DEPARTMENT OF HEALTH AND HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850

SMDL# 10-021
ACA# 10

October 1, 2010

Re: Recovery Audit Contractors (RACs) for Medicaid

Dear State Medicaid Director:

This letter is part of a series of letters intended to provide preliminary guidance on the implementation of the Affordable Care Act (P. L. 111-148). Specifically, this letter provides initial guidance on section 6411 of the Affordable Care Act, *Expansion of the Recovery Audit Contractor (RAC) Program*, which amends section 1902(a)(42) of the Social Security Act (the Act) requiring States to establish programs to contract with RACs to audit payments to Medicaid providers by December 31, 2010. The Centers for Medicare & Medicaid Services (CMS) expects States to fully implement their RAC programs by April 1, 2011. As required by statute, CMS will be issuing regulations in this area shortly, providing additional guidance.

State Medicaid RACs

Under Section 1902(a)(42)(B)(i) of the Act, States and Territories are required to establish programs to contract with one or more Medicaid RACs for the purpose of identifying underpayments and overpayments and recouping overpayments under the State plan and under any waiver of the State plan with respect to all services for which payment is made to any entity under such plan or waiver. States must establish these programs in a manner consistent with State law, and generally in the same manner as the Secretary contracts with contingency fee contractors for the Medicare RAC program.

States and Territories will need to submit to CMS a State plan amendment (SPA) through which the State will either attest that it will establish a Medicaid RAC program by December 31, 2010, or indicate that it is seeking an exemption from this provision. State programs to contract with Medicaid RACs are not required to be fully operational by December 31, 2010. States should submit Medicaid RAC SPAs to their respective CMS Regional Offices.

Many States already have experience utilizing contingency-fee-based Third Party Liability recovery contractors. CMS will allow States to maintain flexibility in the design of Medicaid RAC program requirements and the number of entities with which the States elect to contract within the parameters of the statutory requirements. There are a number of operational and policy considerations in State Medicaid RAC program design (some of which will be discussed in greater depth in future rulemaking) such as:

a. Qualifications of Medicaid RACs;
b. Required personnel - for example physicians and certified coders;
c. Contract duration;
d. RAC responsibilities;
e. Timeframes for completion of audits/recoveries;
f. Audit look-back periods;
g. Coordination with other contractors and law enforcement;
h. Appeals; and
i. Contingency fee considerations.

Finally, we note that States may not supplant existing State program integrity or audit initiatives or programs with Medicaid RACs. States must maintain those efforts uninterrupted with respect to funding and activity.

Exceptions

Section 1902(a)(42)(B)(i) of the Act specifies that States shall establish programs under which they contract with Medicaid RACs subject to such exceptions or requirements as the Secretary may require for purposes of a particular State. This provision enables CMS to vary the Medicaid RAC program requirements. For example, CMS may exempt a State from the requirement to pay Medicaid RACs on a contingent basis for collecting overpayments when State law expressly prohibits contingency fee contracting. However, some other fee structure could be required under any such exception (e.g., a flat fee arrangement).

States that otherwise wish to request variances with respect to, or an exception from, Medicaid RAC program requirements will need to submit to CMS requests in writing from the State's Medicaid Director to the CMS/ Medicaid Integrity Group. We will evaluate requests from States in a timely manner. CMS anticipates granting complete Medicaid RAC program exceptions rarely and only under the most compelling of circumstances.

As noted above, all States will need to submit SPAs which either attest that they will establish compliant Medicaid RAC programs, or indicate the reason for not doing so. For States that require a State legislative change granting authority to establish a Medicaid RAC program, the SPA can be submitted indicating that the Medicaid RAC program cannot be established until legislative authority is granted.

Contingency Fees and Other Payment Matters

Sections 1902(a)(42)(B)(ii)(I) and (II) of the Act provide that payments to Medicaid RACs are to be made only from amounts "recovered" on a contingent basis for collecting overpayments and in amounts specified by the State for identifying underpayments. CMS will not dictate contingency fee rates, but will establish a maximum contingency rate for which Federal Financial participation (FFP) will be available. This rate will be the highest contingency fee rate that is paid by CMS under the Medicare RAC program.

Currently, the four Medicare RAC contracts have an established period of performance of up to five years, beginning in 2009. The highest contingency fee rate is 12.5 percent. To make States aware of future Medicaid RAC contingency fee cap amounts, we expect to publish in a *Federal Register* notice, no later than December 31, 2013, the highest Medicare RAC contingency fee rate. This rate will apply to FFP availability for any Medicaid RAC contracts with a period of performance beginning on or after July 1, 2014. The established cap would be in place based on the period of performance of the Medicare RAC contracts. A State that determines that it must pay a contingency rate above CMS' ceiling rate (for example, in order to attract any qualified Medicaid RAC applicants) may request a waiver from CMS, or may elect to pay the differential amount between the ceiling and amount paid solely from State funds.

