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CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICAID & CHIP SERVICES

CMCS Informational Bulletin

DATE: April 22, 2024

FROM: Daniel Tsai, Deputy Administrator and Director

SUBJECT: **Exercise of Enforcement Discretion until Calendar Year 2028 for Existing Health Care-Related Tax Programs with Hold Harmless Arrangements Involving the Redistribution of Medicaid Payments**

The Center for Medicaid and CHIP Services (CMCS) is issuing this CMCS Informational Bulletin (CIB) to advise state Medicaid agencies that, for a period of time, CMS will not enforce sections 1903(w)(1)(A)(iii) and (w)(4) of the Social Security Act (the Act) and 42 CFR § 433.68(b)(3) and (f) with respect to health care-related tax programs with hold harmless arrangements involving provider payment redistributions that exist as of the date of this guidance. These arrangements were described in detail in a February 17, 2023, CMCS CIB titled *Health Care-Related Taxes and Hold Harmless Arrangements Involving the Redistribution of Medicaid Payments*[1] (February 2023 CIB). This exercise of enforcement discretion will remain in effect until January 1, 2028, at which time CMS will begin enforcement of this policy or provide additional information regarding enforcement of the statutory and regulatory prohibition on hold harmless arrangements involving the redistribution of Medicaid payments. CMS expects that states will not develop or implement health care-related taxes that involve provider payment redistributions or develop, implement, endorse, or encourage new provider payment redistribution arrangements tied to existing health care-related taxes.

In some cases, state Medicaid agencies have asked for assistance to identify existing hold harmless arrangements involving provider payment redistributions. We further understand that states may need time to evaluate and work with their provider communities and/or legislatures to modify existing non-Federal share financing arrangements to come into compliance with federal requirements. This period of enforcement discretion will allow CMS to provide technical assistance to states and continue to gather information on these arrangements to ensure that future CMS enforcement action on existing arrangements does not result in unanticipated and significant Medicaid program disruption. We understand that the immediate elimination of a source of non-Federal share for Medicaid expenditures has the potential to result in state budget shortfalls, potentially leading to reductions in payments that could contribute to solvency issues for providers, including safety net providers, and thereby have an adverse effect on beneficiaries (especially those in underserved communities).

[1] *See* https://www.medicaid.gov/sites/default/files/2023-02/cib021723.pdf.

We intend to use the period before January 1, 2028, to assist states, where necessary, to identify and transition to allowable sources of non-Federal share while mitigating any program disruption to the greatest extent possible. CMS will be available to provide any technical assistance that states may require while transitioning their health care-related taxes away from these types of arrangements. This transition period aligns with the effective date of a related provision in the Medicaid and Children's Health Insurance Program (CHIP) Managed Care Access, Finance, and Quality Final Rule (Managed Care Final Rule), which CMS issued on April 22, 2024. Specifically, in 42 CFR 438.6(c)(2)(ii)(H), this final rule requires states proposing a state-directed payment (SDP) to ensure that providers receiving the SDP attest that they do not participate in any hold harmless arrangement for any health care-related tax as specified in 42 CFR 433.68(f)(3) in which the state or other unit of government imposing the tax provides for any direct or indirect payment, offset, or waiver such that the provision of the payment, offset, or waiver directly or indirectly guarantees to hold the taxpayer harmless for all or any portion of the tax amount. This provision applies as of the first rating period beginning on or after January 1, 2028, for contracts with Managed Care Organizations (MCOs), Pre-Paid Inpatient Health Plans (PIHPs), and Pre-paid Ambulatory Health Plans (PAHPs).

Background

As discussed in the February 2023 CIB and the Managed Care Final Rule, we have identified instances in which states are funding the non-Federal share of Medicaid SDPs and other Medicaid payments through health care-related tax programs that appear to involve an impermissible hold harmless arrangement. In these arrangements, providers appear to have pre-arranged agreements to redistribute Medicaid payments (or other provider funds that are replenished by Medicaid payments). These arrangements appear to redirect Medicaid payments away from the providers that furnish relatively higher percentages of Medicaid-covered services toward providers that provide lower percentages of, or even no, Medicaid-covered services, with the effect of ensuring that taxpaying providers are held harmless for all or a portion of their cost of the health care-related tax. We acknowledge that states have varying degrees of awareness and involvement in these arrangements.

