

Attack of the Medicaid RACs

By Sara Kay Wheeler and Stephanie L. Fuller, King & Spalding LLP, Atlanta, GA

Providers will soon face additional Recovery Audit Contractor (RAC) scrutiny, as Section 6411 of the Patient Protection and Affordable Care Act of 2010,¹ as amended by the Health Care and Education Reconciliation Act of 2010² (collectively, PPACA), expands the RAC program to Medicaid.³ Like Medicare Part A and Part B RACs, Medicaid RACs are charged with identifying overpayments and underpayments.⁴ This article provides an overview of the anticipated Centers for Medicare and Medicaid Services (CMS) framework of the Medicaid RAC program, given the guidance that has been released by CMS to date.

Goal of the Medicaid RAC Program

The purpose of the Medicaid RAC program is to identify improper Medicaid payments. CMS estimates that the Medicaid RAC program could save the federal Medicaid program \$80 million in fiscal year (FY) 2011, \$170 million in FY 2012, \$250 million in FY 2013, \$310 million in FY 2014, and \$330 million in FY 2015.⁵ CMS notes, however, that these estimates are “highly uncertain.”⁶ It is clear that states currently are under pressure to balance their budgets, given that Medicaid spending has expanded dramatically while state revenue has declined.

CMS Prepares for Medicaid RAC Implementation

CMS is preparing for the implementation of the Medicaid RAC program.⁷ CMS issued a proposed rule for the Medicaid RAC program on November 10, 2010 (the Proposed Rule). According to the Proposed Rule, states must contract with *one or more* Medicaid RACs. States were required to submit a State Plan Amendment attesting that the state will either establish a Medicaid RAC program or seek exemption from the program by December 31, 2010, unless the state requested, and CMS granted, an extension. Importantly, CMS makes clear in the Proposed Rule that Medicaid RACs are not intended to replace current Medicaid program integrity or audit efforts. Industry participants naturally are wondering when to expect Medicaid RAC activity. Originally, CMS proposed an April 1, 2011, implementation date for state Medicaid RAC programs.⁸ On February 1, 2011, however, CMS issued a bulletin specifying that states will not be required to implement their Medicaid RAC programs by April 1, 2011.⁹ Rather, a new implementation date will be published in the Medicaid RAC Final Rule. CMS did not provide additional insight on when it expects to issue the Final Rule other than it will be issued later this year.¹⁰

While CMS has not issued the Final Rule, the Proposed Rule provides some insight on the likely scope of the Medicaid RAC program. States are required to contract with one or more Medicaid RACs to audit Medicaid claims to identify underpayments and overpayments.¹¹ Medicaid RACs will review post-payment claims consistent with state laws and regulations.¹² Like Medicare Part A and Part B RACs, Medicaid RACs will be compensated on a contingency fee basis for the identification of overpayments. While CMS is allowing states some flexibility in determining the specific Medicaid RAC payment formula, resulting contingency fees may not exceed that of the highest contingency fee Medicare RAC arrangement—which is currently 12.50%—unless the state submits, and CMS approves, a waiver of the specified maximum contingency rate.¹³ Any amount exceeding the specified maximum rate is not eligible for federal financial participation, unless a waiver of the specified maximum rate has been approved by CMS.¹⁴ With respect to the identification of underpayments, the Proposed Rule provides that states may establish a set fee *or* reimburse Medicaid RACs on a contingency basis.¹⁵ In addition, while providers must be permitted to appeal Medicaid RAC determinations, states may utilize their current appeals structure to handle such appeals.¹⁶ Comments on the Proposed Rule were due January 10, 2011. Not surprisingly, several industry participants including, but not limited to, the Federation of American Hospitals (Federation), the American Hospital Association (AHA), and former and current Medicare Part A and Part B RAC contractors submitted comments on the Proposed Rule.

Medicaid RAC Programs Likely to Vary State to State

As the Proposed Rule indicates, states will have broad discretion regarding the Medicaid RAC program design and the number of RACs with which they elect to contract. According to a supporting statement CMS released in September 2010, this discretion will enable states to tailor RAC activities to the uniqueness of their Medicaid program and target areas prone to improper Medicaid payments.¹⁷ Accordingly, Medicaid RAC programs are likely to vary from state to state. Although CMS has not issued the Final Rule, states are beginning to issue requests for proposals (RFPs). A review of some of the RFPs issued to date confirms that the structure of the state Medicaid RAC programs will vary unless CMS issues additional boundaries in the Final Rule.

