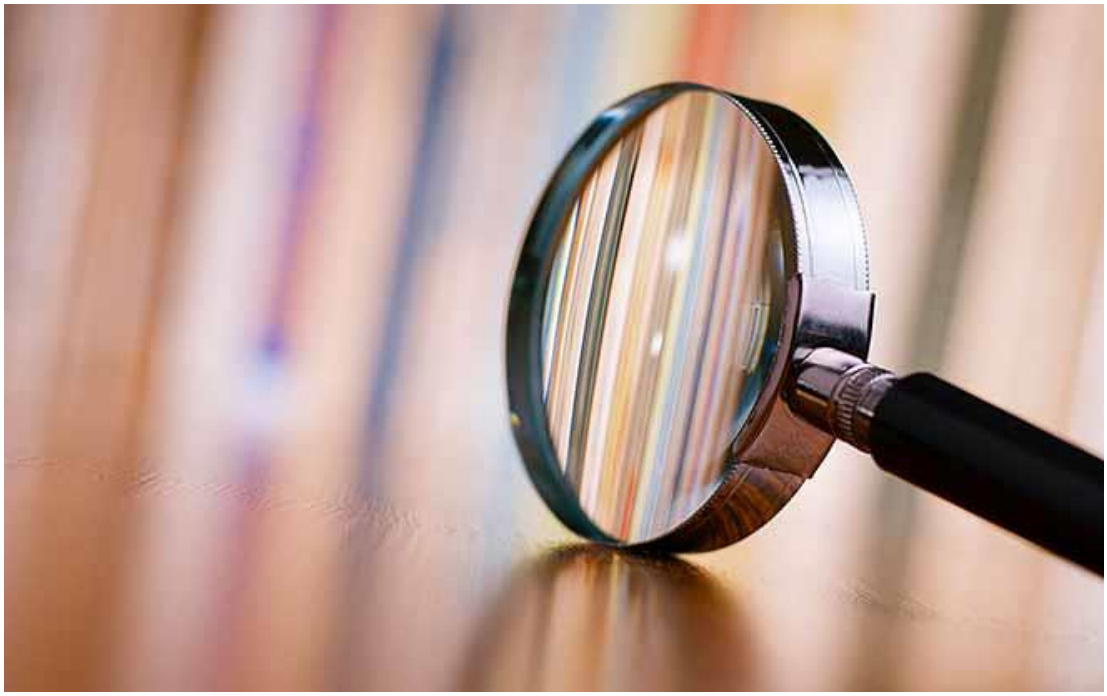
NELSON MULLINS

Healthcare



October 21, 2021

Healthcare Provider Upcoding in Government Investigation Crosshairs

By Hannah L. Cross

A pair of recent reports issued by the Health and Human Services Office of Inspector General ("OIG") and Cotiviti, a Centers for Medicare and Medicaid Services ("CMS") Recovery Audit Contractor ("RAC"), indicate that government enforcement agencies are primed to make healthcare provider upcoding a government focus as it shifts from COVID-related conduct to resuming other enforcement priorities.

Examining hospital inpatient Medicare Severity Diagnosis Related Group (MS-DRG) levels and Evaluation and Management (E/M) claims respectively, OIG and Cotiviti, a RAC encompassing CMS Regions 2 and 3 (including AL, FL, GA, SC, NC, and others), both found a significant increase of healthcare provider billing at the highest severity levels resulting in markedly increased levels of reimbursement. Specifically, the OIG report found that high MS-DRG hospital inpatient stays increased by over 20 percent during the period of FY 2014 through FY 2019, ultimately accounting for almost half of inpatient stays even though the average length of hospital stays remained the same. [1] Cotiviti reported that E/M services billed by providers during a similar period showed a significant increase in Level 4 and Level 5 claims and a corresponding decrease in lower-level claims. [2]

Both OIG and Cotiviti reached essentially the same conclusion, namely that the data trends showing increased high level claims and decreased lower level claims indicate that these services are ripe for upcoding, or, put more bluntly by Cotiviti, a "major likelihood of over-coding" exists given such an increase.

These trends pre-date the COVID-19 pandemic and align with established government enforcement priorities. Notably, the data relied upon by these reports were generated solely by data analytics of provider billing information, a methodology increasingly relied upon by OIG, Department of Justice ("DOJ"), and United States Attorney's Offices ("USAO") to initiate investigations through identifying billing statistical outliers without reliance on traditional whistleblowers or relators under the federal False Claims Act and similar state statutes. These data-mining initiated investigations are low-hanging fruit for government enforcement as they are straightforward and data driven, require low initial allocation of resources, and allow proactive initiation of investigations. As RACs and CMS Uniform Program Integrity Contractors ("UPICs") undertake their own auditing of provider upcoding, misconduct will also be referred to government enforcement agencies where identified.

As hospitals and physician practices update their compliance programs and set audit priorities for 2022, it is advisable to include audits relating to level of care billing and coding. Including these audits as a priority will allow providers to:

- Identify troubling patterns early,
- Critically review the available data,
- Engage relevant experts, and
- Proactively manage any known risk.

These activities will enhance the effectiveness of a provider's compliance program, as well as provide critical documentation in the event a provider receives a government subpoena or other inquiry into its billing practices. Further, as part of its compliance program, providers should consider providing education regarding appropriate level of care billing practices to its healthcare professionals.

Nelson Mullins can assist healthcare organizations in navigating and responding to post-payment reviews, government inquiries, and related enforcement matters. The White Collar Defense and Government Investigations Group and Health Care Team have specific experience responding to regulator inquiries and other government investigations, including into alleged billing upcoding, as well as representing clients in related criminal and civil litigation. Please contact your Nelson Mullins attorney for more information.

---

[1] Trend Toward More Expensive Inpatient Hospital Stays in Medicare Emerged Before COVID-19 and Warrants Further Scrutiny, OEI-02-18-00380. (hhs.gov).

[2] E&M over-coding: How can payers solve this costly challenge? (cotiviti.com).

View on Website

NELSON MULLINS

GET IN TOUCH

Hannah L. Cross

Partner

T 202.689.2928

hannah.cross@nelsonmullins.com