Contingency fee rates for identifying and collecting overpayments should be reasonable and determined by each State, taking into account factors including, but not limited to, the level of effort to be performed by the RAC, the size of the State's Medicaid population, the nature of the State's Medicaid health care delivery system, and the number of Medicaid RACs engaged. A State may pay Medicaid RACs on a contingency fee or flat fee basis for identifying underpayments and the percentage or amount may vary based on factors such as the amount of the identified underpayment. Whichever methodology a State employs, it should be appropriately structured to incentivize the Medicaid RAC to identify underpayments.

A State must refund the Federal Medical Assistance Percentage (FMAP) share of the net amount of overpayment recoveries after deducting the fees paid to Medicaid RACs. In other words, a State must take a Medicaid RAC's fee payments "off the top" before calculating the FMAP share of the overpayment recovery owed CMS. Overpayments are to be reported on the amount remaining after the fees are paid to the Medicaid RAC. This treatment of the fees and expenditures is linked directly to the specific statutory language implementing the Medicaid RAC requirements. It does not apply to any other provisions of Medicaid overpayment recoveries. Section 1902(a)(42)(B)(ii)(IV)(aa) of the Act also provides that amounts spent by a State to carry out the administration of the program are to be reimbursed at the 50 percent administrative claiming rate. CMS will share in States' expenditures through both the contingency fee with respect to payments to the Medicaid RACs and the administrative match for qualified administrative costs associated with the State's implementation and oversight of the Medicaid RAC program.

The total fees paid to a Medicaid RAC include both the amounts associated with (1) identifying and recovering overpayments, and (2) identifying underpayments. Due to the statutory limitations, total fees must not exceed the amounts of overpayments collected. We do not anticipate this will be a problem for States. Our experience with Medicare RAC contractors is that overpayment recoveries exceed underpayment identification by more than a 9:1 ratio. Therefore, a State will not need to maintain a reserve of recovered overpayments to fund RAC costs associated with identifying underpayments. However, the State must maintain an accounting of amounts recovered and paid. The State must also ensure that it does not pay in total Medicaid RAC fees more than the total amount of overpayments collected.

Because of the limitations placed on FFP by Section 1108(g) of the Act, Territories must assess the feasibility of implementing and funding Medicaid RACs in their jurisdiction. CMS will provide technical assistance to the Territories on how to implement the provisions in Sections 1902(a)(42)(B)(ii)(I), (II), and (IV) of the Act in their locality. CMS is encouraging the Territories to review the requirements of these provisions including regulations, when published, and contact the New York or San Francisco Regional Office to work on submitting a SPA or requesting an exception.

Appeals

Section 1902(a)(42)(B)(ii)(III) of the Act requires States to have an adequate process for entities to appeal any adverse decisions made by the Medicaid RACs. Each State has existing administrative appeals processes with respect to audits of Medicaid providers. So long as States are able to accommodate Medicaid RAC appeals within their existing Medicaid provider appeal structure, CMS is not requiring States to adopt a new administrative review infrastructure to conduct Medicaid RAC appeals.

Reporting

States will be required to report to CMS their contingency fee rates, along with other Medicaid RAC contract metrics such as the number of audits conducted, recovery amounts, number of cases referred for potential fraud, contract periods of performance, contractors' names, and other factors such as whether a State has implemented provider or service-specific Medicaid RACs. States will report certain elements of this information via the quarterly Form CMS-64, and other information via separate data reporting forms CMS will require.

Coordination

Section 1902(a)(42)(B)(ii)(IV)(cc) of the Act requires that CMS ensure that States and their Medicaid RACs coordinate their recovery audit efforts with other entities. These entities include contractors or entities performing audits of entities receiving Medicaid payments, as well as with Federal and State law enforcement entities including the U.S. Department of Justice, (including, without limitation, the Federal Bureau of Investigation), the Department of Health and Human Services' Office of Inspector General, State Medicaid Fraud Control Units (MFCUs), and State Surveillance and Utilization Review Units. We will work systematically, both internally and with States, to minimize the likelihood of overlapping audits.

States should ensure that contracts with Medicaid RACs provide that any indication of Medicaid (or other health care) fraud or abuse discerned by the Medicaid RACs will be referred timely either to the State MFCU or directly to an appropriate law enforcement organization. Likewise, States must take affirmative steps to ensure that Medicaid RACs do not duplicate or compromise the efforts of other contractors, entities or agencies that may be undertaking a fraud and abuse investigation. Such coordination should be undertaken in advance of any audit by a Medicaid RAC, and may be accomplished by negotiating a memorandum of understanding or reaching

another agreement between the Medicaid RAC and other Federal and State contractors or entities performing Medicaid audits, as well as the aforementioned law enforcement agencies. CMS expects that States will also provide ongoing information on the nature and direction of their respective Medicaid RAC activities. Moreover, CMS will issue supplemental guidance regarding the interface between Medicaid RACs and CMS' Medicaid Integrity Contractors at a later date.

