

**DEPARTMENT OF HEALTH AND SOCIAL SERVICES**  
**DIVISION OF MEDICAID AND MEDICAL ASSISTANCE**  
Statutory Authority: 31 Delaware Code, Section 512 (31 Del.C. §512)

**PROPOSED**

**PUBLIC NOTICE**

**Medicaid Recovery Audit Contractors Program**

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code), 42 CFR §447.205, and under the authority of Title 31 of the Delaware Code, Chapter 5, Section 512, Delaware Health and Social Services (DHSS) / Division of Medicaid and Medical Assistance (DMMA) is proposing to amend Title XIX Medicaid State Plan regarding the Medicaid Recovery Audit Contractor (RAC) Program, specifically, to request an exception to the RAC contracting requirements.

Any person who wishes to make written suggestions, compilations of data, testimony, briefs or other written materials concerning the proposed new regulations must submit same to, Planning, Policy and Quality Unit, Division of Medicaid and Medical Assistance, 1901 North DuPont Highway, P.O. Box 906, New Castle, Delaware 19720-0906, by email to [Nicole.M.Cunningham@state.de.us](mailto:Nicole.M.Cunningham@state.de.us), or by fax to 302-255-4413 by 4:30 p.m. on July 31, 2018. Please identify in the subject line: Medicaid Recovery Audit Contractors Program.

The action concerning the determination of whether to adopt the proposed regulation will be based upon the results of Department and Division staff analysis and the consideration of the comments and written materials filed by other interested persons.

**SUMMARY OF PROPOSAL**

The purpose of this notice is to advise the public that Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) is proposing to amend Title XIX Medicaid State Plan regarding the Medicaid Recovery Audit Contractor (RAC) Program, specifically, to request an exception to the RAC contracting requirements.

**Statutory Authority**

- The Patient Protection and Affordable Care Act, Public Law 111-148, Section 6411, Expansion of the Recovery Audit Contractor (RAC) program
- Section 1902(a)(42)(b) of the Social Security Act, *requires States to establish programs to contract with RACs to audit payments to Medicaid providers by December 31, 2010*
- 42 CFR 455 Subpart A, *Medicaid Agency Fraud Detection and Investigation Program*
- 42 CFR 455 Subpart F, *Medicaid Recovery Audit Contractors Program*

**Background**

Under Section 1902(a)(42)(B)(i) of the Act, states and territories are required to establish programs to contract with one or more Medicaid Recovery Audit Contractors (RACs) for the purpose of identifying underpayments and overpayments, as well as recouping overpayments, under the Medicaid State Plan and any Medicaid State Plan Waivers. This applies to all services for which payment is made to any entity under such plan or waiver. States must establish these programs in a manner consistent with State law, and generally in the same manner as the Secretary contracts with contingency fee contractors for the Medicare RAC program.

Section 1902(a)(42)(B)(i) of the Act specifies that States shall establish programs under which they contract with Medicaid RACs subject to such exceptions or requirements as the Secretary may require for purposes of a particular State. This provision enables the Centers for Medicare and Medicaid Services (CMS) to vary the Medicaid RAC program requirements. For example, CMS may exempt a State from the requirement to pay Medicaid RACs on a contingent basis for collecting overpayments when State law expressly prohibits contingency fee contracting. However, some other fee structure could be required under any such exception (e.g., a flat fee arrangement).

States that otherwise wish to request variances with respect to, or an exception from, Medicaid RAC program requirements must submit a request to CMS, in writing, from the State's Medicaid Director to the CMS/Medicaid Integrity Group.

Although the Delaware Division of Medicaid and Medical Assistance (DMMA) previously had a Recovery Audit Contract (RAC) vendor, that contract is no longer in place. DMMA posted a Request for Proposals (RFPs) in an attempt to attract a new RAC vendor, but received no bids. The majority of Delaware's Medicaid population is enrolled in managed care and the providers treating them are not subject to audit recovery contracting. There is not sufficient revenue generation to fund an adequate contingency fee.

## Summary of Proposal

### Purpose

The purpose of this proposed regulation is to seek an exception to the RAC contracting requirements.

### Summary of Proposed Changes

Effective for services provided on and after July 1, 2018 Delaware Health and Social Services/Division of Medicaid and Medical Assistance (DHSS/DMMA) proposes to amend Section 4.5 General Program Administration Pages 36, 36a, and 36b of Title XIX Medicaid State Plan regarding the Medicaid Recovery Audit Contractor (RAC) Program, specifically, to request an exception to the RAC contracting requirements.

### Public Notice

In accordance with the federal public notice requirements established at Section 1902(a)(13)(A) of the Social Security Act and 42 CFR 447.205 and the state public notice requirements of Title 29, Chapter 101 of the Delaware Code, Delaware Health and Social Services (DHSS)/Division of Medicaid and Medical Assistance (DMMA) gives public notice and provides an open comment period for thirty (30) days to allow all stakeholders an opportunity to provide input on the proposed regulation. Comments must be received by 4:30 p.m. on July 31, 2018.

### Centers for Medicare and Medicaid Services Review and Approval

The provisions of this state plan amendment (SPA) are subject to approval by the Centers for Medicare and Medicaid Services (CMS). The draft SPA page(s) may undergo further revisions before and after submittal to CMS based upon public comment and/or CMS feedback. The final version may be subject to significant change.

