

## OIG Releases 2016 Work Plan

In November 2015, the *Office of Inspector General* (OIG) of the *U.S. Department of Health & Human Services* (HHS) published its *2016 Work Plan*, which highlights the audits, evaluations, and initiatives that the OIG expects to conduct during 2016. The 2016 Work Plan adds new topic areas that the OIG previously had not examined, such as *ICD-10 implementation*, while also updating existing projects and expected report release dates for many relevant healthcare issues, such as claims auditing and the *two-midnight rule*. This *Health Capital Topics* article will highlight the key changes and continued focus areas for the OIG during 2016, as well as emphasize the prudence of organizations to look beyond the *2016 Work Plan* in developing its compliance efforts, particularly in relation to the regulatory thresholds of *fair market value* and *commercial reasonableness*.

In the *2016 Hospital Outpatient Prospective Payment System* (HOPPS) fee schedule, released on November 13, 2015, the *Centers for Medicare and Medicaid Services* (CMS) modified the *two-midnight rule* through changes to the claims review and auditing process.<sup>1</sup> In light of industry feedback and enforcement delays, the OIG plans to analyze how hospital utilization of outpatient and inpatient stays altered under Medicare's *two-midnight rule*.<sup>2</sup> The OIG also plans to analyze how Medicare and beneficiary payments for hospital inpatient and outpatient stays changed by comparing claims for hospital inpatient and outpatient stays in 2012, the year prior to the 2013 effective date of the *two-midnight rule*, to inpatient and outpatient stays in 2013, the year following the effective date of that rule.<sup>3</sup>

As a follow-up from the *2015 Work Plan*, the OIG will continue to conduct an analysis of hospital employee salaries included in hospital cost reports.<sup>4</sup> The OIG uses this information to determine the potential impact on the *Medicare Trust Fund* if there were limits on employee compensation. Further, in the *2015 Work Plan*, the OIG noted that this compensation should represent reasonable payment for services provided,<sup>5</sup> a key aspect of recent healthcare fraud and abuse enforcement.<sup>6</sup>

In response to industry and Congressional feedback, the OIG revised its planned report on federally contracted claim auditor functions and performance. Specifically, the OIG will review the Medicare benefit integrity contractors' activities in calendar years 2012 and 2013, seeking to discover trends in claims auditing activities

and compare claims auditing data from different years, contractors, and aspects of the Medicare program.<sup>7</sup> CMS utilizes a variety of claim auditors to perform evaluations of billing patterns and to conduct investigations into potential fraudulent practices.<sup>8</sup> As discussed in the September 2014 HC Topics article entitled, "*GAO Report on CMS-Payment Review Contractors*," these programs have come under scrutiny for burdensome and duplicative reviews.<sup>9</sup> While the *Medicare Access and CHIP Reauthorization Act of 2015* (MACRA) suspended *recovery audit contractor* (RAC) reviews of claims involving patient status related to the *two-midnight rule* through September 30, 2015, RAC reviews continue to audit other types of claims for Medicare reimbursement.<sup>10</sup>

In other reimbursement-focused reviews, the OIG will review and compare Medicare payments for physician office visits in provider-based clinics to payments for the same services in freestanding clinics in order to determine the difference in payments made to the clinics for similar procedures.<sup>11</sup> This OIG report is expected to assess the potential impact on Medicare of hospitals claiming provider-based status for such facilities.<sup>12</sup> As discussed in this month's HC Topics article, entitled "*Congress Changes Reimbursement Rules for Off-Campus Facilities*," provider-based facilities often receive higher reimbursement under the HOPPS than other facilities using other payment systems for the same services.<sup>13</sup> On a similar aim, the OIG will continue to monitor any payment disparities between *ambulatory surgery centers* (ASCs) and hospital outpatient departments for similar surgical procedures performed, which the OIG may use to recommend reformulation of the payment rates for these facilities.<sup>14</sup> Finally, the OIG will review payments for imaging services to determine whether they reflect the actual cost to the facilities and to compare the utilization rates with industry practices, focusing specifically on the practice expense components.<sup>15</sup>

