



330 Independence Ave., SW
Washington, DC 20201

June 23, 2000

Mr. Dick Davidson
American Hospital Association
325 Seventh Street, NW
Washington, DC 20004

Dear Mr. Davidson:

Representatives of the American Hospital Association ("AHA") have related to the Office of Inspector General ("OIG") that many AHA members have concerns with the upcoming implementation of the hospital outpatient prospective payment system ("HOPPS"). According to AHA, some of its members believe that HOPPS is such a new and complex system that coding and billing errors are likely to occur as hospitals and fiscal intermediaries work through the implementation process. As such, the AHA has requested from the OIG a statement of enforcement policy in light of the issues surrounding HOPPS implementation.

First, as we have stated in the past, under the law, hospitals are not subject to civil or criminal penalties for innocent errors, mistakes or even negligence. The Government's primary enforcement tool, the civil False Claims Act ("FCA"), covers only offenses that are committed with *actual knowledge* of the falsity of the claim, *reckless disregard* of the truth or falsity of the claim, or *deliberate ignorance* of the truth or falsity of the claim. The FCA simply does not cover mistakes, errors, or negligence. The other major civil remedy available to the Federal Government, the Civil Monetary Penalties Law, has exactly the same standard of proof. The OIG is very mindful of the difference between innocent errors and negligence ("erroneous claims") on the one hand, and reckless or intentional conduct ("fraudulent claims") on the other.

When billing errors, honest mistakes or negligence result in erroneous claims, the hospital will be asked to return the funds erroneously claimed, but without penalties. In other words, erroneous claims result only in the return of funds claimed in error. Nevertheless, inadvertent billing errors are a significant drain on the programs and all parties need to work cooperatively to reduce the overall error rate.

We recognize that providers will face challenges in implementing the new payment system, and it is during such challenging times that providers need to be especially vigilant in identifying erroneous claims. We believe an effective voluntary compliance program can help hospitals identify erroneous claims, correct the underlying problems causing the erroneous claims and ensure that any overpayments caused by such erroneous claims are promptly returned to the Government. But again, it should be emphasized that civil or criminal penalty action will not be initiated for billing errors due to inadvertence or negligence.

Should a question of improper billing under HOPPS by a hospital arise, as in all cases, in assessing whether there is sufficient knowledge to trigger civil or criminal penalties, the OIG will look at a variety

of factors, including (1) the clarity of the relevant rule; (2) the complexity and novelty of the billing system at issue; (3) the guidance issued by HCFA and/or its agents (e.g., fiscal intermediaries); (4) the extent to which the provider has attempted to ascertain an understanding of the relevant rule; (5) the quality of the efforts of the provider to train personnel on the billing system; and (6) whether the provider has an effective compliance program in place. This list is merely illustrative in order to give your members an appreciation for the kinds of factors the OIG evaluates when investigating allegations of fraud and should not be construed as an exclusive list of factors.

We hope that the foregoing has made it clear that the OIG's law enforcement efforts are not directed toward erroneous claims. Rather, they are focused on false or fraudulent claims that are submitted with the requisite level of intent or knowledge to trigger civil or criminal penalties.

Should you have questions or need of further assistance regarding this issue, please feel free to contact D. McCarty Thornton, Chief Counsel to the Inspector General, at (202) 619-0335.

Sincerely,

/s/

June Gibbs Brown
Inspector General