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## Indiana Prepares for Recovery Audit Contractors

Medicare providers in Indiana who have received overpayments for services can expect to start receiving requests for medical records and demands for repayment as early as February 2009 under the permanent Recovery Audit Contractor (“RAC”) program. Under the RAC program, the Centers for Medicare and Medicaid Services seeks to identify underpayments and overpayments and recoup overpayments resulting from, among other things, non-covered services, duplicate services and incorrectly coded services. The permanent RAC program has been temporarily suspended while the Government Accounting Office reviews protests filed by contractors that were unsuccessful in their respective bids to provide auditing services under the RAC program.

A Virginia company, CGI Technologies and Solutions, Inc. (“CGI”), has been selected as the RAC auditor for Indiana, Michigan, and Minnesota. RACs such as CGI will be paid a contingency for overpayments collected, thus making them highly motivated. Health care providers are expected to make repayments within thirty (30) days of notice of overpayment, unless a hardship exists.

Though audits will not be conducted randomly, they will be conducted largely without notice to the provider. The RACs will perform “targeted reviews” that will automatically be triggered by irregular coding and billing. Reviews may be conducted up to 3 years from the date a claim is paid, but in no event may reviews be conducted on claims paid before October 1, 2007. Once a review is commenced, the RAC may request the provider submit medical records in support of its claims. The failure or refusal to submit the medical records within 45 days may result in an automatic determination of overpayment.

For most audits, providers will be unaware of the audit until

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receipt of the auditors request for medical records. Accordingly, providers should be preparing today for RAC audit activity by paying attention to detail in claim submissions and adopting and implementing compliance programs.

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### **OIG Finds DME Inventory in Hospital and Supplier Training for Patients Do Not Constitute Prohibited Remuneration**

The Health and Human Services Office of Inspector General (“OIG”) issued an advisory opinion on November 19 that sanctions under the anti-kickback statute were not warranted for an arrangement whereby: (i) a hospital provides free consignment closets to suppliers of DME, prosthetics, orthotics, and suppliers (“DMEPOS”), and (ii) the suppliers provide free training to patients who choose to use the DMEPOS. The opinion was noteworthy because the OIG has historically considered the marketing of DME as an area fraught with the potential for fraud, yet chose to approve of a plan that included the provision of free services.

Under the arrangement in question, patients of the hospital where given a list of local DMEPOS suppliers, including the two suppliers in questions. Patients were free to choose any supplier of DMEPOS off the list. If chosen to supply the patient with respiratory equipment, the suppliers would have licensed personnel at the hospital to train the patient in how to use the equipment in compliance with the CMS Final October 2008 DMEPOS Quality Standards. The hospital would provide a free desk and phone for the licensed personnel to coordinate with the patient’s health care providers.

In its analysis, the OIG determined that “no remuneration will flow from the Suppliers to their potential referral source” because “the remuneration (the free telephones, desks, and consignment closets) and the referrals run the same way.” The OIG effectively interpreted the consideration in the arrangement as running from the hospital to the suppliers. In a footnote, the OIG cautioned against such consideration, but concluded that the suppliers were in no position to be referral sources for the hospital.

Most surprising was the opinion that the services offered by the licensed personnel were not remuneration to the hospital from the suppliers. To that end, the OIG pointed out that the licensed personnel

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would provide no services that the hospital was otherwise obligated to provide.

The OIG was instead swayed more by the fact that the suppliers would pay nothing for the consignment closets in which DMEPOS were to be stored. In the past, the OIG has warned that paying for consignment closets could be construed as a form of remuneration disguised as an excessive rent payment.

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## Expanding Health Care Technology While Preserving Patient Safety

The Joint Commission issued a *Sentinel Event Alert* on December 11, 2008, warning the health care community about the potential negative impact health information technology may have on patient care. The Commission specifically noted concerns with computerized provider order entry and automated dispensing cabinets, among other technological devices. The harmful errors they cited in the alert were primarily attributed to mislabeled barcode information on medications, medication dispensing device errors, confusing computer screen displays, incorrect computer data entries, and overrides of barcode warnings. The Joint Commission pointed out in its Alert that many of the errors were attributable to human error, but the primary issue is with "inadequate technology planning" and poor product selection.

The Joint Commission's warnings come at a time when the health care industry is showing signs of increasing its use of health care technology. Healthcare IT News reported in its December 16, 2008, issue that "[m]ore than half of the respondents of a recent straw poll conducted by the CDW Corporation say the healthcare sector will invest heavily in IT during the next year." In fact, the CDW survey found that "59 percent said the healthcare and energy industries would show strong growth in IT spending, while the financial services and retail segments will decline."

With health care financing and reform being a hot topic on President-elect Obama's agenda, numerous legislators have proposed bills to address a myriad of health care industry issues. Many of those bills address the desire for more efficient health care through the utilization of health care technology. However, as noted by the Joint Commission, while the health care industry increases its use of technology, providers will need to consider not only the costs and

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benefits of such technology, but also how the technology choices could impact patient safety both in a positive and a negative way.

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