

CMS' RECOVERY AUDIT INITIATIVE (RAC): NEW YORK PHYSICIANS ON THE RACK

By: Bruce A. Smith, Esq.

The RAC is not a medieval torture device, but is just one more burden New York physicians, hospitals and other providers and suppliers will have to live with for the next three years. The Centers for Medicare and Medicaid Services ("CMS") has announced a three year Recovery Audit Contractor ("RAC") initiative that will impact physicians and other providers in California, Florida and New York.

The Medicare Prescription Drug, Improvement and Modernization Act of 2003 authorized the RAC initiative as a way of (1) identifying underpayments and overpayments and (2) recouping overpayments. The CMS bulletin announcing the RAC initiative noted that claims payment error rates of between 6% and 10% have been identified in annual studies of the Medicare program and that in the last two fiscal years "billions of dollars" have been inappropriately paid out by Medicare.

Recovery audit contractors are private companies that will contract with CMS to conduct analyses and audits of claims beyond those conducted by Medicare carriers. The RAC audits are intended to supplement, not replace the traditional carrier audits. The RACs will request claim history and medical records, if necessary, to determine if over or underpayments exist. Connolly Consulting has been awarded the New York State audit contract. In a March 28 release CMS stated that the present RAC contracts will focus on Part A Medicare claims and exclude E&M services. However, other physician services are expected to be included within the scope of the audits.

Somewhat ironically, RAC contractors will be paid based on a contingency fee basis: the more overpayments the RAC contractors can identify and collect, the more compensation they earn. Why is this ironic? Because in the 1990's CMS and the Office of Inspector General discouraged providers from paying their Medicare billing services and consultants on a contingency fee basis because they feared percentage payments tempted billers and consultants to recommend inflated charges. On the margins, might a RAC contractor be more likely to find an overpayment under a contingency fee arrangement than if it was paid on a flat fee basis?

Recovery of an overpayment through a RAC audit does not preclude further investigation or prosecution of fraud and abuse claims by the Office of Inspector General or other enforcement authorities. On the positive side, providers may appeal negative determinations to their local carriers and, if underpayments are identified in connection with the audit, the RAC contractor will forward that information to the carrier for processing and payment.

The demonstration project began in May 2005 and will continue for three years. Both the AMA and MSSNY have stated that they will monitor the project to assure that it is implemented fairly.

The RAC initiative is just one more reason why physicians must make sure that they are billing and coding correctly.

Bruce A. Smith is a shareholder of Wood & Smith, P.C. and represents physicians on health law, business and real estate matters and can be contacted at (315) 423-0400 or at bsmith@woodsmithlaw.com.

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One Lincoln Center, Suite 1110
110 West Fayette Street, Syracuse, NY 13202
(315) 423-0400 • Fax: (315) 424-1011