

MEDICAID RECOVERY AUDIT CONTRACTOR (“RAC”) PROGRAM PROPOSED RULE PUBLISHED

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On November 10, 2010, the Centers for Medicare & Medicaid Services (“CMS”) published its much-anticipated Proposed Rule regarding the new Medicaid Recovery Audit Contractor (“RAC”) program. Section 6411 of the Patient Protection and Affordable Care Act (“Affordable Care Act”) required each State to establish a Medicaid RAC program, similar to the existing Medicare RAC program. Like Medicare RACs, Medicaid RACs will be tasked to audit claims to identify overpayments and underpayments and will be compensated on a contingency fee basis.

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. CMS anticipates granting such extensions “rarely, and only under the most compelling of circumstances,” such as in circumstances where State law would need to be amended to allow for the adoption of a Medicaid RAC program. Therefore, Medicaid RAC auditing activity is slated to begin in the very near future; Medicaid providers and suppliers should prepare for the possibility of even greater claims scrutiny.

Significantly, for Medicaid providers and suppliers already subject to an unprecedented era of claims scrutiny (e.g., routine State program integrity audits, Medicaid Integrity Contractor (“MIC”) audits, and audits conducted by other State and Federal agencies), the Medicaid RAC program is an additional layer of auditing activity. According to the Proposed Rule, “Medicaid RACs are not intended to, and do not, replace any State program integrity or audit initiatives or programs.” Thus, while CMS acknowledges that “overlapping or multiple provider audits may be necessary,” CMS nonetheless hopes “to minimize the likelihood of overlapping audits” and plans to meet this objective by requiring Medicaid RACs to coordinate their auditing efforts with other contractors.

With respect to compensation for identifying overpayments, under the Affordable Care Act and pursuant to the Proposed Rule, Medicaid RACs will be compensated on a contingency fee basis. This payment structure will be similar to that of the Medicare RAC program. Under the Medicare RAC program, the RACs’ contingency fees range from 9 to 12.5 percent (the RAC reviewing the claims of Michigan providers receives a 12.5 percent contingency fee). In the Proposed Rule, 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 (currently 12.5 percent). Any additional payments from the State to the Medicaid RAC would be made using State-only funds.

With respect to compensation for identifying underpayments, the Affordable Care Act and the Proposed Rule grant States flexibility to determine appropriate compensation for the identification of underpayments. CMS cites its policy as follows: “Consistent with a State’s

obligation to ensure that it pays the right amount to the right provider for the right service at the right time for the right recipient, whatever methodology a State chooses must adequately incentivize the detection of underpayments.” CMS notes that in the Medicare RAC program, overpayment recoveries exceeded underpayment identification by more than a 9:1 ratio; CMS does not anticipate dissimilar results in the Medicaid RAC program.

The Affordable Care Act requires States to have “an adequate appeals process” for entities to challenge unfavorable Medicaid RAC determinations. Neither the Affordable Care Act nor the Proposed Rule set forth a specific appeals process that all States must adopt. Rather, the Proposed Rule notes that, “Each State already has in place an administrative appeals infrastructure... States may utilize the existing appeals infrastructure to adjudicate Medicaid RAC appeals... Alternatively, a State may elect to establish a separate appeals process for RAC determinations, which must also ensure provider adequate due process in pursuing an appeal.” In either scenario, under the Proposed Rule, each State must submit a proposal to CMS describing the appeals process, which must be approved prior to implementing the Medicaid RAC program. Significantly, one result of this flexibility is that the Medicaid RAC appeals process may differ from State-to-State.

Details regarding the Medicaid RAC program will likely be forthcoming over the next few weeks, as the December 31, 2010 contracting deadline approaches. In a recent letter to State Medicaid Directors, CMS notes that questions regarding the Medicaid RAC program may be directed to the CMS Program Integrity Group (<https://www.cms.gov/MedicaidIntegrityProgram/>).