

RAC AUDIT UPDATE: LIMITED RESTART, CGI LAWSUIT & SETTLEMENT PROGRAM

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After a lull in activity earlier this year, the Recovery Audit Contractor ("RAC") program has seen several new developments in recent weeks. First, the Centers for Medicare & Medicaid Services ("CMS") announced that it will allow Recovery Auditors ("RAs" or "RACs") to restart a limited number of Medicare fee-for-service claim reviews. Meanwhile, the procurement process for the new round of RA contracts has encountered roadblocks resulting from the bid protest brought by CGI Federal Inc. ("CGI"), challenging the new payment terms for RAs.¹ Finally, CMS has introduced a settlement program intended to reduce the volume of inpatient status claims currently pending in the appeals process. This legal alert will discuss these recent changes to the RAC program. Additional background and information about the RAC program is available in our August 2011 legal alert "[CMS Continue to Roll Out RAC Programs, With Some Improvements,](#)" and September 2012 legal alert "[CMS Launches RAC Prepayment Review Demonstration.](#)"

Please feel free to reach us at the phone number or email address to the left if you have questions about the new developments or how to best prepare for and challenge adverse RAC determinations.

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Audits During the Restart Period. In February, CMS announced that it would temporarily halt RAC audits in order to allow RAs to "complete all outstanding claim reviews and other processes by the end date of the current contracts."² On August 4, 2014, CMS announced it was initiating contract modifications to the current RA contracts to allow the RAs to restart some reviews.³ The limited restart period will allow RACs to "conduct a limited number of automated reviews and a small number of complex reviews on certain claims including, but not limited to: spinal fusions, outpatient therapy services, durable medical equipment, prosthetics, orthotics and supplies; and cosmetic procedures."⁴ Inpatient hospital patient status reviews will not be conducted during the restart period.

Revised RAC Procedures. In response to industry feedback, CMS announced in February that it will implement certain changes to the RAC program intended to reduce the burden on providers and make the program more efficient. Audits during the limited restart period will *not* include these changes. The changes will

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be effective with the next Recovery Audit Program contract awards and include the following:

- Upon notification of an appeal by a provider, RACs must wait 30 days to allow for a discussion before sending the claim to the Medicare Administrative Contractors ("MACs") for adjustment. Providers will not have to choose between initiating a discussion and an appeal.
- RACs must confirm receipt of a discussion request within three days.
- RACs must wait until the second level of appeal is exhausted before they receive their contingency fee.
- CMS is establishing revised additional documentation request ("ADR") limits that will be diversified across different claim types (e.g., inpatient, outpatient).
- RACs will be required to adjust the ADR limits in accordance with a provider's denial rate. Providers with low denial rates will have lower ADR limits while providers with high denial rates will have higher ADR limits.⁵

Status of CGI Lawsuit. On April 28, 2014, CGI filed a bid protest in the United States Court of Federal Claims, challenging the new payment terms that prohibit RACs from being paid until after the second level of appeal. Under the current contracts, RACs invoice CMS for their fees when the overpayment is collected. The new payment terms contained in the January 2014 Requests for Quotation ("RFQs") require the RACs to wait to invoice until the claim clears the second level of appeal. Accordingly, if the provider submits a second level appeal to a qualified independent contractor ("QIC"), the RAC must wait up to 420 days to invoice CMS for its contingency fee. CGI argued that the new payment terms of the RFQs are inconsistent with customary commercial practice, unduly restrict competition, and violate the RAC program's enabling statute and prompt payment requirements. CGI sought an injunction to prevent CMS from awarding the new RAC contracts, order CMS to revise the existing payment terms, and provide all prospective bidders an opportunity to submit bids under revised RFQs.

