

# PUBLICATION

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## RACs Hit the Medicaid Trail - The Times they are Changing

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The Patient Protection and Affordable Care Act (PPACA) requires states to contract with Recovery Audit Contractors (RACs) by December 31, 2010 to identify underpayments and overpayments in Medicaid programs. The Centers for Medicare & Medicaid Services (CMS) published a proposed rule in the Federal Register establishing the contracting parameters and requiring adequate appeal processes for adverse RAC determinations.

### Argument for Exemptions

Under PPACA, each state is required to establish a Medicaid RAC program through the State Plan amendment process and to implement the program no later than April 1, 2011. The Medicaid RACs are intended to supplement existing integrity efforts by the states. CMS established a look back period of five years for audits in their September 29, 2010 Informational Bulletin to the Medicaid Integrity Group. The American Hospital Association (AHA) urged CMS to use its authority to exempt states with Medicaid Integrity Programs (MIPs), Medicaid managed care programs (MCOs) and other pilot and demonstration programs from the Medicaid RAC program in their December 20, 2010 comment letter to the proposed Medicaid RAC rule. The purpose of the exemptions is to "avoid creating a disincentive for states and hospitals to engage in meaningful efforts to reform our health care payment system."

### RAC Fees

CMS's proposed rule suggests that states pay RACs on a contingency fee basis for Medicaid overpayments recovered. While the contingency fee payment amount is to be similar to that under the Medicare RAC program, CMS proposes to only provide Federal Financial Participation (FFP) for fees that are not "in excess of the then highest Medicare RAC contingency fee unless a state requests an exception from CMS and provides an acceptable justification." Total fees paid may not exceed the overpayment amounts collected. States must maintain an accounting record of amounts recovered and paid. States must report to CMS overpayments based on the net amount remaining after all fees are paid to the Medicaid RAC. When the RAC identifies overpayments but may not be able to recover them, states are still required to refund the federal share of overpayments back to the Federal government. The state may deduct from the payment any contingency fee paid to the RAC. States may elect to pay RACs on a contingency fee, set fee or other fee structure for identifying underpayments. CMS will monitor the fee payment methodologies and timing of the payments, and may issue future regulations based on its findings.

### Appeals Process

CMS will provide states with technical support and assistance to benefit from the lessons learned during the Medicare RAC demonstration. States must establish appeal processes and may utilize existing processes as long as approved under a State Plan amendment. States may consider establishing requirements regarding documentation of good cause to review a claim. This issue has been very contentious in the current RAC and RAC demonstration appeals because providers are frustrated with administrative bodies declining jurisdiction to hear the issue of whether the RACs had good cause to reopen claims.

CMS also proposed that RACs be required to report to appropriate law enforcement officials when they have reasonable grounds to believe that fraud or criminal activity has occurred. CMS proposed that states coordinate Medicaid RAC activity with other auditor activity on a state and federal level because states are obligated to ensure that Medicaid RACs do not duplicate or compromise both audit and investigation or law enforcement efforts of other bodies or agencies.

The AHA December 20, 2010 comment letter to the proposed rule also urges CMS to revise its rule to add additional safeguards implemented by the Medicare RAC program to avoid the mistakes realized under the Medicare RAC Demonstration Program.

Comments to CMS's proposed rule published on November 10, 2010 are due no later than 60 days after the date of publication. Should you have questions please contact your Baker Donelson attorney.