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Proposed MPFS Revises 60-Day Rule, Has 'Good' Telehealth News, but Brings Complications

By Nina Youngstrom

It's déjà vu all over again now that CMS has proposed a change to a definition at the heart of the Medicare 60-day overpayment refund rule for the second time in two years, according to the 2025 proposed Medicare Physician Fee Schedule (MPFS) rule announced July 10.[1] This time around, though, CMS also would formalize a six-month runway for providers to investigate and quantify suspected overpayments.

This surprise package is one of several in the MPFS rule. CMS also "had good news for telehealth providers and rural providers," said Richelle Marting, an attorney and certified coder in Olathe, Kansas. For example, although there are strings attached, CMS will continue coverage of audio-only telehealth services and virtual supervision. "The rest of the rule continues to complicate the professional billing process," she said. Medicare proposes to add or expand behavioral and care management services in a way that "will create unintended challenges for providers."

On the 60-day rule, CMS has revived a proposed change to the definition of an "identified overpayment" that appeared in a proposed 2022 rule on policy and technical changes to Medicare Advantage but was never finalized. "The 60-day rule has become one of the most significant pillars of an effective compliance plan," said attorney Judy Waltz, with Foley & Lardner LLP in San Francisco. She noted it "has many tentacles that are subject to interpretation."

That's probably a factor in the proposed change. The 60-day rule—which came to life in the Affordable Care Act—requires providers to report and return Part A and B overpayments within 60 days of identifying them, although the statute didn't define an identified overpayment. That's where a 2016 regulation interpreting the 60-day rule came in. It obligated providers to use "reasonable diligence" to identify overpayments by doing proactive compliance activities to monitor for overpayments and investigating potential overpayments in a timely manner.

CMS proposed in 2022 to replace "reasonable diligence" with language more consistent with the False Claims Act's knowledge standard (i.e., an overpayment would be identified when the provider has actual knowledge of the existence of the overpayment or acted in reckless disregard or deliberate ignorance of the overpayment). On top of the 60 days provided in the statute to report and return overpayments, CMS proposed in the MPFS rule to give providers formal approval to use six months to investigate a suspected overpayment.

"They are sticking with their original proposal to revise the definition of identified but adding in a comfort level for providers and suppliers that the six-month investigation period before the 60-day clock starts will be maintained," Waltz explained. Because the six-month period was only mentioned in the preamble of the 2016 regulation, some of the comments on the proposed changes in the 2022 rule expressed concern it would be removed.