In a decision filed August 22, 2014, the Court denied CGI's motion for injunctive relief. Although CGI argued that the new payment terms unduly restricted competition, the Court observed that all incumbent RACs except CGI submitted quotes for the RFQ, and there was no evidence "that the payment terms were the cause of any other RACs failing to bid."⁶ The Court acknowledged that the new payment terms "will increase cost[s], reduce competition, and appear[] to be a bit excessive," but did not conclude that the agency's action was arbitrary and capricious or lacking a rational basis.⁷ The Court reasoned that CMS "examined relevant data, considered several options, articulated a basis for its decision, did not violate statute or regulation or unfairly disadvantage any bidder or class of bidders."⁸ As a result, the Court characterized the agency's action as "a financial judgment call" that did not violate the enabling statute or regulatory requirements.⁹ Moreover, the Court noted that the new payment terms equally disadvantaged all prospective bidders and did not significantly curtail competition.

CGI requested an emergency stay of the Court's decision, arguing that it should not lose the opportunity to compete for the RAC contracts while appealing the case. On September 2, 2014, the Court granted CGI's motion to stay the ruling

pending appeal to the Court of Appeals for the Federal Circuit. The stay prevents CMS from proceeding with the award of RAC contracts under the January 2014 RFQs for realigned RAC Regions 1, 2 and 4 (which encompass current RAC regions A, B, D and half of C). RAC Region 3 (which is the other half of current RAC region C) is not part of the CGI litigation, but it appears unlikely that CMS will award a contract for that region before the litigation is resolved. The existing RAC contracts will not expire until 2016. As a result, limited audits under the existing RAC contracts are likely to continue through 2015, and new RAC contracts will most likely be awarded in the latter part of 2015.

Settlement Program. CMS is offering a settlement agreement to certain types of hospitals with inpatient status claims currently pending in the appeals process or within the administrative timeframe to request an appeal review.¹⁰ Eligible hospitals can elect to receive 68 percent of the net payable amount of the denied inpatient claim as a final administrative and legal settlement of the eligible claim. Eligible hospitals include acute care hospitals and critical access hospitals. Inpatient rehabilitation facilities (“IRFs”) and long-term acute care hospitals (“LTCHs”), among others, are not eligible to participate in this settlement program. Hospitals must submit their request (or request an extension from CMS) by October 31, 2014.

Although this version of the settlement program is not available to IRFs and LTCHs, it is possible that CMS will expand the program if it successfully reduces the backlog of pending appeals. As of January 2014, the existing backlog would take at least two years to clear.¹¹ As the rate of appeals filed by hospitals continues to grow—due in large part to the sharp increase in claim reviews by RAC—CMS is subject to increasing criticism by providers whose appeals are trapped in “administrative purgatory” for years.¹² The settlement offer from CMS gives eligible hospitals a way to avoid a prolonged appeal process in exchange for discounting the value of the claim.

¹ *CGI Federal Inc. v. United States*, No. 14-355C, 2014 WL 4179360 (Fed. Cl. Aug. 22, 2014).

² *Recent Updates*, CENTERS FOR MEDICARE & MEDICAID SERVICES, http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Recovery-Audit-Program/Recent_Updates.html (last visited Sept. 16, 2014).

³ *Id.*

⁴ Memorandum from Lauren Aronson, Director, Office of Legislation, Centers for Medicare & Medicaid Services to Congressional Health Staff (Aug. 4, 2014).

⁵ *RAC Program Improvements*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Recovery-Audit-Program/Downloads/RAC-Program-Improvements.pdf> (last visited Sept. 16, 2014).

⁶ *CGI Federal Inc. v. United States*, No. 14-355C, 2014 WL 4179360 (Fed. Cl. Aug. 22, 2014) at 22.

⁷ *Id.* at 23.

⁸ *Id.*

⁹ *See id.* at 24.

¹⁰ *Inpatient Hospital Reviews*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <http://cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Medical-Review/InpatientHospitalReviews.html> (last visited Sept. 16, 2014).

¹¹ Joe Carlson, *RAC Appeals Backlog Cause for Frustration*, MODERN HEALTHCARE, (Jan. 10, 2014).

¹² See, e.g., Letter from Daniel Landon, Senior Vice President of Government Relations, Missouri Hospital Association, to The Honorable Roy Blunt, U.S. Senator (Jan. 9, 2014).

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