The OIG's *2016 Work Plan* also includes reviews related to quality of care issues for federal healthcare program beneficiaries. For example, the OIG plans to investigate inpatient rehabilitation facilities to determine if there are any adverse events in post-acute care for Medicare beneficiaries.<sup>16</sup> As part of this investigation, the OIG will seek to pinpoint any repeated issues that contributed to adverse events, determine whether these

events were preventable, and estimate the costs associated with these adverse events.<sup>17</sup> A 2013 study published in the *Journal of Patient Safety* estimated that over 210,000 lethal adverse events occur per year, which often contributes to the permanent injury or death of hospital patients.<sup>18</sup> The prevalence of adverse events contributes to the expense of medical malpractice insurance, which healthcare entities often provide for their practitioners.<sup>19</sup> The *Affordable Care Act's* (ACA) focus on improving quality of care could also help lower the malpractice costs through reducing the occurrence of adverse events.<sup>20</sup> Additionally, *healthcare-acquired conditions* (HACs) remain a concern for the OIG in 2016. Specifically, the OIG is interested in whether certain states provided Medicaid payments for HACs, despite a 2011 prohibition outlawing federal payments for medical assistance relating to a HAC.<sup>21</sup>

Other planned OIG reviews that are discussed in previous OIG work plans include a report on the utilization of *electronic health records* (EHRs) by healthcare providers who participate in CMS initiatives. Specifically, the OIG will review the level of EHR use by *accountable care organizations* (ACOs) participating in the *Medicare Shared Savings Program* (MSSP) to determine the effect EHRs may have on care coordination between providers and the quality of care ultimately provided.<sup>22</sup>

In addition to reviews and reports on issues discussed in previous work plans, the OIG added two (2) noteworthy projects to its *2016 Work Plan*. First, the OIG added a project examining submitted claims that Medicare paid according to the *skilled nursing facility* (SNF) prospective payment system.<sup>23</sup> In 2013, the OIG issued a report noting that SNFs are increasingly billing at the highest level of therapy performed, even when not appropriate.<sup>24</sup> Similarly, the OIG also found that Medicare payments for services “*greatly exceeded SNF’s cost for therapy.*”<sup>25</sup> In response, the OIG plans to determine the extent to which these billing practices were appropriate and in compliance with federal regulations.<sup>26</sup> Based on its findings, the OIG will conduct audits of the payments and services provided to determine any noncompliance with SNF billing requirements.<sup>27</sup>

Second, the OIG plans to review CMS’s implementation of ICD-10, which was released on October 1, 2015. The OIG will review CMS’s management of the implementation of the ICD-10 coding system, which currently supplies the codes for Medicare Parts A and B.<sup>28</sup> As part of this review, the OIG plans to inspect the assistance and guidance provided by CMS and its contractors to hospitals and physicians transitioning to ICD-10, as well as the effect the transition has had on claims processing, including resubmissions, appeals, and medical reviews.<sup>29</sup>

The *2016 Work Plan* provides insight into the areas in which the OIG plans to utilize its resources during 2016, which can help an organization develop its compliance plan for 2016.<sup>30</sup> However, organizations would remain

prudent to also note recent OIG enforcement actions and settlements in developing its compliance plan, most notably the OIG’s June 2015 Special Fraud Alert regarding physician compensation as well as recent settlements in *United States ex rel. Barker v. Columbus Regional Healthcare System et al.*, *U.S. ex rel. Reilly v. North Broward Hospital District*, and *U.S. ex rel. Payne et al. v. Adventist Health System et al.* (which are detailed in the October 2015 Health Capital Topics article entitled, “*Regulatory Scrutiny for Physician Compensation Continues.*”)<sup>31</sup> While these actions and alerts extensively examine the thresholds of *fair market value* and *commercial reasonableness*, the 2016 Work Plan provides little discussion as to these thresholds, even though the OIG has increasingly targeted these issues in the past year. In light of the aforementioned cases, it may be beneficial for healthcare organizations to consider these three cases, the June 2015 Special Fraud Alert, and the *2016 Work Plan* when examining their own compliance programs, particularly in regard to the regulatory thresholds of *fair market value* and *commercial reasonableness*.

