RECOVERY AUDIT CONTRACTORS: IS THE HONEYMOON OVER?

Pursuant to the Medicare Modernization Act of 2003 ("MMA"), the Centers for Medicare & Medicaid Services ("CMS") established a three-year demonstration program to use Recovery Audit Contractors ("RACs") to identify and recapture Medicare underpayments and overpayments and to pay the RACs a percentage of what they recoup.

The RAC demonstration covers all providers located in Florida, California and New York, except home health agencies and providers whose intermediaries are out of state. The only claims excluded are potential overpayments resulting from improper Evaluation & Management levels. Everything else is fair game.

HOW WILL RACS IDENTIFY AND PURSUE OVERPAYMENTS?

Each RAC will identify overpayments by applying its own proprietary and confidential data mining methodologies to years 2002 through 2005 claims data supplied by CMS. Clearly, it is a major concern that the RACs' data mining methodologies, which determine which providers will be targeted and what claims will be reviewed, are not disclosed to either CMS or the provider community.

Overpayments are identified through two types of review: automated or complex. Automated reviews identify claims that the RAC is sure include overpayments. Complex reviews identify claims where the RAC believes there probably are overpayments, but it requires further review of medical records. Not surprisingly, what a provider can expect once a RAC finds an overpayment depends upon whether the determination resulted from an automated or complex review, and whether the claim was paid by an intermediary or a carrier.

AUTOMATED REVIEW

Generally, for overpayments identified by an automated review, the provider will receive a letter demanding repayment. For claims that were paid by an intermediary, prior to any recoupment of the overpayment, a provider has 30 days to dispute the RAC's overpayment determination. This is termed a "rebuttal." After 30 days, if the provider does not successfully refute the RAC's determination, the intermediary will offset the overpayment.

If the claim was originally paid by a carrier, the carrier will adjust the claim and the provider will receive a demand letter and a revised explanation of benefits (EOB). The provider has 41 days to repay the overpayment. There is no rebuttal period for a claim identified by a RAC when the claim was originally paid by the carrier. The provider does, however, have the option of contesting the RAC's determination, which the RAC may review and rescind.

COMPLEX REVIEW

In a complex review, the RAC is not certain that there is an overpayment. Accordingly, the first letter will request further medical records from the provider. The RAC then has 60 days to review the information and determine if an overpayment exists. Significantly, the RAC staffer reviewing the medical records for medical necessity must be a nurse or other "appropriate" clinician. CMS has indicated that RAC review staff does not, however, have to have specific expertise in the area of the individual claim. And, when it comes to coding, there is no training requirement at all.

Once the complex review is complete, the RAC will notify the provider in writing if an overpayment is discovered. In a complex review, recoupment is the same regardless of whether the claim was paid by the intermediary or the carrier. The overpayment amount will be offset against each provider's future payments. If the overpayment is significant, a provider may request an extended payment plan in the same way it would for any other overpayment.

Regardless of whether the overpayment resulted from an automated review or a complex review, a provider still has the same right to appeal the RAC's final determination that it would have for any other Medicare coverage determination.

WILL RACS SEEK OUT UNDERPAYMENTS?

The MMA is oddly silent regarding repaying underpayments. Currently, RACs do not have any financial incentive to find underpayments, nor do their data mining methods actively seek them. CMS is negotiating with the RACs to address these issues and expects a resolution during the first quarter of 2006. When they do come to agreement, however, there will be significant limitations on the recognition and repayment of underpayments under the RAC demonstration. Specifically, underpayments must be discovered by the RAC and in most instances cannot be reported by providers. Thus, the volume of underpayments uncovered through this demonstration will probably be low.

WHAT CAN PROVIDERS EXPECT GOING FORWARD?

CMS has been extremely close-mouthed regarding the scope of the initial demand letters, the types of providers that received letters, and the types of claims identified as overpayments. How RACs decide which providers receive letters and for what types of claims remains unanswered. The equally important question of who RACs will be investigating in the future and for what types of claims also remains unknown.

At a minimum, it seems that CMS and the RACs are working out operational problems and CMS is gaining confidence in the RACs' methods. Accordingly, providers can expect the volume of demand letters to increase dramatically in the near future. CMS has also suggested that it may soon share more information regarding the progress of the demonstration. It may then be possible to project more about the remaining two years of the demonstration.

If you are a provider subject to review in the RAC demonstration project, Duane Morris attorneys would be happy to assist you with any questions or concerns you might have.

If you have a question on this material, or would like to discuss legal services, please contact us at healthcare@duanemorris.com.

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