Founders

THE HEALTH LAW PARTNERS

The RAC Sheet

The Health Law Partners, P.C. ("The HLP") is pleased to send you the November issue of The RAC Sheet. This monthly newsletter will provide up-to-date developments regarding the Recovery Audit Contractor ("RAC") program as it expands nationwide. If you have questions regarding RACs, Medicare audits, Medicaid audits or other payor audits, please call us at (248) 996-8510 or email Abby Pendleton, Esq. or Jessica L. Gustafson, Esq. Please also visit the RAC page of The HLP website.

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FIRST STEPS MADE TOWARD THE MEDICAID RECOVERY AUDIT CONTRACTOR ("RAC") PROGRAM

On November 10, 2010, the Centers for Medicare & Medicaid Services ("CMS") published its much-anticipated Proposed Rule regarding the Medicaid Recovery Audit Contractor ("RAC") program. Section 6411 of the Patient Protection and Affordable Care Act ("Affordable Care Act") requires each State to establish a Medicaid RAC program similar to the existing Medicare RAC program. States are required to contract with Medicaid RACs by December 31, 2010 and implement Medicaid RAC programs by April 1, 2011, unless CMS grants a State an extension (which CMS anticipates granting "rarely, and only under the most compelling of circumstances").

Therefore, Medicaid providers and suppliers should begin to prepare for yet another layer of auditing activity. The Medicaid RAC program is in addition to, and will supplement, existing routine State program integrity audits, Medicaid Integrity Contractor ("MIC") audits, and audits conducted by other State and Federal agencies. According to the Proposed Rule, "Medicaid RACs are not intended to, and do not, replace any State program integrity or audit initiatives or programs." While "overlapping or multiple provider audits may be necessary, [CMS] hope[s] to minimize the likelihood of overlapping audits" by requiring Medicaid RACs to coordinate their efforts with other contractors. Accordingly, CMS proposes to require any entity wishing to become a Medicaid RAC to agree to audit coordination efforts.

Under the Proposed Rule, Medicaid RACs would be compensated on a contingency-fee basis for recovery of overpayments, similar to the payment structure under the Medicare RAC program. CMS notes that existing contingency fees under the Medicare RAC program range from 9 to 12.5 percent. CMS proposes that, in order to receive Federal financial participation, the Medicaid RACs' contingency fees should be limited to the highest level approved under the Medicare program; that is, CMS has proposed that a State only pay a Medicaid RAC contractor a contingency fee up to the highest Medicare RAC contingency rate (12.5 percent). Any additional payment from the State to the Medicaid RAC must be made using State-only funds. With respect to identifying underpayments, under the Proposed Rule Medicaid RACs will be granted flexibility to determine appropriate RAC compensation.

Other noteworthy provisions of the Proposed Rule include the following:

- Medicaid RACs will be required to employ trained medical professionals to review Medicaid claims;
- States "may consider" establishing requirements regarding the documentation of good cause to review Medicaid claims;
- Whenever a Medicaid RAC has reason to believe that fraud or criminal activity has occurred, it must report such activity to appropriate law enforcement officials.

The Affordable Care Act mandates that States have an "adequate appeals process" in place for entities to appeal unfavorable Medicaid RAC determinations. Under the Proposed Rule, CMS proposes to permit States the "flexibility to determine the appeals process that would be available to providers who seek review of adverse RAC determinations." SIgnificantly, this means that the appeals process will likely differ from State-to-State.

THE HLP's MONTHLY RAC TIP: *PIP Hospitals – Watch for RAC denials on RAs*

Following The HLP's submission of numerous written inquiries and phone calls to representatives of CMS, National Government Services, Inc. ("NGS") (the Medicare Affiliated Contractor), and CGI (the Medicare RAC for Region B), on November 8, 2010, CMS published a response to Frequently Asked Questions related to RAC reviews of Periodic Interim Payments ("PIP"). As described by CMS, PIP are "biweekly payments made to a provider enrolled in the PIP program based upon the hospital's estimate of applicable Medicare reimbursement for the current cost report period."

Confusion had arisen among hospitals with respect to the appeals process for PIP claims. Specifically, because "Review Results Letters" were being issued, but "Demand Letters" were not consistently being issued (but sometimes were issued), it was unclear what event would trigger appeal rights with respect to PIP claims.

Pursuant to the recently-posted FAQ, the "discussion period" for PIP claims is initiated by the Review Results Letter. The RA establishes appeal rights for PIP claims. Accordingly, a hospital that has received a PIP claim denial should monitor incoming RAs for the PIP-claim adjustment, as such event will trigger any appeals timeframes.

UPCOMING EVENTS

- On March 31, 2011, Abby Pendleton and Jessica Gustafson will present on the topic of "How RAC Audits and MIC Audits Will Affect Long Term Care Facilities" at the 2011 Health Care Association of Michigan ("HCAM") Spring Leadership Conference.

- On April 10, 2011, Abby Pendleton and Jessica Gustafson will co-speak with Donald H. Romano, a partner at Arent Fox and former Division Director of CMS, at the 2011 Health Care Compliance Association ("HCCA") Compliance Institute on the topic of "Compliance in the Age of EMR."

- On April 20, 2011, Jessica Gustafson will present on the topic of, "An Unprecedented Era of Claims Scrutiny: Successfully Managing ADR/TMR, RAC Audits and MIC Audits" at the Nebraska Hospice and Palliative Care Organization Annual Meeting.

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