



February 13, 2023

Chiquita Brooks-LaSure
Administrator
Centers for Medicare and Medicaid Services
Department of Health and Human Services
200 Independence Ave, SW
Washington, DC 20201

RE: Medicare Program; Medicare Parts A, B, C and D Overpayment Provisions of the Affordable Care Act (CMS-4201-P)

Dear Administrator Brooks-LaSure,

The National Partnership for Healthcare and Hospice Innovation (NPHI), a national membership organization representing nearly 100 non-profit, community-based advanced illness providers across 36 states and DC, is pleased to submit the following comments in response to the Centers for Medicare & Medicaid Services' (CMS) proposed rule to amend the existing rule at 42 C.F.R. § 401.305(a)(2), 422.326(c), and 423.360(c) for Medicare Parts A, B, C and D (hereafter "Sixty Day Rule") regarding the standard for an "identified overpayment."

In short, NPHI opposes the proposed change because it would create significant and unnecessary confusion and legal risk for our Part A, not-for-profit hospice members. These providers engage in good faith compliance and billing reviews to identify and, as appropriate, report and refund identified overpayments. The current rule, finalized for Part A and B providers in 2016 following significant industry notice and comment, provides a clear standard for identification of an overpayment that includes a common-sense approach to allow for "reasonable diligence" following credible information of a potential overpayment as well as the quantification of the overpayment. These are two pragmatic and necessary steps to align with the Affordable Care Act's statutory requirement to report and refund identified Medicare overpayments within 60 days. CMS proposes to replace these pragmatic standards with a standard fraught with uncertainty, a lack of clarity, and most vexing, an approach that would fail to account for "quantification" of an overpayment that must be both reported and refunded to comply with the statutory requirement.

Hospice organizations often face challenging analyses that involve voluminous clinical records related to their terminally ill patients to determine whether Medicare overpayments exist. A standard that embraces a period for "reasonable diligence" is necessary and without it, hospices will face unnecessary uncertainty as to how to achieve compliance with the Sixty Day Rule. The proposed rule would substitute the federal False Claims Act definition of "knowing" and "knowingly" to establish a new standard for when a provider has identified an overpayment. This proposed standard will impose great uncertainty and legal risk on Medicare providers, including hospices, given the vagueness and ever evolving nature of the term "knowingly." The False Claims Act and the "knowing" standard is regularly interpreted by Federal courts, often in inconsistent ways. As such, the case law evolves continuously. Imposing an unclear, obtuse standard to replace a common-sense existing standard that has been working for both compliance-minded providers and CMS Medicare contractors would be a step-backward in the efficient and effective administration of the Medicare program. This is especially so

with regard to the proposed deletion of the “quantification” standard from the identification of an overpayment.

Moreover, the proposed change to the Sixty Day Rule would significantly increase the risk on our well-meaning hospice provider members of unwarranted False Claims Act liability based on allegations that they knowingly failed to identify, report and refund an overpayment within some unclear timeframe based on a “reckless disregard or deliberate indifference” standard that is prone to a high degree of subjectivity. NPHI respectfully submits that deleting the practical standards of “reasonable diligence” and quantification to align with an unclear, constantly evolving False Claims Act definition and interpretation of “knowingly” is unwise.

Thank you again for the opportunity to provide comment on CMS’s proposed regulation regarding Medicare overpayments. As always, NPHI appreciates the opportunity to provide insight and commentary into how proposed regulatory changes may impact the not-for-profit hospice and palliative care provider community. If you have any questions concerning these comments or want to discuss these issues further, please contact NPHI’s Policy Director, Ethan McChesney, at emcchesney@hospiceinnovations.org.

Sincerely,

A handwritten signature in blue ink that reads "Tom Koutsoumpas". The signature is fluid and cursive, with the first name "Tom" written in a larger, more prominent script than the last name "Koutsoumpas".

Tom Koutsoumpas
Founder and CEO
NPHI