (77 Fed. Reg. 9179)
- Medicare Part A and B only (but statute still applies)
- TEN YEAR LOOK BACK PERIOD PROPOSED!!!
  - HHS would amend reopening regulations
  - Must undertake a “reasonable inquiry” to identify potential overpayments.

Many Watchful Eyes
Vigilance and Established Audit/Refund Processes
-- Don't be caught flatfooted

Failure to conduct reasonable inquiry on potential overpayments

♦ Failure to Report and Refund Identified Overpayments
  ♦ High risk
  ♦ Many open questions
  ♦ How far back?
  ♦ Advocacy position?
  ♦ Privileged reviews/audits?

OIG and DOJ Self-Disclosure Options

  ♦ Not always “built for speed” and formalistic but sometimes the right choice
  ♦ Summer 2012 – OIG solicited input for changes to its SDP
  ♦ Consider U.S. Attorney's Office disclosure as well
  ♦ Engage experienced health care counsel
Dollars and Cents – What if Large Overpayment?

- Managing the refund
- Cash impact
- Extended Repayment Plan
- Offset
- Which direction to take?

New vs. Established Patients--Case Study

- Solo physician joins new office
- Code 99201 vs. 99212
- Net difference in pricing/overpayment

New vs. Established

- Dr. Jones sells his practice and joins the practice of Care Right Primary Care group in 2009
  - This results in a change in tax id #
- Office Manager Miss Johnson had instructed all charge entry staff that new vs. established patient in this scenario, is driven only by the tax id change
  - Staff key 99201 (new) instead of 99212 (established) under multiple circumstances
- In 2012 Miss Johnson attends her first billing and coding seminar and learns this is not correct; CMS publishes very clear guidelines regarding new vs. established patients
Overpayment

- Ms. Jones has reviewed the patient population of new office visits of 99201 for years 2009, 2010, 2011 and consequently determines how many claims were submitted in error over the three year period
- 2600 were 99201 and should have been 99212
  - Payment differential is $16.94 per patient
  - Overpayment for patient population affected is $44,044.00
  - Disclosing and refunding the overpayment

Next Steps

- Establish impact to practice when considering methods of refunding the overpayment
- After determining overpayment exists, refund a check to Medicare or offset of future claims?
- Large refund check could impact cash on hand
- Future offsets can be difficult to manage
- Extended repayment plan requires detailed proof of inability to pay
- EOB denial codes are sometimes difficult to understand and/or trace back to original claim, further complicating office payment posting and accounting

Refunding to Medicare

- Ensure form is filled out completely and accurately
- Failure to complete form may impact subsequent appeal rights
- Offset is the most efficient and cost effective method but be sure the reason and charge being offset is actually understood
- Timeliness of refund/offset
Other Considerations

- Are other payors similarly affected?
- What are the refund obligations – contractual or legal?
- Patient co-payment refunds?

Training of Personnel

- The essence of new rules must be communicated to all personnel so they can spot potential overpayments
- “Reasonable inquiry” – eyes of the beholder but government will have high standards
- Mistakes happen – but how you react to identified mistake could make all the difference
  - May require substantial internal/external resources to respond appropriately
- Written policies and procedures – general or detailed?

QUESTIONS?
### Speaker Contact Information

<table>
<thead>
<tr>
<th>Colleen Fusetti</th>
<th>Howard J. Young, Esq.</th>
</tr>
</thead>
<tbody>
<tr>
<td>215.510.0865</td>
<td>Morgan Lewis &amp; Bockius, LLP</td>
</tr>
<tr>
<td><a href="mailto:cfusetti@sharonmgalup.com">cfusetti@sharonmgalup.com</a></td>
<td>202.739.5481 (office)</td>
</tr>
<tr>
<td></td>
<td>202.320.9640 (mobile)</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:hyoung@morganlewis.com">hyoung@morganlewis.com</a></td>
</tr>
</tbody>
</table>