



The Honorable Charles Rangel
The Honorable Lois Capps

The Honorable Pete Stark
The Honorable Devin Nunes

House of Representatives
Washington, DC 20515

December 10, 2007

Dear Chairman Rangel, Chairman Stark, Representative Capps, and Representative Nunes:

Since the start of the Recovery Audit Contractor (RAC) demonstration project, the American Hospital Association, the California Hospital Association and the Healthcare Association of New York State have communicated with the Centers for Medicare and Medicaid Services (CMS) about the need to improve the RAC program. Providers are not opposed to increased oversight that ensures accurate payment. However, the misguided financial incentives that currently govern RACs, and the lack of CMS oversight, have allowed the project to become marred by aggressive and misguided RAC activities, creating significant concerns among hospitals and other providers.

In his December 7, 2007 letter to Reps. Capps and Nunes, CMS Administrator Kerry Weems describes several positive changes to the program. However, most of the changes reiterate those that are already in the most recent CMS Statement of Work. We therefore remain concerned that significant issues – issues that we have already raised with the agency, the RACs and with Congress – have not been addressed. This letter serves as our brief response to CMS' letter. We look forward to working with you to resolve the concerns that remain and we are hopeful that a resolution can be achieved prior to the national roll out.

Areas of Progress

We appreciate that CMS acknowledges, and is willing to take corrective action to address, the significant problems with RAC review of Inpatient Rehabilitation Facility (IRF) claims in California. We support their decision to direct the RACs to re-review all IRF claims where an overpayment was found. The letter, however, does not provide details about how the re-review will proceed, nor about what education will be provided to IRFs.

We also appreciate CMS' decision to halt all medical record requests after December 1, 2007 for the demonstration states. This will ease RAC denials of inpatient claims and allow the RAC the opportunity to examine its protocols.

Areas of Concern

The three-state demonstration project revealed serious deficiencies in the RAC program, only some of which were addressed in either the December 7 letter or the most recent Statement of Work. It is clear that a recalibration of the program is necessary. Our outstanding major areas of concern include:

- CMS should immediately apply to the demonstration program the same changes it incorporated in the November 7 Statement of Work for the roll out of the permanent program;
- The inappropriate and generous contingency fees CMS pays the RAC create misaligned incentives;
- CMS is not adequately overseeing the RAC program, and there is an absence of RAC process transparency; and
- Medical necessity judgments are not being made by qualified, experienced, medical professionals.

Apply Improvements in the Statement of Work to the Demonstration

CMS' current Statement of Work for the national RAC program incorporates many changes that address some of our concerns with the RAC demonstration. CMS has:

- removed the contingency payment when a provider overturns a denial at any level;
- required RACs to have a medical director;
- shortened the look-back period for claims review from four to three years; and
- set Oct. 1, 2007 as the oldest date for which claims can be reviewed.

These changes addressed serious flaws that are ongoing in the current demonstration, yet CMS has not sought to correct these problems for that demonstration. These improvements should apply today for the demonstration, or all new RAC review should be discontinued until roll out of the permanent program.

Inappropriate Financial Incentives for RACs

The incentives of a contingency fee arrangement without appropriate and robust oversight have led to aggressive and improper pursuit of recoveries and a disregard for the accuracy of the auditing and recovery processes. There is no financial disincentive for aggressive RAC behavior, nor is any contractor in the Medicare program paid such a bounty.

Under the current project design, the RAC has access to significant contingency fee payments during the appeals process, which can take more than two years, even when the denial of reimbursement was inappropriate. This provides an incentive for inaccurate review.

We recommend that Congress change the authorization of the RAC program to remove the contingency fee incentive structure. It should be replaced with a set fee for the scope of all the work under the purview of RACs, and establish clear performance standards for RACs.

As in other areas of Medicare appeal, we also recommend that reimbursement for RACs be deferred if the provider initiates an appeal within a specified time frame.

Oversight and Transparency

The current program has been characterized by a lack of transparency and by poor oversight from CMS. Several times throughout the course of the demonstration we have made CMS aware of key problems. The agency has in some cases acknowledged errors, but has not resolved the problems.

Like other aspects of the RAC demonstration, the appeals process has been difficult to decipher. CMS has not released any data on the rate of denials and appeals, nor of the outcome of those appeals at each level. There is tremendous confusion within the provider community over the few statements that CMS and the RACs have made regarding the outcome of appeals. Simply put, provider data differ greatly from data disclosed by the RACs.

We recommend that CMS report regularly to Congress and the public on the ongoing activities of RACs, including denial and appeals data.

Further, we recommend that CMS establish and make public structural guidelines that govern all RACs to ensure that processes, procedures, and expectations are consistent and fair from one RAC to the next.

We recommend that RACs and CMS establish an electronic claims tracking mechanism whereby hospitals and other providers can monitor the progress of claims moving through the review process. This mechanism should be in place prior to the national rollout.

Qualified Medical Personnel

RAC employees who are reviewing claims do not have experience with Medicare coding practices. They also lack the clinical expertise needed to understand decisions made by physicians and others who take care of Medicare beneficiaries in hospitals and other settings. This has proven true even in cases where the RAC employed a chief medical officer. We continue to believe that medical necessity determinations should be excluded from the scope of RAC review.

While we appreciate CMS' recognition of the problems with IRF claims, we are concerned that there are other areas of medical necessity review that require correction. Many providers have experienced inappropriate and arbitrary denials of one-day and short-stays for acute care services, for example. Further investigation and review of these

and other areas are essential so that legitimate concerns may be addressed proactively and effectively.

The need for qualified medical professionals has been documented in several cases that have been appealed. Specifically, one Administrative Law Judge (ALJ) stated:

“To discount the opinions by operating and treating physicians for the need for IRF services without a comprehensive (sic) by a physician with a specialty in physical medicine and rehabilitation is seemingly arbitrary on its face.”

We recommend that only appropriately trained and qualified medical professionals be involved in medical necessity reviews.

In addition, we recommend that, as the agency did with IRF claims, CMS should develop a plan to address medical necessity reviews of acute care one-day and short-stays.

As health care providers, we recognize there is a need for fair and equitable review of Medicare claims. We are committed to working collaboratively with CMS and others to ensure that services provided to Medicare beneficiaries are necessary and clinically appropriate. We thank you for your continued interest in our concerns about the RAC program and we look forward to working with you to resolve these outstanding issues for the demonstration program and before a national roll out of the RAC program.

Sincerely,

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