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- 1 “Hospital Outpatient Prospective Payment System” Federal Register Vol. 80, No. 219 (November 13, 2015) p. 70298, 70305.
  - 2 “Work Plan Fiscal Year 2016” By OIG, November 2, 2015, <http://oig.hhs.gov/reports-and-publications/archives/workplan/2016/oig-work-plan-2016.pdf> (Accessed 12/16/15), p. 6.
  - 3 *Ibid.*
  - 4 *Ibid.*
  - 5 *Ibid.*, p. 2.
  - 6 For example, see “United States ex rel. Payne et al. v. Adventist Health System et al.,” Case No. 3:12cv856-W (W.D.N.C. February 13, 2013), Relator’s Amended Complaint, p. 11.
  - 7 “Work Plan Fiscal Year 2016” OIG, November 2, 2015, p. 24.
  - 8 *Ibid.*
  - 9 “GAO Report on CMS-Payment Review Contractors” Health Capital Topics, Vol. 7, No. 9 (September 2014).
  - 10 “Medicare Access and CHIP Reauthorization Act of 2015” Pub. L. No. 114-10, § 521, 129 Stat. 87, 176 (April 16, 2015).
  - 11 “Work Plan Fiscal Year 2016” OIG, November 2, 2015, p. 7.
  - 12 *Ibid.*
  - 13 “Congress Changes Reimbursement Rules for Off-Campus Facilities” Health Capital Topics, Vol. 8, No. 12 (December 2015).
  - 14 “Work Plan Fiscal Year 2016” OIG, November 2, 2015, p. 16.
  - 15 *Ibid.*, p. 18.
  - 16 *Ibid.*, p. 10.
  - 17 *Ibid.*
  - 18 “A New, Evidence-Based Estimate of Patient Harms Associated with Hospital Care,” By J.T. James, *Journal of Patient Safety*, Vol. 9, No. 3 (September 2013), p. 127.
  - 19 See generally “Chapter 11: Medical Malpractice and Tort Reform” By Robert James Cimasi, MHA, ASA, FRICS, MCBA, CVA, CM&AA, and Todd A. Zigrang, MBA, MHA, FACHE, ASA, found in “Risk Management and Asset Protection Strategies for Doctors” by David Marcinko, M.D. (forthcoming 2016).
  - 20 “Currents in Contemporary Bioethics: Health Care Reform and Medical Malpractice Claims,” By Mark A. Rothstein, *Journal of Law, Medicine, and Ethics*, Winter 2010, p. 871; See generally “Chapter 11: Medical Malpractice and Tort Reform” By Robert James Cimasi, MHA, ASA, FRICS, MCBA, CVA, CM&AA, and Todd A. Zigrang, MBA, MHA, FACHE, ASA, found in “Risk Management and Asset Protection Strategies for Doctors” by David Marcinko, M.D. (forthcoming 2016).
  - 21 “Payment Adjustment for Provider-Preventable Conditions Including Health Care-Acquired Conditions” Federal Register,

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- Vol. 76, No. 108 (June 6, 2011) p. 32816; “Work Plan Fiscal Year 2016” OIG, November 2, 2015, p. 35.
- 22 “Work Plan Fiscal Year 2016” OIG, November 2, 2015, p. 25.
- 23 *Ibid.*, p. 11.
- 24 “The Medicare Payment System for Skilled Nursing Facilities Needs to be Reevaluated” OIG, September 2015, <http://www.oig.hhs.gov/oei/reports/oei-02-13-00610.pdf> (Accessed 12/22/15).
- 25 “Work Plan Fiscal Year 2016” OIG, November 2, 2015, p. 11.
- 26 *Ibid.*
- 27 *Ibid.*
- 28 *Ibid.*, p. 26.
- 29 *Ibid.*
- 30 “OIG Releases 2016 Work Plan” By Patrick J. Cannon, Esq., et al., *The National Law Review*, November 12, 2015, <http://www.natlawreview.com/article/oig-releases-2016-work-plan> (Accessed 12/22/15).
- 31 “Regulatory Scrutiny for Physician Compensation Continues” *Health Capital Topics*, Vol. 8, No. 10 (October 2015).



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