

# Internal Investigations, Repayment, and Self-Disclosure: Finding the best way to “fix things”



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## Agenda

- ❑ **Concept and Terms Overview and Introduction**
  - ❑ Overpayments
  - ❑ The 60-Day Rule
  - ❑ Options for Handling an Overpayment
- ❑ **Panel Discussion**
  - ❑ Conducting an Internal Investigation
  - ❑ Deciding on the Best Option

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# What is an overpayment?

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## What is an overpayment?

- An overpayment is any funds that a person has received or retained under the Medicare program to which the person, after applicable reconciliation, is not entitled to such.
  - ▶ Any funds not received in conformance to the payment rules, whether inadvertently or due to fraudulent activity, are funds to which the recipient is not entitled.
  - ▶ Overpayment amount is the difference between the amount that was paid, and amount that should have been paid.

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## Overpayment Statute - ACA Section 1128J(D); 42 U.S.C. § 1320A-7K(D)

- ❑ In general, if a person has received an overpayment, the person shall:
  - Report and return the overpayment to the Secretary, the State, an intermediary, a carrier, or a contractor, as appropriate, at the correct address; and
  - Notify the Secretary, State, intermediary, carrier, or contractor to whom the overpayment was returned in writing of the reason for the overpayment.
- ❑ What is an overpayment?
  - The term “overpayment” means any funds that a person receives or retains under subchapter XVIII or XIX of this chapter to which the person, after applicable reconciliation, is not entitled under such subchapter.

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## THE 60-DAY RULE

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## Creation of the 60-Day Repayment Requirement

- ❑ The Affordable Care Act (ACA) requires providers to report and return any overpayment within 60 days after identification (or the date any corresponding cost report is due), whichever is later - Section 1128 J(d) of the Social Security Act
- ❑ “Overpayment” is defined as any funds that a person receives or retains from Medicare or Medicaid to which the person, after any applicable reconciliation, is not entitled
- ❑ Overpayments include payments received for claims submitted in violation of the Stark Law or the Anti-Kickback Statute
- ❑ Any overpayment retained after the repayment deadline is considered an obligation for purposes of the False Claims Act

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## The 60-Day Rule (Medicare Parts A & B)

### Key Concepts:

- ❑ Identification of an Overpayment
- ❑ The Reasonable Diligence Standard
- ❑ Credible Information
- ❑ Time Within Which to Exercise Reasonable Diligence
- ❑ Lookback Period

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## The 60-Day Rule (Medicare Parts A & B)

### Identification of an Overpayment:

- “[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 overpayment and quantified** the amount of the overpayment.” (emphasis added)

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## The 60-Day Rule (Medicare Parts A & B)

### Reasonable Diligence Standard:

- “Reasonable Diligence” includes both (1) proactive compliance activities and (2) reactive investigations conducted in a timely manner in response to credible information of a potential overpayment
  - “Minimal compliance activities to monitor the appropriateness and accuracy of claims would be a failure to exercise reasonable diligence”
  - Identification of a single overpaid claim requires further investigation
  - “Part of identification is quantifying the amount, which requires a reasonably diligent investigation.”

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## The 60-Day Rule (Medicare Parts A & B)

### How Long is Reasonable Diligence?

The Final Rule states:

A good faith investigation should occur within six months from receipt of the credible information, absent “extraordinary circumstances”

- Following the six month period to investigate, you have 60 days to report and return the overpayment
- A total of eight months, absent extraordinary circumstances, is presumptively reasonable

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## The 60-Day Rule (Medicare Parts A & B)

### Credible Information:

- “Credible information” is information that supports a reasonable belief that an overpayment may have been received.
- Potential sources of credible information:
  - Government of contractor audits; Government RFIs (subpoenas, CIDs)
  - Internal compliance reviews
  - Exit interviews
  - *Qui Tam*
  - Hotline complaints
  - Unexplained revenue increases
  - Unusually high profits or wRVUs
  - A single overpaid claim

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## The 60-Day Rule (Medicare Parts A & B)

- ❑ The 60-day time period for reporting / returning begins when either:
  - The reasonable diligence is completed; or
  - On the day the provider received credible information of a potential overpayment (if the provider fails to conduct reasonable diligence)
- ❑ For an investigation to be conducted in a “timely” manner, providers typically must complete the investigation within 6 months from receipt of credible information indicating there may be an overpayment
  - 6-month timeframe may potentially be extended under “extraordinary circumstances”
  - *8 months generally the maximum total time to return overpayments.*
- ❑ The government recommends that providers maintain records documenting “reasonable diligence”

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## Options for handling an overpayment

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## What if I choose not to report and refund?

- ▶ Retention may create an “obligation” for purposes of False Claims Act.
- ▶ Reverse false claim if “knowingly concealing” or “knowingly and improperly avoiding or decreasing” an obligation to pay back to federal government. 31 U.S.C. §3729(a)(1)(G).
- ▶ Potential Civil Monetary Penalty (CMP) liability of not more than \$20,000 for each knowing unpaid refund/overpayment, and an assessment of not more than three times the amount of each unpaid refund/overpayment (*also*, risk of Federal health care program exclusion). 42 USC § 1320a-7a(a)(10).

