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Practice Group:

Health Care

MACRA Brings Modifications to the Recovery Audit Program

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This is the second K&L Gates Health Care Client Alert discussing the "Medicare Access and CHIP Reauthorization Act of 2015" (MACRA),[1] signed into law by President Barack Obama on April 16, 2015.[2] This alert focuses on modifications to the Recovery Audit Contractor (RAC) Program contained within MACRA. Specifically, MACRA will further delay enforcement of the "Two-Midnight Rule" ("Rule") and presents a new "provider education" mechanism to collect and distribute data on frequent provider errors between the RACs, Medicare Administrative Contractors (MACs), and providers.

Additional Delays to the Two-Midnight Rule; Additional Guidance Slated for the Outpatient Prospective Payment Rule This Summer

The Rule was enacted by Centers for Medicare and Medicaid Services (CMS) in 2013, with an aim of providing a bright-line presumption to whether a patient was appropriate for inpatient admission or observation care.[3] The issuance of the Rule resulted in pushback from physicians' groups and other providers, who expressed concern that the Rule applied an overly technical requirement to complex medical determinations. In light of these concerns, Congress delayed implementation of the Rule through a provision of the "Protecting Access to Medicare Act of 2014" (Public Law 113–93) that instructed the Secretary not to perform any post-payment RAC reviews on the appropriateness of an inpatient admission with admission dates of October 1, 2013 through March 31, 2015, except in the cases of systematic gaming, fraud, abuse, or delays in the provision of services.[4]

MACRA further extends this RAC review moratorium to September 30, 2015, while also noting that this does not limit the ability of CMS to pursue fraud and abuse activities.[5]

In conjunction with this extension, CMS has also recently indicated that it will be further revising its guidance on the Rule, due to continued concerns expressed by health care

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[1] Medicare Access and CHIP Reauthorization Act of 2015, H.R. 2, 114th Cong. (2015) (enacted) (to be codified in 16 and 42 U.S.C.).

[2] K&L Gates' prior alert discussed changes to the CMP prohibition on gainsharing brought by MACRA, and can be located here.

[3] *See Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long Term Care; Hospital Prospective Payment System and Fiscal Year 2014 Rates; Quality Reporting Requirements for Specific Providers; Hospital Conditions of Participation; Payment Policies Related to Patient Status; Final Rule*, 78 Fed. Reg. 50,496 (Aug. 19, 2013). Under the Rule, CMS instructs physicians to base inpatient admission decisions on whether or not a patient is expected to stay in the hospital over the course of two midnights, with certain exceptions. RACs are instructed to presume that a decision to admit a patient was appropriate if the patient's stay in the hospital crosses two midnights. If a patient's stay as an inpatient did not cross two midnights, the medical record should demonstrate that it was nonetheless reasonable to expect that patient's stay would cross two midnights at the time of admission, or that an exception applied.

[4] Protecting Access to Medicare Act of 2014, H.R. 4302, 113th Cong. (2014), Pub. L. 113-93, § 111.

[5] H.R. 2 § 521.

providers and physicians.[6] CMS indicated in its recent inpatient prospective payment proposed rule that this guidance will address these concerns, and will discuss "issues related to short inpatient hospital stays, long outpatient stays with observation services, and the related -0.2 percent IPPS adjustment." This guidance will be included in the CY 2016 hospital outpatient prospective payment system proposed rule, which is expected to be published this summer.

"Probe and Educate" Audits

Notably, MACRA extends the ability of the MACs to perform "probe and educate" audits of hospital patient statuses until September 30, 2015.[7] Under these audits, MACs can review 10–25 hospital claims to assess the appropriateness of the patients' admission status. If the MAC finds significant concerns, it can ultimately audit and deny a larger sample of claims—up to 250, for larger hospitals.[8]

Provider Education Activities

With a stated aim of reducing improper Medicare payments, MACRA also amends Section 1874A of the Social Security Act by introducing an "Improper Payment Outreach & Education Program," to be established and run by the MACs. Through this program, MACs will regularly collect and report information related to overpayments and errors by providers to area health care providers and suppliers, including:

> (A) A list of the providers' or suppliers' most frequent and expensive payment errors over the last quarter.
>
> (B) Specific instructions regarding how to correct or avoid such errors in the future.
>
> (C) A notice of new topics that have been approved by the Secretary for audits conducted by recovery audit contractors under section 1893(h).
>
> (D) Specific instructions to prevent future issues related to such new audits.
>
> (E) Other information determined appropriate by the Secretary.[9]

MACs are instructed to focus their education and other activities on the items and services with the highest error rates, the greatest total-dollar error amounts, errors resulting from a "clear misapplication or misinterpretation of Medicare policies," errors that appear to be common and inadvertent, and other areas to be determined by the Secretary.[10] MACs will also receive regular sets of information from the Secretary concerning improper payments

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[6] See *Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System Policy Changes and Fiscal Year 2016 Rates; Revisions of Quality Reporting Requirements for Specific Providers, including Changes Related to the Electronic Health Record Incentive Program; Proposed Rule*, scheduled to be published in the Federal Register on April 30, 2015. Pre-publication version available at: https://s3.amazonaws.com/public-inspection.federalregister.gov/2015-09245.pdf. (Last visited: April 27, 2015).

[7] H.R. 2 § 521.

[8] *See* Centers for Medicare & Medicaid Services, "Selecting Hospital Claims for Patient Status Reviews; Admissions On or After October 1, 2013," available at: http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medical-Review/Downloads/SelectingHospitalClaimsforAdmissionsonorafterOctober1st2013forReviewForWebPostingCLEAN.pdf (Last visited: April 27, 2015).

[9] H.R. 2 § 505.

[10] *Id*.

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RACs have identified. The information will be focused on the providers and regions that have high error rates and high total-dollar improper payment amounts.

Next Steps

These developments reflect that CMS is continuing to find ways to conduct audit and provider review activities, despite the RAC post-payment audit moratorium. Further guidance from CMS on these issues will be forthcoming:

- Providers should stay tuned for further guidance on the Rule, delayed until September 30, 2015.
- Providers should continue to monitor inpatient admission for compliance, in light of the Probe and Educate audit mechanism, as well as guidance from CMS that future RAC additional document request limits will be adjusted based on CMS's determination of a provider's compliance with Medicare rules.[11]
- Providers should monitor information disseminated by their MAC in connection with the new Provider Outreach and Education Program.

Furthermore, notably absent from this guidance is any proposal or indication of how to resolve the tremendous backlog at the Office of Medicare Hearings and Appeals and in the audit appeal process.[12] Until providers can retain equitable relief through the appeals process, the RAC audit system remains broken.

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[11] *See* Centers for Medicare & Medicaid Services, "Recovery Audit Program Improvements," available at: 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: April 27, 2015).

[12] RAC appeals at the administrative law judge level currently have processing delays in excess of 500 days. *See* Office of Medicare Hearings and Appeals, "Current Workload," *available at:* http://www.hhs.gov/omha/Data/Current%20Workload/index.html (Last visited: April 27, 2015).

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