

**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**  
**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**  
Statutory Authority: 31 Delaware Code, Section 512 (31 **Del.C.** §512)

**PROPOSED**

**PUBLIC NOTICE**

**Medicaid Recovery Audit Contractor Program**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the **Delaware Code**) and under the authority of Title 31 of the **Delaware Code**, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is amending the Title XIX Medicaid State Plan to comply with section 6411 of the Affordable Care Act regarding the Medicaid Recovery Audit Contractor Program.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to Sharon L. Summers, Planning & Policy Development Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906 or by fax to 302-255-4425 by December 31, 2010.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

**SUMMARY OF PROPOSAL**

The proposal amends the Title XIX Medicaid State Plan to comply with section 6411 of the Affordable Care Act 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.

**Statutory Authority**

The Patient Protection and Affordable Care Act, Public Law 111-148, Section 6411, *Expansion of the Recovery Audit Contractor (RAC) program*.

**Background**

**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.

The Centers for Medicare and Medicaid Services (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.

**Contingency Fees**

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.

### **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.

### **Summary of Proposal**

In accordance with the statutory requirements of Section 6411 of the Affordable Care Act, the Division of Medicaid and Medical Assistance (DMMA) intends to submit a State plan amendment (SPA) through which Delaware will attest that it will establish a compliant Medicaid RAC program by December 31, 2010.

State programs to contract with Medicaid RACs are not required to be fully operational by December 31, 2010. However, CMS expects States to fully implement their RAC programs by April 1, 2011.

The provisions of this state plan amendment are subject to approval by the Centers for Medicare and Medicaid Services (CMS).

### **Fiscal Impact Statement**

This revision imposes no increase in cost on the General Fund; however, there is the potential for administrative and system change costs.

### **DMMA PROPOSED REGULATION #10-51**

#### **REVISION:**

Revision:  
OMB No.

CMS

## **STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT State/Territory DELAWARE**

### **SECTION 4 – GENERAL PROGRAM ADMINISTRATION**

#### **4.5 Medicaid Recovery Audit Contractor Program**

<p><u>Citation</u></p> <p>Section 1902(a)(42)(B)(i) of the Social Security Act</p>	<p><input checked="" type="checkbox"/> 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.</p> <p>____ The State is seeking an exception to establishing such program for the following reasons:</p>
<p>Section 1902(a)(42)(B)(ii)(I) of the Act</p>	<p>____ 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.</p> <p>Place a check mark to provide assurance of the following:</p> <p><input checked="" type="checkbox"/> The State will make payments to the RAC(s) only from amounts recovered.</p> <p><input checked="" type="checkbox"/> The State will make payments to the RAC(s) on a contingent basis for collecting overpayments.</p>
<p>Section 1902 (a)(42)(B)(ii)(II)(aa) of the Act</p>	<p>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):</p> <p><input checked="" type="checkbox"/> 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.</p> <p>____ 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.</p> <p>____ 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.</p>
<p>Section 1902 (a)(42)(B)(ii)(II)(bb) of the Act</p>	<p><input checked="" type="checkbox"/> 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):</p>
<p>Section 1902 (a)(42)(B)(ii)(III) of the Act</p>	<p><b><i>The Medicaid RAC will be paid an equivalent percentage contingency fee for the identification of underpayments.</i></b></p> <p><input checked="" type="checkbox"/> The State has an adequate appeal process in place for entities to appeal any adverse determination made by the Medicaid RAC(s).</p> <p><input checked="" type="checkbox"/> 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.</p>
<p>Section 1902 (a)(42)(B)(ii)(IV)(aa) of the Act</p>	<p><input checked="" type="checkbox"/> The State assures that the recovered amounts will be subject to a State's quarterly expenditure estimates and funding of the State's share.</p>
<p>Section 1902(a)(42)(B)(ii)(IV)(bb) of the Act</p>	<p><input checked="" type="checkbox"/> 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.</p>
<p>Section 1902 (a)(42)(B)(ii)(IV)(cc) of the Act</p>	