Section 6411(a)(2)(A) of the Affordable Care Act requires CMS to coordinate the expansion of the RAC program to Medicaid with the States, particularly with respect to States that enter into contracts with Medicaid RACs prior to December 31, 2010. CMS will provide technical assistance and support to States to ensure these programs are compliant with Medicaid RAC program requirements, and will provide continuing guidance through the CMS Medicaid Program Integrity Technical Advisory Group.

Enclosed with this letter is a draft SPA preprint form in which States may attest to the implementation of the Medicaid RAC program, or indicate that the State does not intend to operate a program in accordance with the statutory requirements of Section 6411 of the Affordable Care Act, along with its reason(s) for not doing so. Additionally, the draft preprint requires States to attest that they are in compliance with the provisions of the Medicaid RAC program and, where appropriate, provide additional program details. Currently, CMS is seeking Office of Management and Budget approval to utilize the preprint. Accordingly, this form is recommended for use by States, but not required, until the Paperwork Reduction Act process is completed.

We look forward to our continuing work together as we implement this important legislation. If you have questions regarding the information presented in this letter, please contact Ms. Angela Brice-Smith, Director of the Medicaid Integrity Group, Center for Program Integrity, at Angela.Brice-Smith@cms.hhs.gov or 410-786-4340.

Sincerely,

/s/

Peter Budetti, M.D., J.D.
Deputy Administrator & Director
Center for Program Integrity

/s/

Cindy Mann
Deputy Administrator & Director
Center for Medicaid, CHIP and Survey & Certification

Enclosure
cc:

CMS Regional Administrators

CMS Associate Regional Administrators
Division of Medicaid and Children's Health

State Program Integrity Directors

Richard Fenton
Acting Director
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Joy Wilson
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DRAFT – Medicaid State Plan Preprint Page -- DRAFT

Revision: State _____

PROPOSED SECTION 4 - GENERAL PROGRAM ADMINISTRATION

4.5 Medicaid Recovery Audit Contractor Program

Citation	
Section 1902(a)(42)(B)(i) of the Social Security Act	_____The State has established a program under which it will contract with one or more recovery audit contractors (RACs) for the purpose of identifying underpayments and overpayments of Medicaid claims under the State plan and under any waiver of the State plan. ____The State is seeking an exception to establishing such program for the following reasons:
Section 1902(a)(42)(B)(ii)(I) of the Act	_____The State/Medicaid agency has contracts of the type(s) listed in section 1902(a)(42)(B)(ii)(I) of the Act. All contracts meet the requirements of the statute. RACs are consistent with the statute. Place a check mark to provide assurance of the following: _____The State will make payments to the RAC(s) only from amounts recovered. _____The State will make payments to the RAC(s) on a contingent basis for collecting overpayments.
Section 1902 (a)(42)(B)(ii)(II)(aa) of the Act	The following payment methodology shall be used to determine State payments to Medicaid RACs for identification and recovery of overpayments (e.g., the percentage of the contingency fee): _____ The State attests that the contingency fee rate paid to the Medicaid RAC will not exceed the highest rate paid to Medicare RACs, as published in the Federal Register. _____ The State attests that the contingency fee rate paid to the Medicaid RAC will exceed the highest rate paid to Medicare RACs, as published in the Federal Register. The State will only submit for FFP up to the amount equivalent to that published rate.

	_____The contingency fee rate paid to the Medicaid RAC that will exceed the highest rate paid to Medicare RACs, as published in the Federal Register. The State will submit a justification for that rate and will submit for FFP for the full amount of the contingency fee.
Section 1902 (a)(42)(B)(ii)(II)(bb) of the Act	_____The following payment methodology shall be used to determine State payments to Medicaid RACs for the identification of underpayments (e.g., amount of flat fee, the percentage of the contingency fee):
Section 1902 (a)(42)(B)(ii)(III) of the Act	_____ The State has an adequate appeal process in place for entities to appeal any adverse determination made by the Medicaid RAC(s).
Section 1902 (a)(42)(B)(ii)(IV)(aa) of the Act	_____ The State assures that the amounts expended by the State to carry out the program will be amounts expended as necessary for the proper and efficient administration of the State plan or a waiver of the plan.
Section 1902(a)(42)(B)(ii)(IV(bb) of the Act	_____ The State assures that the recovered amounts will be subject to a State's quarterly expenditure estimates and funding of the State's share.
Section 1902 (a)(42)(B)(ii)(IV)(cc) Of the Act	_____ Efforts of the Medicaid RAC(s) will be coordinated with other contractors or entities performing audits of entities receiving payments under the State plan or waiver in the State, and/or State and Federal law enforcement entities and the CMS Medicaid Integrity Program.