Issue Brief

FEDERAL ISSUE BRIEF

Analysis provided for MHA by Larry Goldberg, Goldberg Consulting

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CMS Finalizes Rule Regarding the Medicare Advantage (MA) Risk Adjustment Data Validation (RADV) Program

The Centers for Medicare and Medicaid Services (CMS) have issued a final rule regarding the Medicare Advantage (MA) Risk Adjustment Data Validation (RADV) program that CMS uses to recover improper risk adjustment payments made to Medicare Advantage (MA) plans.

CMS notes that Contract-level Risk Adjustment Data Validation (RADV) audits are its main corrective action for overpayments made to Medicare Advantage organizations (MAOs) when there is a lack of documentation in the medical record to support the diagnoses reported for risk adjustment.

A copy of the 72-page display version currently at the ***Federal Register*** office is available at: https://public-inspection.federalregister.gov/2023-01942.pdf. Publication will be on February 1. The rule will become effective in 60-days.

The rule codifies in regulation that, as part of the RADV audit methodology, CMS will extrapolate RADV audit findings beginning with payment year (PY) 2018.

CMS says that rather than applying extrapolation beginning for payment year (PY) 2011 audits as proposed, the agency is finalizing a policy not to extrapolate RADV audit findings for PYs 2011-2017 and beginning extrapolation with the PY 2018 RADV audit. As a result, CMS will only collect the non-extrapolated overpayments identified in the CMS RADV audits and OIG audits between PY 2011 and PY 2017. CMS is not adopting any specific sampling or extrapolation audit methodology but will rely on any statistically-valid method for sampling and extrapolation that is determined to be well-suited to a particular audit. However, any extrapolation methodology adopted by CMS for RADV audits will be focused on MAO contracts that, through statistical modeling and/or data analytics, are identified as being at the highest risk for improper payments. While not required, CMS will continue to disclose its extrapolation methodology to MAOs, providing MAOs with the information sufficient to understand the means by which CMS extrapolated the RADV payment error.

Extrapolation has historically been a normal part of auditing practice at CMS, including in FFS Medicare, and CMS interprets its existing authority as authorizing the use of sampling and extrapolation in RADV audits.

COMMENT

CMS says it believes that "this is an appropriate policy because it recognizes our fiduciary duty to protect taxpayer dollars from overpayments, and preserves our ability to collect on potentially significant amounts of overpayments made to plans beginning in PY 2018 using an extrapolation methodology".

Further, CMS estimates that findings from audits of MAO contracts for PYs 2011, 2012, and 2013 will identify a total of $683.2 million in extrapolated improper payments. This $683.2 million represents a transfer from the Federal Government to insurers, because it reflects improper payments for human coding error which CMS paid to MAOs. Although CMS will not exercise its authority to seek extrapolated

contract-level recoveries for these payment years, CMS refers to the $683.2 million in improper payments to estimate future expected recoveries from finalizing this rule.

With extrapolation applied to audit findings beginning with 2018 payment year audits, the expected level of recovery in calendar year 2025 (the year in which CMS projects to initiate improper payment recoveries for PY 2018 audits) would produce $428.4 million in net recovery (that is, $479.4 million minus the annual cost of the RADV program of $51 million).

Note the recovery amount for 2025 through 2032 is $4.516 billion.

The table below identifies CMS' projections;

TABLE 3: IMPACT ON ESTIMATED COLLECTIONS OF IMPROPER PAYMENTS PER YEAR FROM RADV RULE ($ IN MILLIONS)

	2024	2025	2026	2027	2028	2029	2030	2031	2032	Total
Estimated Non-Extrapolated Collections Assumed Without RADV Final Rule Changes	$28.0	$11.6	$10.9	$12.7	$13.5	$14.4	$15.4	$16.4	$17.5	$153.5
Estimated Collections from Audits Completed in Prior Years With RADV Final Rule Changes	28.0	479.4	447.5	522.6	557.2	594.0	633.2	675.0	719.5	$4,669.5
Additional Estimated Collections as a Result of RADV Final Rule	0.0	467.8	436.6	509.9	543.7	579.6	617.8	658.6	702.0	$4,516.0

CMS says it will not apply an adjustment factor (known as an FFS Adjuster) in RADV audits consistent with a recent D.C. Circuit Court decision in *UnitedHealthcare Insurance Co. v. Becerra*, 16 F.4th 867 (D.C. Cir. August 13, 2021, reissued November 1, 2021), *cert*. *denied*, 142 S. Ct. 2851 (U.S. June 21, 2022) (No. 21-1140). Nonetheless, how can CMS truly state that its actions for not exercising its authority to recover over payments for PYs 2011 - 2017 is protecting taxpayer dollars from overpayments?