

## **HEALTH CARE REFORM EXPANDS THE RAC PROGRAM**

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The recently enacted health care reform legislation, formally known as the Patient Protection and Affordable Care Act (PPACA), calls for significant expansion of the Recovery Audit Contractor (RAC) Program. The permanent RAC program, which is currently operational in all 50 states, reviews services provided under Medicare Parts A and B. Pursuant to the mandates set forth in the PPACA, the RAC program will be expanded to Medicare Parts C and D, as well as the Medicaid program.

With regard to the Medicaid program, Section 6411(a) of the PPACA requires all states to contract with at least one RAC by December 31, 2010. The contractors' mission will be the same as that under the Medicare RAC Program: to identify underpayments and overpayments, and to recoup Medicaid overpayments. In addition, like their Medicare counterparts, Medicaid RACs will be paid on a contingency fee basis. Each state will be permitted to determine the amount of the contingency fee paid to RACs with which it contracts.

The PPACA also requires the states to provide assurances to the department of Health and Human Services that the state has "an adequate process" for entities to appeal adverse determinations made by the Medicaid RACs. While the states currently have Medicaid appeals processes in place, it is uncertain whether the current processes will be deemed to be "adequate" by HHS. In addition, the PPACA requires Medicaid RACs to coordinate their efforts with state and federal law enforcement, including the Department of Justice and the FBI. The purpose of this coordination is likely two-fold: (1) to reduce the risk of repetitive audits and (2) to act as a fraud detection vehicle. Additional clarifications with regard to the Medicaid expansion are expected, as the PPACA also requires the Department of Health and Human Services to promulgate additional regulations regarding the implementation of the Medicaid RAC program.

It is important to note that the Medicaid RAC program is in addition to and not in lieu of the Medicaid Integrity Program (MIP). Although some comparisons have been drawn between Medicaid RACs and the MIP's Medicaid Integrity Contractors (MICs), there are several important distinctions. For example, the Medicaid RACs will contract with individual states, while the MICs contract directly with the federal government through the Centers for Medicare and Medicaid Services (CMS). In addition, the MICs are not paid on a contingency fee basis and, thus, do not have the same incentives to identify overpayments. Whether these two programs will be merged in the future remains to be seen.

Section 6411(b) of the PPACA also expands the RAC program to Medicare Parts C and D. In addition to the expansion, the PPACA sets forth certain "special rules" for Part C and D RACs. First, the RACs will be required to ensure that Medicare Advantage and prescription drug plans under Parts C and D have anti-fraud plans in effect. The RACs will also be required to review the effectiveness of such anti-fraud plans. In addition, the

RACs will be required to examine claims for reinsurance payments to determine whether plans submitting those claims incurred costs in excess of the allowable reinsurance costs. Finally, the RACs will be required to review estimates submitted by prescription drug plans with respect to the enrollment of “high cost beneficiaries” and to compare such estimates with the numbers of such beneficiaries actually enrolled by such plans. As with the Medicaid RAC contracts, the PPACA requires the Part C and D contracts to be in place prior to the end of 2010.

Section 6411(c) of the PPACA also requires the Secretary of the Department of Health and Human Services, acting through the Administrator of CMS, to submit an annual report to Congress outlining the effectiveness of the RAC Program under Medicaid and Medicare. The report is required to include recommendations for the expansion or improvement of the program.

Wachler & Associates, P.C. is a leading law firm nationwide in defense of Recovery Audit Contractor audits. If you need assistance with preparing for or defending a RAC or third party payor audit, or if you have any other questions regarding how the Patient Protection and Affordable Care Act may impact your practice, please contact one of our attorneys at 248-544-0888.