

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

FINAL

ORDER

Medicaid Recovery Audit Contractors Program

NATURE OF THE PROCEEDINGS:

Delaware Health and Social Services ("Department") / Division of Medicaid and Medical Assistance initiated proceedings to amend Title XIX Medicaid State Plan regarding the Medicaid Recovery Audit Contractor (RAC) Program, specifically, to request an exception to the RAC contracting requirements. The Department's proceedings to amend its regulations were initiated pursuant to 29 **Del.C.** §10114 and its authority as prescribed by 31 **Del.C.** §512.

The Department published its notice of proposed regulation changes pursuant to 29 **Del. C.** §10115 in the September 2022 *Delaware Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by October 3, 2022 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

Effective for services provided on and after October 1, 2022, DHSS/DMMA proposes to amend Title XIX Medicaid State Plan to request an exception to the RAC contracting requirements.

Background

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 Recovery Audit Contractors (RACs) to identify underpayments and overpayments, as well as recouping overpayments, under the Medicaid State Plan and any Medicaid State Plan Waivers. This applies 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 way as the Secretary contracts with contingency fee contractors for the Medicare RAC program.

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 the Centers for Medicare and Medicaid Services (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, another fee structure could be required under any such exception (e.g., a flat fee arrangement).

States that otherwise wish to request variances concerning, or an exception from, Medicaid RAC program requirements must submit a request to CMS from the State's Medicaid Director to the CMS/Medicaid Integrity Group.

Although the Delaware Division of Medicaid and Medical Assistance (DMMA) previously had a Recovery Audit Contract (RAC) vendor, that contract is no longer in place. DMMA posted a Request for Proposals (RFPs) to attract a new RAC vendor but received no bids. Most of Delaware's Medicaid population is enrolled in managed care, and the providers treating them are not subject to audit recovery contracting. There is not sufficient revenue generation to fund an adequate contingency fee.

In a letter dated December 26, 2020, the Centers for Medicare & Medicaid Services (CMS) approved an amendment modifying the State Plan to grant Delaware an exception to the RAC requirements for a 2-year period ending June 30, 2020. After careful review, the RAC requirements continue to be impractical and not cost-effective for Delaware's Medicaid program. Delaware will submit an amendment to modify the State Plan to grant Delaware an exception to the RAC requirements.

Statutory Authority

- The Patient Protection and Affordable Care Act, Public Law 111-148, Section 6411, Expansion of the Recovery Audit Contractor (RAC) program
- Section 1902(a)(42)(b) of the Social Security Act requires states to establish programs to contract with RACs to audit payments to Medicaid providers by December 31, 2010
- 42 CFR 455 Subpart A, Medicaid Agency Fraud Detection and Investigation Program
- 42 CFR 455 Subpart F, Medicaid Recovery Audit Contractors Program

Purpose

The purpose of this proposed regulation is to request an exception to the RAC contracting requirements.

Summary of Proposed Changes

Effective for services provided on and after October 1, 2022, DHSS/DMMA proposes to amend Title XIX Medicaid State Plan to request an exception to the RAC contracting requirements.

Public Notice

In accordance with the federal public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 440.386 and the state public notice requirements of Title 29, Chapter 101 of the **Delaware Code**, DHSS/DMMA gave public notice and provided an open comment period for 30 days to allow all stakeholders an opportunity to provide input on the proposed regulation. Comments were to have been received by 4:30 p.m. on October 3, 2022.

Centers for Medicare and Medicaid Services Review and Approval

The provisions of this state plan amendment (SPA) are subject to approval by the Centers for Medicare and Medicaid Services (CMS). The draft SPA page(s) may undergo further revisions before and after submittal to CMS based upon public comment and/or CMS feedback. The final version may be subject to significant change.

Provider Manuals and Communications Update

Also, there may be additional provider manuals that may require updates as a result of these changes. The applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals and/or Delaware Medical Assistance Portal will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding DMAP updates. DMAP updates are available on the Delaware Medical Assistance Portal website: <https://medicaid.dhss.delaware.gov/provider>

Fiscal Impact Statement

There is no anticipated fiscal impact.

Summary of Comments Received with Agency Response and Explanation of Changes

DMMA received the following comments:

Comment: The Governor's Advisory Council for Exceptional Citizens (GACEC) supports these regulations but would like to clarify what other methods DMMA plans to use to enhance program integrity.

Response: DMMA appreciates the support. The Surveillance Utilization Review (SUR) Unit under the Program Integrity Section in partnership with the Delaware Medicaid Fraud Control Unit and our Managed Care Organizations Special Investigation Units continues to increase fraud waste abuse awareness. Improvements in information sharing continues to be ongoing to support the need of investigations.

DMMA is pleased to provide the opportunity to receive public comments and greatly appreciates the thoughtful input given.

FINDINGS OF FACT:

The Department finds that the proposed changes as set forth in the September 2022 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to amend Title XIX Medicaid State Plan regarding the Medicaid Recovery Audit Contractor (RAC) Program, specifically, to request an exception to the RAC contracting

requirement is adopted and shall be final effective November 11, 2022.

10/13/2022
Date of Signature

Molly Magarik, Secretary, DHSS

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT
STATE/TERRITORY: **DELAWARE**

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.

Section 1902(a)(42)(B)(ii)(I)
of the Act

The State is seeking an exception to establishing such program for the following reasons:

Although the Delaware Division of Medicaid and Medical Assistance (DMMA) previously had a Recovery Audit Contract (RAC) vendor, that contract is no longer in place. DMMA posted a Request for Proposals (RFPs) in an attempt to attract a new RAC vendor but received no bids. The majority of Delaware's Medicaid population is enrolled in managed care and the providers treating them are not subject to audit recovery contracting. There is not sufficient revenue generation to fund an adequate contingency fee. Program review and assessment indicate RAC requirements as impractical and not cost-effective for Delaware's Medicaid program.

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. Delaware RFP for RACs is completed.

Place a check mark to provide assurance of the following:

The State will make payments to the RAC(s) only from amounts recovered.

Section
1902(a)(42)(B)(ii)(II)(aa) of the
Act

The State will make payments to the RAC(s) on a contingent basis for collecting overpayments.

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

TN No. SPA# <u>22-0010</u>	Approval Date
Supersedes	
TN No. <u>18-004</u>	Effective Date: <u>September 1, 2022</u>

26 DE Reg. 394 (11/01/22) (Final)