AMPING UP MEDICARE AND MEDICAID PAYMENT SCRUTINY

Kathleen Houston Drummy & Rebeccah Edelstein

Davis Wright Tremaine LLP

865 South Figueroa Street, Suite 2400

Los Angeles, CA 90017-2566

The Audit and Improper Payment Landscape

- RACs
- MACs
- PSCs/ZPICs
- MICs
- OIG
- DOJ

Recovery Audit Contractors Basics

- 3 Year Demonstration Program
- Contract with CMS to identify improper payment for Medicare Part A and Part B Claims
- Post-Payment Reviews
- Both Overpayments and Underpayments
- Contingency Fee Compensation

RAC APPEAL PROCESS FOR PART A AND PART B CLAIM DENIALS

- 5 Levels
  - Redetermination: 120 days
  - Reconsideration: 180 days
  - ALJ: 60 days
  - Appeals Council: 60 days
  - Federal Court: 60 days
- Impact of Appeal on Recoupment of Alleged Overpayment
- Interest

Example of Current RAC Appeal Issue:

Inpatient Hospital Short Stay Denials

- Inpatient vs. Observation Care Level
  - Rebilling Claims: Demonstration vs. Permanent RAC Program
  - Legal Arguments

LEGAL ISSUES REGARDING APPEAL ALTERNATIVES

A NEW WORLD OF PROVIDER RIGHTS?

- NEW ISSUES HAVE TO BE POSTED TO THE WEB
- CLINICAL REVIEWERS ARE MANDATORY
  - MEDICAL DIRECTORS
  - CERTIFIED CODERS
- DISCUSSION WITH MEDICAL DIRECTOR RE CLAIM DENIALS ON REQUEST IS MANDATORY
- VALIDATION REVIEWS OF ACCURACY OF RAC OVERPAYMENT DETERMINATIONS ARE REQUIRED
- OUTREACH EFFORTS BY THE RAC ARE REQUIRED

LOOK FOR TECHNICAL FOULS TO HEAD OFF DENIALS

- DOES RAC AUDIT COMPLY WITH RAC CONTRACTUAL REQUIREMENTS?
  - *EXAMPLE*: NO REVIEW OF CLAIMS REVIEWED BY OTHER MEDICARE AUDITORS OR FEDERAL AGENCIES
  - *EXAMPLE*: CANNOT EXCEED CMS ISSUED LIMITS ON NUMBER AND FREQUENCY OF MEDICAL RECORD REQUESTS
  - *EXAMPLE*: DID RACs INVOLVE APPROPRIATE CLINICAL STAFF IN REVIEW
  - *EXAMPLE*: DID RAC APPLY CMS RULES/POLICIES OR ITS OWN SCREENING CRITERIA AND RULES

REBUTTAL: FIRST BITE AT THE APPLE?

DISCUSSION/REBUTTAL PERIOD WITH RAC

- UPON RAC DENIAL: ACCEPT, OR DISCUSS AND/OR APPEAL
- DISCUSS/REBUT
  - AFTER RECEIPT OF RAC'S RESULTS REVIEW LETTER (COMPLEX) OR DEMAND LETTER (AUTOMATED)
  - ACCESS TO RAC MEDICAL DIRECTOR
  - CAN SUBMIT STATEMENT AND ADDITIONAL MATERIALS
  - REVIEW BY RAC REVIEWER WHO WAS NOT INVOLVED IN THE ORIGINAL IMPROPER PAYMENT DETERMINATION
  - POSSIBLE USE TO AUGMENT PROVIDER'S UNDERSTANDING OF THE BASIS FOR THE DENIAL AND IN ASSESSING WHETHER TO APPEAL

DISCUSSION PERIOD (cont'd)

- OPPORTUNITY TO OFFER RESULTS OF PRIOR REBUTTALS OR APPEALS OR TECHNICAL FOULS, SUCH AS CLAIM UNDER REVIEW BY ANOTHER CMS AUDITOR
- REFERENCE ANY MEDICARE AUTHORITY SUPPORTING PROVIDER'S POSITION
- PROVIDER STILL ABLE TO APPEAL, BUT USE OF REBUTTAL DISCUSSION IS SEPARATE FROM THE APPEAL PROCESS AND DOES NOT ALTER RECOUPMENT OR APPEAL TIME FRAMES

PREEMPTIVE ACTIONS BY THE PROVIDER

- SELF-DISCLOSURES TO THE OIG
- VOLUNTARY REFUNDS
- CORRECTIVE ACTIONS TO MINIMIZE FUTURE IMPACT

VOLUNTARY DISCLOSURES AND OVERPAYMENT REFUNDS

- LEGAL AUTHORITIES AND GOVERNMENTAL POLICIES
- RISK/ BENEFIT CALCULATION REGARDING DISCLOSURE
- WHICH AGENCY OR AGENCIES SHOULD BE ALERTED?

