



COLORADO
MEDICAL SOCIETY



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Colorado Hospital Association

June 23, 2023

Dear Department of Health Care Policy & Financing (HCPF) Recovery Audit Contractor Program Team:

Thank you for providing the Colorado Medical Society (“CMS”) and the Colorado Hospital Association (“CHA”) with the opportunity to provide feedback on the draft of a proposed rule creating an informal reconsideration and appeals processes for the Recovery Audit Contractor (RAC) audit program notice of adverse action for overpayment. Since HCPF has not yet initiated the formal rulemaking process pursuant to the Administrative Procedure Act or Executive Rule 05, it is CMS and CHA’s understanding that HCPF is seeking preliminary feedback to improve the draft prior to initiating the formal rulemaking process. The new procedures proposed for RAC regarding Appeals and Informal Reconsiderations process and timelines constitute a significant rule change and as such, it is critically important that the Department follow all procedures set forth by the State Administrative Procedure Act ([C.R.S. 24-4-101](#)) prior to undertaking these changes. We appreciate the opportunity to engage in a formal rulemaking process should these changes move forward.

Within the proposal, we appreciate the Department’s recognition that providers should have additional time to respond to informal reconsideration requests included in 8.050.5.A.1; however, we have serious concerns with the other proposals that would increase provider administrative burden and limit their rights. **Overall, the proposed rule changes put burdens and limitations on providers without addressing the recurring problems that providers encounter with the RAC audit process.** The proposed rule also frequently concludes that a failure to comply with the “informal” process results in complete forfeiture of the provider’s right to challenge the action alleging overpayment. For fairness, consistency and the protection of the rights of providers as well as the Department, CMS and CHA believe that the rule should be changed in the following ways:

- **8.050.5.A - Voluntary nature of reconsideration.** The reconsideration process should be voluntary with no forfeit of the right to file an appeal with the CO Office of Administrative Courts (OAC) for any violation of the regulatory requirements. If the process continues to be dysfunctional, then providers should have the right to go straight to a formal appeal through OAC.
 - *Action:* Continue to allow providers to go straight to formal appeal. Additionally, in 8.050.5.A.3 the language “without impacting the provider’s right to appeal to through the Office of Administrative Courts” should be added to the end of the sentence.
 - Remove 8.050.4.B.2 - The informal reconsideration process should be voluntary, not mandatory, for a provider to pursue relief from OAC.
- **8.050.5.A.4 – Clarifying request requirements.** Providers spend a significant amount of time and resources complying with the exact request criteria when requesting reconsideration from the auditor. Unfortunately, the Department and their auditor does not provide a response that is specific to each overpayment, rather they respond to claims as a batch. This makes it impossible for providers to understand which claims were reconsidered and which were overturned or omitted from reconsideration.

- *Action:* The reconsideration process should require that the Department and/or its auditor specify in their decision on informal reconsideration the specific determination on each alleged overpayment, or the Department has forfeited the right to enforce the action alleging overpayment.
- **8.050.5.A.4 – Timelines for HCPF to issue reconsideration.** The Department is currently required to respond within 45 days or to provide notice of its inability to respond; however, providers have experienced frequent issues with slow response times from both the Department and their contractor that fall outside of the statutory window.
 - *Action:* The Department should forfeit the right to allege overpayment if the Department fails within 45 days of receiving a written request for informal reconsideration to either: (a) Issue a decision on reconsideration; or (b) Notify the provider that the Department cannot issue a decision on reconsideration within 45 days.
- **Record volume** – We are hearing concerns that HMS has been requesting medical records above the limit established by HCPF pursuant to CFR Section 455.506. It is impossible for providers to keep up with the current limits to fairly retain payments rendered.
 - *Action:* Establish a process in rule where the Department must work with stakeholders to fairly define the volume of record requests and transparently communicate updates prior to formal changes.
- **8.050.4.B.4 & 8.050.6.G– Burden on proof of provider/ preponderance of evidence.** The wording of this provision places unclear and unfair burdens of proof on the provider to verify that they “*complied with the requirements cited in the Notice of Adverse Action or otherwise has correctly received, or is entitled to receive, any amounts in dispute.*” By the time of a RAC audit, providers contracted with the Department have already provided contracted services to patients and completed coding and billing requirements. It is then the Department, through its auditor, alleging breach of contract in the form of an overpayment, often based on faulty or incomplete data analysis. The burden of proof should be on the Department and its auditor to prove that the provider violated the contract by seeking or receiving an overpayment. The same above analysis on burden of proof applies to overpayment actions arising from any non-RAC audit means referenced in 8.050.6.G. The Department may want to determine the root cause of any true overpayment problems and address them in advance of payment and in a manner that does not create more burdensome work for providers trying to provide patient care by requiring an unclear and inconsistent “preponderance of evidence.”
 - *Action:* Remove 8.050.4.B.4 & 8.050.6.G

We appreciate the Department’s review and would be happy to answer any questions.

Sincerely,


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