For instance, should CMS not establish a national look-back period in the Final Rule, providers operating in multiple states would likely be subject to different look-back periods. For example, the Mississippi Medicaid RAC RFP provides that



Medicaid RACs will not be permitted to review claims prior to January 1, 2008, while Ohio's Medicaid RAC RFP suggests that Medicaid RACs may not review claims more than five years past the date of the initial determination. In addition, the type of Medicaid claims subject to Medicaid RAC review may vary if CMS does not outline the specific Medicaid claims (e.g., Medicaid fee-for-service and/or Medicaid managed care) subject to Medicaid RAC review in the Final Rule. As noted, the AHA submitted comments on the Proposed Rule and urged CMS to exclude Medicaid managed care claims from Medicaid RAC review.¹⁸ Notably, the Ohio Medicaid RAC RFP provides that Medicaid RACs are only permitted to review Medicaid fee-for-service claims. Thus, it is conceivable that the types of Medicaid claims subject to Medicaid RAC review could also vary state to state.

While the precise limits of Medicaid RAC reviews remains uncertain at this point, one thing is clear, states will influence the structure of their Medicaid RAC programs. Thus, providers operating in multiple states will need to understand the specific Medicaid RAC framework for each state in which they operate.

Duplication of Audits

Given that providers are already subject to audits by an array of entities including, but not limited to, Medicare Administrative Contractors (MACs), Medicare Part A and Part B RACs, Zone Program Integrity Contractors (ZPICs), Program Safeguard Contractors (PSCs), and Medicaid Integrity Contractors (MICs), the addition of Medicaid RACs into the already crowded contractor landscape creates some concern as to how Medicaid RAC audit efforts will be coordinated so as to avoid duplicative audits.¹⁹ To illustrate the proliferation of the contractor landscape, below is a map of the various contractors authorized to review provider claims in Georgia.

As providers are well aware, Medicaid claims already are subject to audits by the federal MIC program. While the Proposed Rule provides that states need to ensure that Medicaid RAC audits do not overlap audit efforts of other government contractors and state and federal law enforcement entities, the Proposed Rule does not provide specific guidelines on how to avoid such duplication. As noted, several organizations submitted comments on the Proposed Rule, and many of the comments expressed concern regarding the potential

Medicaid

- Thomson Reuters (Review of Provider MIC) →
- Health Integrity (Audit MIC) →
- Strategic Health Solutions (Education MIC) →
- Medicaid Fraud Control Unit of Georgia (MFCU) →
- Medicaid RAC(s) (TBD) →

Medicare

- ← Cahaba Government Benefit Administrators (A/B MAC, Jurisdiction 10)
- ← CIGNA Government Services (DME MAC, Jurisdiction C)
- ← Palmetto GBA (Home Health and Hospice MAC, Jurisdiction C)
- ← Connolly Consulting (A/B RAC, Region C)
- ← Part C and Part D RAC (TBD)



Potential Fraud


AdvanceMed Corporation
(ZPIC, Zone 5)

duplication of audits.²⁰ Noting the existence of the MICs, the Federation recommended that the Medicaid RAC program not be implemented until there are clear guidelines on how coordination among the various state and federal contractors will be accomplished.²¹ In addition, the Federation suggested that Medicaid RACs should be excluded from reviewing any claim for which payment has been denied or issues that are already addressed by other program integrity contractors.²² Similarly, the AHA urged CMS to revise the Final Rule to specifically prohibit Medicaid RACs from conducting audits on claims under review by a Medicaid Integrity Program contractor or other entity.²³ Unless CMS issues clear guidelines on how states should avoid duplicate audits, states may adopt varying methods to reduce the risk of duplicative audits. For example, the Ohio Medicaid RAC RFP provides that the Medicaid RAC will be required to build and maintain a data warehouse to minimize duplication of audits.

Conclusion

Providers can monitor the implementation of state Medicaid RAC programs on CMS's Medicaid RAC "At-a-Glance" website, available at www.cms.gov/medicaidracs/home.aspx.

The website includes, among other things, whether CMS has received a SPA, whether an exception to the Medicaid RAC program has been requested by a state, and the type of Medicaid RAC fee structure.