LEGAL AUTHORITIES

- STARK LAW REGULATION
- SOCIAL SECURITY ACT PROVISIONS ON HEALTH CARE FRAUD
- ANTI-KICKBACK STATUTE
- FALSE CLAIMS ACT
  - 2009 FERA AMENDMENTS
- AND OTHERS

GOVERNMENT POLICIES AND POSITIONS

- MOST (IF NOT ALL) ENCOURAGE VOLUNTARY DISCLOSURE AND REPAYMENT
- CMS FORM 855
- CMS's OVERPAYMENT REFUND FORM (1999)
- CMS PROPOSED RULE (JANUARY 2002)
  - DID NOT BECOME FINAL

GOVERNMENT POLICIES AND POSITIONS, CTD.

- OIG OPEN LETTERS TO PROVIDERS (2000, 2001, 2006, 2008)
- OIG SELF DISCLOSURE PROTOCOL
  - SPECIFIC, ONEROUS FORMAT
  - CAN RESULT IN REDUCED EXPOSURE
- CIVIL FALSE CLAIMS ACT
  - PENALTIES REDUCED FROM TREBLE TO DOUBLE
- U. S. SENTENCING GUIDELINES

RISK / BENEFIT CALCULATION

- BENEFITS CAN INCLUDE:
  - MAY REDUCE CRIMINAL OR CIVIL PENALTIES
  - CRIMINAL EXPOSURE MAY BE ELIMINATED
  - MAY HELP GOVERNMENT DECIDE TO FOREGO A CIA OR IMPOSE LESS ONEROUS REQUIREMENTS
  - MAY REDUCE SCOPE OF GOVERNMENT'S INVESTIGATION (OR AVOID ONE)
  - MAY ACT AS A *QUI TAM* BAR
  - ALLOWS PROVIDER TO "MAKE ITS CASE" (MAY FACILITATE A MORE FAVORABLE SETTLEMENT)
  - ALLOWS PROVIDER TO EVIDENCE GOOD CITIZENSHIP
  - MAY PRECLUDE CONCURRENT RAC AUDIT!

RISK / BENEFIT CALCULATION

- RISKS MAY INCLUDE:
  - GOVERNMENT DEFINITELY FINDS OUT
  - PROVIDER DEFINITELY ENDS UP REPAYING MONIES
  - INVITATION TO GOVERNMENTAL SCRUTINY
    - MAY OPEN THE DOOR TO LARGER SCOPE INVESTIGATION
  - NO GUARANTEE OF BETTER TREATMENT OR REDUCTION IN PENALTIES
  - ONE AGENCY'S RESPONSE IS NOT BINDING ON OTHER AGENCIES

WHO DO I TELL?

- NOT ALWAYS A CLEAR ROUTE
- AGENCIES MAY INTER-REPORT
- DEPENDS ON FACTS
  - INNOCENT BILLING ERROR – CRIMINAL FRAUD CONTINUUM

WHO DO I TELL?

- CARRIER/ FISCAL INTERMEDIARY
- OIG
- CMS
- DOJ (LOCAL OR MAIN OFFICE)
- MEDICAID
- STATE AG

- IMPACT ON RAC AUDITS:
  - RACs MAY NOT REVIEW CLAIMS THAT ARE UNDER REVIEW BY ANOTHER GOVERNMENT ENTITY
  - RAC COMPENSATION IS IMPACTED BY SELF-DISCLOSURES AND VOLUNTARY REFUNDS

SEE CMS RAC FAQs

Q: IF A PROVIDER PERFORMS A SELF AUDIT, HOW SHOULD THEY NOTIFY THE RAC?

