EXPECT INCREASED ENFORCEMENT: CMS TO SEEK REFUNDS OF MEANINGFUL USE EHR INCENTIVE PAYMENTS

The Office of Inspector General ("OIG") and the Centers for Medicare & Medicaid Services ("CMS") recently published work plans and reports detailing their intent to increase enforcement and audits of eligible providers who received meaningful use EHR incentive payments. Eligible providers should anticipate increased government scrutiny of past and future meaningful use EHR incentive payments and prepare accordingly by: (i) maintaining sufficient records for each meaningful use EHR incentive payment attestation; (ii) watching for communications from government officials and their third party auditing companies regarding an audit or investigation; and (iii) developing a response plan to efficiently resolve outstanding audits. Failure to respond in a timely and appropriate manner to investigations and audits may result in repayment of meaningful use EHR incentive payments and adjustments to Medicare Part A or Part B reimbursement.

WORK PLANS & REPORTS

In its original Fiscal Year 2017 HHS/OIG Work Plan, OIG broadly stated that it would: (i) "review Medicare incentive payment data to identify payments to providers that should not have received incentive payments (e.g., those not meeting selected meaningful use criteria)"; (ii) assess CMS's plans to oversee future meaningful use EHR incentive payments ("Meaningful Use Payments"); and (iii) assess CMS's plans to take "corrective actions" to recover the erroneous Meaningful Use Payments. Last month, OIG issued a report entitled *Medicare Paid Hundreds of Millions in Electronic Health Record Incentive Payments That Did Not Comply With Federal Requirements* in which it concluded that CMS inappropriately paid over $729 million in Meaningful Use Payments to eligible providers ("EPs") who did not meet meaningful use requirements. OIG also reviewed all payments made to deceased EPs and EPs who switched between Medicaid and Medicare meaningful use EHR incentive programs during the audit period and determined that CMS made $2,344,680 in inappropriate Meaningful Use Payments to 471 EPs.

The Meaningful Use Payment audits were based upon a random sample of Meaningful Use Payments made to 100 EPs between May 2011 and June 2014. From this sample, OIG identified 14 EPs with Meaningful Use Payments totaling $291,222 that did not meet meaningful use requirements because the EP failed to maintain or provide adequate attestation support, failed to accurately report meaningful use on patient data from the appropriate reporting period or insufficiently used certified EHR technology. OIG then extrapolated these results to the over 250,000 EPs who had received such payments during the same period and concluded that CMS had overpaid $729,424,395 in Meaningful Use Payments. OIG posited that the erroneous payments occurred because the sampled providers failed to maintain support for their meaningful use attestations and CMS had conducted minimal reviews of the attestations.

CMS concurred with four of six OIG recommendations in the report. Specifically, CMS agreed to: (i) pursue recoupment of the $2,635,902 of inappropriate Meaningful Use Payments made to the 485 EPs specifically identified in OIG's report; (ii) educate EPs on proper documentation requirements; (iii) perform "targeted risk-based audits to strengthen the program integrity"; and (iv) implement edits within its system to ensure EPs who switch payment during a given year receive payment under only one meaningful use EHR incentive program. However, CMS did not commit to pursuing recovery of the estimated $729 million in inappropriate Meaningful Use Payments or to review a random sampling of documentation to identify additional inappropriate Meaningful Use Payments.

This response did not, apparently, satisfactorily address the government's concerns. Senators Orrin Hatch (R-UT) and Charles Grassley (R-IA) recently issued a letter to CMS Administrator Seema Verma calling into question the adequacy of CMS's response and asking CMS to recover these overpayments. Additionally, in a recent update to the 2017 Work Plan, OIG states that: (i) between January 1, 2011 and December 31, 2016, CMS made Medicare Meaningful Use Payments to hospitals totaling $14.6 billion; (ii) previous OIG reviews reveal that hospitals have been overpaid by $66.7 million in Medicaid Meaningful Use Payments and will be overpaid by an additional $13.2 million in the future due to inaccurate calculations of hospitals' total Meaningful Use Payments; and (iii) the agency intends to review these calculations to determine their accuracy and to identify potential overpayments to the hospitals. A report of the agency's findings is expected next year.

As noted above, CMS has already agreed to work with its contractor to recover the meaningful use EHR incentive overpayments specifically identified by OIG in its report, and, in light of OIG's continuing review and increasing pressure, we currently expect CMS to expand this

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pursuit. Therefore, it is important for EPs who participated in these incentive programs to maintain all documentation used to support each attestation of meaningful use and to develop a plan for responding to audits and investigations, which includes identifying the necessary stakeholders and coordinating with legal counsel to timely respond and navigate legal requirements.

If you have any questions regarding CMS or OIG's audit of Meaningful Use Payments, please contact:

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