In addition to information released by CMS regarding the Medicaid RAC program, providers should consider monitoring state information concerning the Medicaid RAC program, as the ultimate structure of the state Medicaid RAC programs will be influenced both by CMS and the states. Although CMS has not issued the Final Rule and some states have yet to issue RFPs, providers should begin preparing for the arrival of the Medicaid RACs. Importantly, providers should consider assessing their contractor preparedness and their ability to timely respond to Medicaid RACs. 

About the Authors

Sara Kay Wheeler (skwheeler@kslaw.com) is a Partner in King & Spalding's Healthcare Practice Group in Atlanta, GA. She has extensive experience in the creation and implementation of corporate compliance programs and investigations, government contractor audits (including RACs, MACs, MICs, PSCs and ZPICs), voluntary disclosure strategies, clinical research compliance, and managed care arrangements. Ms. Wheeler also works with King & Spalding's Special Matters Group to defend healthcare providers that are investigated by federal and state enforcement entities.

Stephanie L. Fuller (sfuller@kslaw.com) is an Attorney in King & Spalding's Healthcare Practice Group in Atlanta, GA. She represents healthcare clients in government investigations, internal investigations, and complex business disputes. In addition, she advises clients on federal and state regulatory issues, including Medicare and Medicaid reimbursement, government contractor audits (including RACs, MACs, MICs, PSCs and ZPICs), compliance, and fraud and abuse. She is also a member of AHA's Young Professionals Council and Chair of its Publications Work Group.

Endnotes

- 1 PPACA, Pub. L. No. 111-148, 124 Stat. 751 (2010).
- 2 Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).
- 3 Section 6411 of PPACA also expands the RAC program to Medicare Parts C and D.
- 4 PPACA, Section 6411.
- 5 Medicaid Program; Recovery Audit Contractors, 75 Fed. Reg. 69,037 (Nov. 10, 2010) (to be codified at 42 C.F.R. pt. 455).
- 6 Medicaid Program; Recovery Audit Contractors, 75 Fed. Reg. 69037 (Nov. 10, 2010) (to be codified at 42 C.F.R. pt. 455).
- 7 See Agency Information Collection Activities: Proposed Collection; Comment Request; 75 Fed. Reg. 55330 (Sept. 10, 2010); Medicaid Program; Recovery Audit Contractors, 75 Fed. Reg. 69037 (Nov. 10, 2010) (to be codified at 42 C.F.R. pt. 455).
- 8 See Medicaid Program; Recovery Audit Contractors, 75 Fed. Reg. 69037 (Nov. 10, 2010) (to be codified at 42 C.F.R. pt. 455); a copy of the State Medicaid Director letter is available at www.cms.gov/smdl/downloads/SMD10021.pdf.
- 9 A copy of the CMS bulletin is available at www.nebmed.org/uploadedFiles/RAC%20delay.pdf.
- 10 *Id.*
- 11 See PPACA, Section 6411; Medicaid Program; Recovery Audit Contractors, 75 Fed. Reg. 69037 (Nov. 10, 2010) (to be codified at 42 C.F.R. pt. 455).
- 12 Medicaid Program; Recovery Audit Contractors, 75 Fed. Reg. 69037 (Nov. 10, 2010) (to be codified at 42 C.F.R. pt. 455).
- 13 *Id.*
- 14 *Id.*
- 15 *Id.*
- 16 *Id.*
- 17 A copy of the supporting statement is available at www.kslaw.com/Library/publication/HH092010_Statement.pdf.
- 18 A copy of the AHA letter is available at www.aha.org/aha/letter/2010/101220-cl-cms-6034.pdf.
- 19 *Id.*
- 20 See, e.g., The AHA's comments available at www.aha.org/aha/letter/2010/101220-cl-cms-6034.pdf; The Federation's comments available at www.fah.org/fahCMS/Documents/On%20The%20Record/Public%20Comments/2011/RA_medicaid_comments.pdf.
- 21 A copy of the Federation's letter is available at www.fah.org/fahCMS/Documents/On%20The%20Record/Public%20Comments/2011/RA_medicaid_comments.pdf.
- 22 *Id.*
- 23 A copy of the AHA letter is available at www.aha.org/aha/letter/2010/101220-cl-cms-6034.pdf