CMS Issues Proposed Rule for the Establishment of State-Based Medicaid Recovery Audit Contractor (RAC) Programs

On November 10, 2010, CMS published a proposed rule intended to guide States in establishing Medicaid Recovery Audit Contractor (RAC) programs. *The Patient Protection and Affordable Care Act* mandates that each State establish a RAC program by December 31, 2010. This rule is intended to implement the statutory requirement, and CMS has proposed a Medicaid RAC program that closely resembles the ongoing Medicare RAC program. In brief, a Medicaid RAC would be a contractor tasked with identifying Medicaid underpayments and overpayments made to providers. A copy of the rule is available here. Comments will be accepted until January 10, 2011.

Key provisions of the proposed rule and CMS's preamble include the following:

- Each State would need to submit a state plan amendment (SPA) establishing a Medicaid RAC program by December 31, 2010. CMS would not require, however, that the RACs be fully implemented until April 1, 2011. If a State needs legislative authority to establish the RAC, it would need to explain so in its SPA. While CMS has the authority to exempt States from establishing a Medicaid RAC program, it anticipates granting exceptions "rarely, and only under the most compelling of circumstances." This language emphasizes CMS's expectation that each State establish a RAC program, and particularly that each legislature pass any necessary enabling legislation in short order.
- States must pay RACs on a contingency fee basis. The maximum permitted payment to a RAC is the highest rate CMS pays to any Medicare RAC, currently 12.50%, unless the State can justify a higher rate to CMS.
- State payments to RACs must be based only on amounts actually recovered by the State. Fees cannot be paid, or must be returned by a RAC if already paid, for amounts identified by a RAC and not recovered by the State or amounts initially recovered by the State but returned to the provider on appeal.
- States would be required to establish a provider appeals process, which could be based on existing Medicaid appeals procedures or unique to the RAC program. In either circumstance, States would need to have their appeals process prior-approved by CMS.
- CMS seeks to encourage States to incentivize adequately the detection of underpayments. Yet the program ultimately is designed to identify overpayments, as payments to RACs cannot exceed the total amount of overpayments collected. CMS's experience with the Medicare RAC program was that the ratio of overpayments to underpayments identified by its contractors was 9:1. In other words, the overwhelming odds are that a Medicaid RAC audit will result in identifying overpayments, not underpayments.
- When Medicaid RACs have a reasonable basis for believing that they have detected fraud or other criminal activity, they will be required to report these findings to the appropriate law enforcement authorities. A State would be permitted to reward RACs for amounts collected pursuant to a civil or criminal proceeding.

- Addressing provider concern regarding the lack of medical experience of the Medicare RACs, CMS will require that Medicaid RACs employ trained medical personnel to review the Medicaid claims. Also responding to provider complaints related to the Medicare RAC program, CMS encourages States to consider requiring their Medicaid RACs to document their good cause basis for selecting a claim for further review.
- RAC efforts would be intended to complement, but not replace, State program integrity efforts. To limit the occurrence of overlapping or multiple audits, States will be required to coordinate their ongoing audit activities with those performed by the RACs.

If you have questions regarding the proposed rule, please contact the Ropes & Gray attorney with whom you regularly work.