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## OPTIONS FOR WHERE TO REPORT AND RETURN AN OVERPAYMENT

If you decide there is an overpayment or potential liability, there are options on where to report and return:

- ❑ Contractor Refund (Medicare Administrative Contractor, MAC)
- ❑ Contracted Payor Refund (Parts C and D)
- ❑ State Agency
- ❑ OIG Self-Disclosure Protocol (SDP)
- ❑ CMS Self-Referral Disclosure Protocol (SRDP)
- ❑ Department of Justice (DOJ) / U.S. Attorney’s Office (USAO)

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## PANEL DISCUSSION

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## Conducting an internal investigation

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## Deciding the best option to deal with an over payment

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## Challenges and considerations in choosing to report or disclose

- Have any laws been violated? If so, which ones?
- Was this provider-identified or externally identified (e.g., through government or contractor audit)?
- What steps should be taken to remedy the situation?
- What payors are impacted? What are the rules for each?
- Are all records electronic? Paper? Note: will this present a problem with a six-year lookback?
- Sample versus all claims?
- Who should be involved in the decision?
- What is the scope of potential disclosure?
- How would the scope change if violation is reported?
- What was the root cause?
- What can be done to prevent violation from happening again?
- Should we disclose or just refund?
- What is the right place to disclose?

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## Options for reporting / Returning overpayments

- ❑ Medicare Administrative Contractor (MAC) reporting process
  - Provider-identified overpayments to the MAC:
    - ▶ Use the MAC process generally for: simple overpayments, claim corrections, claim adjustments, credit balance, self-reported refund, or other reporting process set forth by the Medicare contractor.
    - ▶ Familiarize yourself with the MAC's process for reporting and returning overpayments.
    - ▶ Be transparent when reporting to the MAC.
    - ▶ Follow their process (if one is provided).

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## Contractor (MAC) disclosure/refund: pros and cons

### Pros

- ❑ Typically least costly option
- ❑ Best for simple overpayment matters (e.g., improper coding)
- ❑ Simple process
- ❑ Somewhat predictable process, though varies by MAC
- ❑ Often faster than OIG/DOJ/SRDP
- ❑ Low to no reputational harm
- ❑ Six-year lookback period
- ❑ Satisfies legal obligation to report and return overpayment

### Cons

- ❑ No release

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## OIG SDP: The Basics

### ❑ **OIG: Self-Disclosure Protocol (SDP)**

- Created in 1998, updated in 2013, amended in 2021
- Disclose for:
  - Potential violations of federal criminal, civil, or administrative law for which Civil Monetary Penalties are authorized. Examples include:
    - ▶ Conduct involving false billing; Conduct involving excluded persons.
    - ▶ Conduct involving the Anti-Kickback Statute (including conduct that violates both the AKS and Stark Law). Not for Stark-only conduct.
- Not for:
  - Error on overpayments, requests for opinion on whether there is a potential violation, Stark-only conduct

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## OIG SDP: PROS AND CONS

### Pros

- ❑ Lower settlement multiplier on single damages (often 1.5x) and other potential damages likely reduced
- ❑ False Claims Calculation: All claims or statistical sample of 100 claims minimum; Use point estimate
- ❑ Presumption of no CIA (Corporate Integrity Agreement)
- ❑ The OIG can provide a release from exposure under the CMP law and permissive exclusion
- ❑ Tolls 60-day period after submission
- ❑ More predictable process, clear framework provided
- ❑ Expedited resolution
- ❑ Low reputational harm
- ❑ Possibly indicative of a good compliance program

### Cons

- ❑ Can make referrals to other agencies
- ❑ Cannot provide release for potential FCA liability (without DOJ involvement)
- ❑ DOJ participation often results in higher settlement amounts
- ❑ May cost more and can be a longer process than returning money to the MAC
- ❑ May result in public reporting
- ❑ Not eligible for overpayments where there is no potential violation of CMPL
- ❑ Not eligible for Stark-only conduct
- ❑ Not eligible for settlements less than \$20,000 (\$100,000 AKS)

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## Tips and common mistakes for disclosures (OIG SDP)

### Mistakes

- ❑ Does not follow the revised SDP
- ❑ Lack of cooperation
- ❑ Statement of no fraud liability
- ❑ Not identifying laws potentially violated
- ❑ Disclosing conduct too early or too late
- ❑ No plan to quantify damages or correct issue
- ❑ Conduct violates only Stark
- ❑ Refusal to pay multiplier
- ❑ Argues damages should be calculated in a manner contrary to the SDP

### Tips

- ❑ Review the revised SDP and use as a roadmap. Include and address all parts.
- ❑ Do not admit guilt or make definitive statements of no fraud
- ❑ Review, address, and state all potential violations of law
- ❑ Provide initial letter with deadline to submit final SDP

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## TAKEAWAYS: Facilitating compliance with the 60-day rule

- ▶ Take proactive steps in Compliance Programs
- ▶ Identify the laws that were potentially violated, the timeframes during which the potential violation occurred, and acknowledge the potential violation
- ▶ Engage legal/outside counsel and other experts when necessary to complete a thorough investigation (including quantification)
- ▶ Ensure understanding of risks, benefits, and methods for reporting and returning overpayments, including which method is appropriate for which type of overpayment
- ▶ Take corrective action to end the non-compliant practice, arrangement, etc., and prevent recurrence
- ▶ Determine whether self-disclosure is appropriate, and decide most appropriate option
- ▶ Cooperate fully during the process and/or with the agency's investigation

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## Conclusion/ Questions

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