

## Resources

### CMS Delays Again the 60-Day Repayment Rule

February 27, 2015

On February 17, 2015, the Centers for Medicare & Medicaid Services (CMS) announced that it was delaying once again the final version of its 60-day repayment rule, which would implement Section 6402(a) of the Patient Protection and Affordable Care Act (new Section 1128(d) of the Social Security Act). Section 6402(a) requires a “person,” i.e., a Medicare provider or supplier, to report and return any overpayments within 60 days of “identifying” the “overpayment” or the date any corresponding cost report is due, if applicable. CMS first published its proposed rule on February 16, 2012. The comment period ended in April 2012, and health care entities have been anxiously awaiting the release of the final version of the repayment rule. CMS noted that “the complexity of the rule and scope of comments warrants the extension of the timeline for publication.” CMS’s notification extends the deadline for publication of the final rule to February 16, 2016.

Health care providers had hoped that CMS’s final rule would clarify ambiguities in the proposed rule. Under the proposed rule, it is unclear what information meets the level of “identifying” an overpayment. Providers also hoped that the final rule would contain a more favorable definition of the applicable look-back period. Currently, many providers use a four-year or six-year look-back period for calculating a potential overpayment. The proposed rule contains a 10-year look-back requirement, which could increase compliance responsibilities.

The only reported case addressing the 60-day repayment rule is *United States ex rel. Kane v. HealthFirst, Inc. et al.* (S.D.N.Y., No. 11-cv-2325 (ER), *intervenor complaint filed July 27, 2014*). In *HealthFirst*, an employee working in the revenue department of the entity managing several New York City hospitals was asked as part of an internal investigation to determine if an overpayment had occurred. In February 2011, the employee determined there were potentially 900 claims with overpayments in excess of \$1 million and emailed his findings to his supervisors. However, no repayments were made within 60 days. On July 24, 2014, the United States, intervened in the *qui tam* or “whistleblower” suit that the employee had filed. The defendants have filed a motion to dismiss arguing, among other things, that the overpayments were not “identified” under the repayment statute on the date the employee sent his email to the administrators.

*HealthFirst* raises several relevant issues that could affect health care providers, including when payments are “identified” and the appropriate damages.

Dykema will continue to monitor developments in the *HealthFirst* matter and other developments relating to the 60-day repayment rule to advise its health care clients. For more information, please contact the co-authors of this alert, Jonathan Feld at 312-627-5680 (Chicago) or 202-906-8716 (Washington D.C.), or Wayne Creel at 312-627-5678, any of the attorneys listed on the left, or your relationship attorney.

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Health Care

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