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A proactive and targeted approach to billing audits

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Incorrect billing to government programs, such as Medicare and Medicaid, can result in substantial liability under the federal False Claims Act (FCA).^[1] Any person found to violate the FCA is liable for treble damages plus a civil penalty between \$5,000 and \$10,000, adjusted for inflation, per claim, and each line item submitted to the government may constitute a separate claim. Appropriate use of billing audits can help you avoid the submission—or allow the timely correction—of incorrect and, at least potentially, false claims. However, in our experience, many companies conduct billing audits only as a response to a crisis. A more proactive approach would be beneficial, allowing healthcare companies to identify and correct errors prior to being called to task. Even where unsuccessful in identifying errors, the existence of such a program may be useful to demonstrate a commitment to compliance, which could result in lower penalties in the event of a prosecution for an FCA violation.^[2] What is more, when they do conduct audits, many healthcare companies fail to audit effectively. Below we provide guidance on how to build an audit program into your compliance efforts.

Adopt a proactive approach to auditing

A proactive approach requires identification of when billing audits should be conducted. It is advisable to conduct audits at least in the following circumstances.

You become aware of a systemic error in approach

In circumstances where you know or should know (i.e., essentially, have a reasonable suspicion)^[3] that something is wrong with your billing and coding practices, you will need to investigate your approach to billing and coding so as to guard against repeating the error. This knowledge can arise in any number of ways; for example, an employee may voice a concern about your company's billing practices, or you may receive a letter from a recovery audit contractor identifying a handful of claims with problems, asserting a suspicion of a more systemic problem.

Problems come in different flavors, with different consequences and implications. You may uncover intentional fraud, or you may simply find a good-faith mistake. While it is true that claims that are submitted in true error are not fraudulent, once you become aware of a systemic error, any subsequent submissions involving the same problem could be fraudulent. For example, an erroneous claim that was submitted unwittingly because it was miscoded by billing software might not be fraudulent, but a claim submitted with the same error, once you are aware of the defect in the software, might be fraudulent. Also, once you are aware of a systemic error, you may be required to evaluate whether you have received an overpayment.

When you may have received an overpayment

In a circumstance where you become aware that you have received an overpayment, you will have to conduct a billing audit. The FCA applies not only to affirmatively false claims but also to “reverse false claims.” A reverse false claim arises whenever a person “knowingly conceals or...avoids...an obligation to pay or transmit money or property to the Government.”^[4] This law has been interpreted to mean that when you are in possession of credible information that you may have received an overpayment, you have a duty to investigate if you have, indeed, received an overpayment. (The discussion in this section is predicated on the regulation applicable to Medicare Parts A & B. It is possible that different obligations exist with respect to different programs.) Absent extraordinary circumstances, you have six months from the receipt of the information to conduct the investigation.^[5] If you identify^[6] any overpayments, you must promptly ^[7] return them to the government.

As part of your compliance program

Even in the absence of any suspected problem, billing audits are useful compliance monitoring tools. A robust compliance program will help you avoid errors and can reduce culpability when errors occur (such as requiring reduced damages if the court finds the defendant has self-reported and cooperates with any investigation).^[8] Billing audits can also be useful to give you information that will inform you on how best to interact with outside auditors.

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