



Health Care ADVISORY ■

DECEMBER 22, 2022

Health Care Alert: CMS Reverses Course on Overpayment Rule

by [Bill Jordan](#), [Rob Stone](#), [Heidi Sorensen](#), and [Christopher \(CJ\) Frisina](#)

The Centers for Medicare & Medicaid Services (CMS) is proposing to redefine what it means to “identify” a Medicare overpayment. Buried in a late December publication, the new definition seems to be an about-face from CMS’s previous comments in rulemaking implementing the 2010 Affordable Care Act (ACA) overpayment requirement. Specifically, the proposed revisions remove the requirement that Medicare providers, suppliers, managed care organizations, and plan sponsors (“Medicare participants”) use “reasonable diligence” to identify an overpayment. CMS proposes that “[a] person has identified an overpayment when the person knowingly receives or retains an overpayment,” with “knowingly” having the same meaning as in the False Claims Act (FCA). While this change appears to relax certain obligations to investigate suspected overpayments, the net effect on day-to-day compliance activities is likely to be minor. The proposed rule is scheduled to be published in the *Federal Register* on December 27, 2022, and comments are due to the CMS by February 13, 2023.

The Affordable Care Act and Prior Regulations

The ACA requires Medicare participants who have received an overpayment to report and return the overpayment within 60 days of identifying it—as a result, this requirement is often referred to as the “60-Day Rule.” The ACA defines an overpayment as any funds received and retained under the Medicare and Medicaid programs to which the recipient is not entitled. An overpayment retained past the 60-day deadline is an obligation that could lead to reverse FCA liability.

The ACA did not define what it meant to “identify” an overpayment, so CMS’s regulatory definition was critical to Medicare participants’ compliance efforts. CMS regulations, issued in 2014 (for Medicare Parts C and D) and 2016 (for Medicare Parts A and B), require Medicare participants to conduct “reasonable diligence” to determine whether they have received overpayments and rejected comments that Medicare participants should only have obligations to return overpayments when they have actual knowledge of them. CMS’s existing “reasonable diligence” standard encompasses both proactive compliance activities and responses to credible information about potential overpayments.

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

CMS's proposal notes that a group of Medicare Advantage Organizations successfully challenged CMS regulations for the Medicare Parts C & D programs, arguing that by requiring reasonable diligence to identify overpayments, "the final rule impermissibly created False Claims Act liability for mere negligence." A 2018 district court decision (which was subsequently reversed on other grounds) held that the ACA's references to the FCA only impose liability for overpayments "knowingly" retained—or, as defined by the FCA, when a person (1) has actual knowledge, (2) acts in deliberate ignorance of the truth or falsity of the information, or (3) acts in reckless disregard of the truth or falsity of the information.

CMS's New Proposed Rule

CMS's proposed revisions would drop the "reasonable diligence" standard and adopt the FCA's "knowingly" standard. Medicare participants would be deemed to have identified an overpayment if they have actual knowledge of the existence of an overpayment or act in reckless disregard or deliberate ignorance of an overpayment.

Practically speaking, however, the proposed revisions may not result in significant changes for Medicare participants' day-to-day compliance activities. While the revisions may technically relieve Medicare participants of the regulatory responsibility of performing "reasonable diligence," CMS's proposal does not permit Medicare participants to ignore credible information about potential overpayments. Medicare participants will still need to evaluate credible information or face potential liability for deliberate ignorance or reckless disregard if they have retained overpayments. One aspect of the "reasonable diligence" standard we believe CMS should maintain, however, is the acknowledgement in the 2016 Preamble discussion that timely good faith investigation of credible information could take up to 6 months (or longer in extraordinary circumstances). Further, as CMS suggested in its 2016 final rule for Medicare Parts A & B, Medicare participants should conduct proactive reviews to ensure they have properly received Medicare payments.

In short, while CMS's proposal arguably provides Medicare participants more leeway in their day-to-day compliance efforts with respect to potential overpayments, it by no means removes their obligations to monitor reimbursement, conduct audits, and investigate credible evidence of potential overpayments.

You can subscribe to future *Health Care* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

Alston & Bird has launched the [Digital Transformation of Health Care](#), an initiative that advances our commitment to an industry approach to providing legal services in the health care space. Our health care and technology teams can assist with establishing or significantly growing telehealth capabilities and navigating the regulatory landscape.

If you have any questions, or would like additional information, please contact one of the attorneys in our [Health Care Group](#).

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2022

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghai Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86.10.85927500
BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ■ 3rd Floor ■ 1000 Brussels ■ Brussels, 1000, BE ■ +32.2.550.3700 ■ Fax: +32.2.550.3719
CHARLOTTE: One South at The Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
FORT WORTH: Bank of America Tower ■ 301 Commerce ■ Suite 3635 ■ Fort Worth, Texas, USA, 76102 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 4th Floor ■ Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 1950 University Avenue ■ Suite 430 ■ East Palo Alto, California, USA 94303 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333