CMS Proposes Change to Overpayment Identification Rule

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On December 27, 2022, the Centers for Medicare and Medicaid Services (CMS) issued a proposed rule that could materially modify the obligations of providers participating in the Medicare program to report and return overpayments. The overpayment rules require a provider that receives an overpayment to report and return the overpayment by the later of 60 days after the provider identifies the overpayment or the date of any corresponding cost report that is due.

The current overpayment rule applies a "reasonable diligence" standard under which a provider is deemed to have identified an overpayment when the provider has, or should have through the exercise of reasonable diligence, identified that they received an overpayment and determined the amount of the overpayment. If finalized, the proposed rule would eliminate the "reasonable diligence" standard and replace it with a "knowing" standard established under the False Claims Act (FCA), under which providers would only be deemed to have identified an overpayment if they had actual knowledge of the existence of the overpayment or acted in reckless disregard or deliberate ignorance of such overpayment knowledge standard. The proposed rule would also eliminate the requirement that an overpayment must be quantified before the 60-day reporting requirement is triggered.

The proposed rule would apply to all claims submitted under Medicare Parts A, B, C, and D. The proposed rule is influenced by the outcome of UnitedHealthcare Ins. Co. v. Azar, in which the court noted that the use of the "reasonable diligence" standard in identifying overpayments conflicted with the "knowledge" standard in the FCA and improperly created liability for mere negligence, and CMS does not have the legislative authority to apply more stringent standards to impose FCA consequences through regulation."

For more information, contact:

Keith J. Roberts | 973.364.5201 | kroberts@bracheichler.com
Jonathan J. Walzman | 973.403.3120 | cjwalzman@bracheichler.com
Harshita Rathore | 973.364.8393 | hrathore@bracheichler.com