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### PBDs May Want to Delay Refunds in Mid-Build Audit, Lawyer Says; Adjustments Are Tricky

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By Nina Youngstrom

Hospitals with provider-based departments (PBDs) that failed CMS's audit<sup>[1]</sup> on the mid-build exception might want to sit on their overpayments, an attorney said. It's conceivable CMS under the Biden administration will reconsider the audit findings, which would be a relief both in terms of the money and in terms of what two compliance professionals said is the nightmare of sorting through claims to determine which have to be adjusted.

"It's premature to start making refunds," said attorney Larry Vernaglia, with Foley & Lardner in Boston. "Why would anyone write a check today if there's a possibility CMS will change course because of a new administration?" There's hope for a reprieve because of the timing of the audit findings, which were announced on the last full day of the Trump administration, and the basis of the audit findings. "I don't think it's obvious CMS was right," Vernaglia said.

CMS audited the mid-build exception to the prohibition on billing the outpatient prospective payment system (OPPS) by off-campus PBDs established after Nov. 2, 2015. Congress cut them off in Sec. 603 of the 2015 Bipartisan Budget Act, and now CMS pays "non-excepted" PBDs 40% of the OPPS rate under the Medicare physician fee schedule. An exemption was created by the 21<sup>st</sup> Century Cures Act for off-campus PBDs that were under construction when the switch was flipped Nov. 2, 2015, with some strings attached. Hospitals were required to: (1) file an attestation with CMS that the department was, in fact, provider-based, and it had to be signed by a CEO or chief operating officer; (2) add the PBD to its 855A enrollment form; and (3) have proof of a signed contract with an unrelated party for the construction of the PBD before Nov. 2, 2015.

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