### Provider Manuals and Communications Update

Also, there may be additional provider manuals that may require updates as a result of these changes. The applicable Delaware Medical Assistance Program (DMAP) Provider Policy Specific Manuals and/or Delaware Medical Assistance Portal will be updated. Manual updates, revised pages or additions to the provider manual are issued, as required, for new policy, policy clarification, and/or revisions to the DMAP program. Provider billing guidelines or instructions to incorporate any new requirement may also be issued. A newsletter system is utilized to distribute new or revised manual material and to provide any other pertinent information regarding DMAP updates. DMAP updates are available on the Delaware Medical Assistance Portal website: <https://medicaid.dhss.delaware.gov/provider>

### Fiscal Impact

The proposed amendment is being implemented to clarify current DMMA practices and does not result in a change in current practice. Therefore, there is no projected fiscal impact.

Revision: HCFA-PM-88-10 (BERC) OMB No: 0938-0193  
September 1988

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STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
STATE/TERRITORY: **DELAWARE**

### Citation

42 CFR 455.12

AT 78-90

48 FR 3742

52 FR 48847

§1902(a)(42)(B)

P.L. 111-148

§42 CFR 455 Subpart A

§42 CFR 455 Subpart F

### 4.5 Medicaid Agency Fraud Detection and Investigation Program

The Medicaid agency has established and will maintain methods, criteria, and procedures ~~that will meet all requirements of 42 CFR 455.13 through 455.21 and 455.23~~ for prevention and control of program fraud and abuse, including methods for identification, investigation, and referral of suspected fraud cases.

TN No. SPA# 18-002

Approval Date

Supersedes

HCFA ID: 1010P/0012P

TN No. SP# 268

Effective Date July 1, 2018

STATE PLAN UNDER TITLE XIX OF THE SOCIAL SECURITY ACT  
STATE/TERRITORY: **DELAWARE**

**4.5 Medicaid Recovery Audit Contractor Program**

Citation

Section 1902(a)(42)(B)(i)  
of the Social Security Act

- ☒ The State has established a program under which it will contract with one or more recovery audit contractors (RACs) for the purpose of identifying underpayments and overpayments of Medicaid claims under the State plan and under any waiver of the State plan.

Section 1902(a)(42)(B)(ii)(I)  
of the Act

- ☒ The State is seeking an exception to establishing such program for the following reasons:

Although the Delaware Division of Medicaid and Medical Assistance (DMMA) previously had a Recovery Audit Contract (RAC) vendor, that contract is no longer in place. DMMA posted a Request for Proposals (RFPs) in an attempt to attract a new RAC vendor, but received no bids. The majority of Delaware's Medicaid population is enrolled in managed care and the providers treating them are not subject to audit recovery contracting. There is not sufficient revenue generation to fund an adequate contingency fee

- ☒ The State/Medicaid agency has contracts of the type(s) listed in section 1902(a)(42)(B)(ii)(I) of the Act. All contracts meet the requirements of the statute. RACs are consistent with the statute. Delaware RFP for RACs is completed.

Place a check mark to provide assurance of the following:

- ☒ The State will make payments to the RAC(s) only from amounts recovered.
- ☒ The State will make payments to the RAC(s) on a contingent basis for collecting overpayments.

Section 1902  
(a)(42)(B)(ii)(II)(aa) of the Act

The following payment methodology shall be used to determine State payments to Medicaid RACs for identification and recovery of overpayments (e.g., the percentage of the contingency fee):

- ☒ The State attests that the contingency fee rate paid to the Medicaid RAC will not exceed the highest rate paid to Medicare RACs, as published in the Federal Register

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|---------------------------|------------------------------------|
| TN No. SPA# <u>18-002</u> | Approval Date _____                |
| Supersedes                |                                    |
| TN No. <u>10-005</u>      | Effective Date <u>July 1, 2018</u> |

#### 4.5 Medicaid Recovery Audit Contractor Program

- Citation ☐ The State attests that the contingency fee rate paid to the Medicaid RAC will exceed the highest rate paid to Medicare RACs, as published in the Federal Register. The State will only submit for FFP up to the amount equivalent to that published rate.
- ☐ The contingency fee rate paid to the Medicaid RAC that will exceed the highest rate paid to Medicare RACs, as published in the Federal Register. The State will submit a justification for that rate and will submit for FFP for the full amount of the contingency fee.
- Section 1902 (a)(42)(B)(ii)(III)(bb) of the Act ☒ The following payment methodology shall be used to determine State payments to Medicaid RACs for the identification of underpayments (e.g., amount of flat fee, the percentage of the contingency fee):  
**~~The Medicaid RAC will be paid an equivalent percentage contingency fee for the identification of underpayments.~~**
- Section 1902 (a)(42)(B)(ii)(III) of the Act ☒ The State has adequate appeal process in place for entitles to appeal any adverse determination made by Medicaid RAC(s).
- Section 1902(a)(42)(B)(ii)(IV)(aa) of the Act ☒ The State assures that the amounts expended by the State to carry out the program will be amounts expended as necessary for the proper and efficient administration of the State plan or waiver of the plan.
- Section 1902(a)(42)(B)(ii)(IV)(bb) of the Act ☒ The State assures that the recovered amounts will be subject to a State's quarterly expenditure estimates and funding of the State's share.
- Section 1902 (a)(42)(B)(ii)(IV)(cc) of the Act ☒ Efforts of the Medicaid RAC(s) will be coordinated with other contactors or entitles performing audits of entitles receiving payments under the State plan or waiver in the State, and/or State and Federal law enforcement entitles and the CMS Medicaid Integrity Program.

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Supersedes

TN No. 10-005

Effective Date July 1, 2018