A: IF A PROVIDER DOES A SELF-AUDIT AND IDENTIFIES IMPROPER PAYMENTS, THE PROVIDER SHOULD REPORT THE IMPROPER PAYMENTS TO THE APPROPRIATE MEDICARE CLAIMS PROCESSING CONTRACTOR. THE EXACT INFORMATION NECESSARY FOR THE SELF REFERRAL CAN BE DETERMINED BY CONTACTING YOUR LOCAL CARRIER, FI OR MAC. THERE ARE TWO TYPES OF SELF AUDITS. ONE IS COMMONLY CALLED A VOLUNTARY REFUND AND IS CLAIM BASED. IF THE REQUIRED CLAIM INFORMATION IS INCLUDED ALONG WITH THE AMOUNT OF THE IMPROPER PAYMENT, THE CLAIM WILL BE ADJUSTED BY THE CLAIM PROCESSING CONTRACTOR. THE RAC WILL BE AWARE OF THE ADJUSTMENT, BUT THE REFUND DOES NOT PRECLUDE FUTURE REVIEW. THE SECOND TYPE OF SELF AUDIT MAY INVOLVE THE USE OF EXTRAPOLATION. IF EXTRAPOLATION IS USED, THE CLAIM PROCESSING CONTRACTOR WILL REVIEW THE CASE FILE TO DETERMINE IF IT IS ACCEPTABLE. THE CLAIM PROCESSING CONTRACTOR WILL ACCEPT OR DENY THE EXTRAPOLATION FOR THE ISSUE IDENTIFIED BY THE PROVIDER. IF THE CLAIM PROCESSING CONTRACTOR ACCEPTS THE EXTRAPOLATION, THOSE CLAIMS IN THE UNIVERSE WILL BE EXCLUDED FROM RAC REVIEW.

RELATED COMPLIANCE ISSUES

- RACs ARE TO REPORT SUSPECTED FRAUD AND ABUSE
- MMA OF 2003 DID NOT PROHIBIT INVESTIGATIONS BY CMS OF FRAUD AND ABUSE ARISING FROM A RAC OVERPAYMENT DETERMINATION
  - OTHER MEDICARE ENFORCEMENT AGENCIES WILL SEE THE DENIAL STATISTICS

- ERRONEOUS OR QUESTIONABLE RAC DETERMINATIONS MIGHT BE HARDER TO CHALLENGE AT THE BACK END IF THOSE DETERMINATIONS BECOME THE BASIS OF A COMPLIANCE INVESTIGATION
  - IF THE RAC FINDS OVERPAYMENTS OF A SYSTEMATIC TYPE, PROVIDER CORRECTIVE ACTIONS MERITED PARTICULARLY IF DO NOT APPEAL
  - IF DO APPEAL, THERE IS A LEGAL DISPUTE OVER WHETHER ANY KNOWLEDGE OF FALSITY UNDER THE FALSE CLAIMS ACT

RACs Are In Addition To Other Government Auditors

- PSCs and ZPICs
  - Payment recoupments in coordination with the ACs and MACs MPIM, Chapter 4, § 4.18.1.3.3
  - MPIM, Chapter 4, § 4.18 et seq.
    - Refer all cases of suspected fraud to OIC/OI regardless of $ amounts or subject matter
    - Refer to FBI or other law enforcement agency
    - Refer to State agencies or other enforcement agencies MPIM, Chapter 4, §§ 4.18.1.5.3 and 4.18.2

RACs Are In Addition To Other Government Auditors (Cont'd)

- May also take corrective action including provider education and warnings, prepayment review or payment suspension or payment denial, even where referral is rejected by OIG/OI. MPIM, Chapter 4, §§ 4.18.1.3.1, 4.18.1.5.2, 4.19 and 4.20

- Coordinate with:
  - OIG
  - DOJ
  - GAO
  - State survey agencies
  - Medicaid
  - Other PSCs and ZPICs
  - Other organizations
  - State licensing agencies
  - State Medical Boards

RACs Are In Addition To Other Government Auditors (Cont'd)

- MICs
  - Post-payment audit of Medicaid claims
    - Joint effort with the State
      - Differing State Medicaid policies
  - Identify inappropriate payments or fraud
    - State appeal process
  - No overlap with ongoing investigations of audit target
  - Refer to DHHS and OIG and share information with State Medicaid Fraud programs