Given the growing number of SDPs generally and the growing number of SDPs that raise potential financing concerns, including those described in the February 2023 CIB, we stated explicitly in the Managed Care Final Rule (and reflected in our updates to the regulations governing SDPs) that the same financing requirements governing the sources of the non-Federal share apply regardless of delivery system, and that CMS will evaluate the source of the non-Federal share of SDPs for compliance with federal statutes and regulations during the SDP preprint review process.

Accordingly, we finalized revisions to 42 CFR 438.6(c)(2)(ii) to add a new paragraph (c)(2)(ii)(G) to require explicitly that an SDP comply with all Federal legal requirements for the financing of the non-Federal share, including, but not limited to, 42 CFR part 433, subpart B, as part of the CMS SDP preprint review process. This provision is effective 60 days after the date of publication in the *Federal Register*. We also finalized new paragraph 42 CFR 438.6(c)(2)(ii)(H), to require states to ensure that providers receiving an SDP attest that they do not participate in any hold harmless arrangement for any health care-related tax as specified in

42 CFR 433.68(f)(3) in which the state or other unit of government imposing the tax provides for any direct or indirect payment, offset, or waiver such that the provision of the payment, offset, or waiver directly or indirectly guarantees to hold the taxpayer harmless for all or any portion of the tax amount. The attestation provision is applicable beginning with the first rating period for contracts with MCOs, PIHPs, and PAHPs beginning on or after January 1, 2028.

Guidance and Options for States

CMS will not take enforcement action until January 1, 2028, against states that, as of the publication date of this CIB, have the type of financing arrangements described in the February 2023 CIB and are prohibited under section 1903(w)(4) of the Act and 42 CFR 433.68(f), regardless of which Medicaid delivery system or type of payment the arrangement supports (e.g., SDPs, fee-for-service payments). During the period before January 1, 2028, we expect states with existing hold harmless arrangements to undertake changes necessary so that by no later than January 1, 2028, the state is compliant with all non-Federal share financing requirements. CMS is available to provide technical assistance that states may require while transitioning their health care-related taxes away from these types of arrangements. CMS also intends to utilize this time to obtain additional information about where such hold harmless arrangements exist and their implications for providers, particularly safety net providers, and Medicaid beneficiaries. We note that the recently finalized Managed Care Final Rule does not conflict with the policy described in this guidance. As noted above, 42 CFR 438.6(c)(2)(ii)(G) now requires explicitly that an SDP comply with all Federal legal requirements for the financing of the non-Federal share, including, but not limited to, 42 CFR part 433, subpart B.

Although we will not be taking enforcement actions for the specified time period related to provider payment redistribution arrangements that were in effect as of the date of this CIB, we will continue to identify and track arrangements through SDPs, state plan amendments, and other means. Specifically, CMS intends to begin routinely asking questions about possible hold harmless arrangements in conjunction with reviews of health care-related tax waiver requests and state payment proposals funded, at least in part, by health care-related taxes. The purpose of this work is twofold. First, we wish to ensure states are aware of which existing arrangements may be at risk of adverse action (such as deferral or disallowance of federal financial participation) beginning January 1, 2028, so that the state can proactively modify the payments or source of non-Federal share associated with those arrangements before that date. Second, it will allow CMS to identify any states or program sectors particularly at risk due to a currently unknown concentration of impermissible arrangements. With that information, CMS can take steps necessary to assist states through technical assistance to ensure that the end of this period of enforcement discretion does not cause unnecessary program disruptions, and to help states mitigate any disruption, where possible. CMS expects states to transition away from existing provider payment redistribution arrangements and not develop reliance on new redistribution arrangements. CMS will also continue to review new health care-related taxes and any new provider payment redistribution arrangements about which we may learn about during the period of non-enforcement outlined in this CIB. New health care-related taxes that do not meet federal requirements or new provider payment redistribution arrangements may result in CMS disapproval of state Medicaid payment proposals and/or disallowance of Federal Financial Participation (FFP).

We understand that coming into compliance with federal requirements may involve coordination among state agencies, state legislatures, providers and provider groups. CMS is committed to working with state Medicaid agencies in furtherance of achieving full compliance with applicable Federal requirements with as little burden and disruption as possible. CMS encourages states to act to end prohibited arrangements as quickly as feasible, before January 1, 2028. We have already partnered with states that have taken steps to prevent or end these arrangements, and we will provide technical assistance to additional states informed by those experiences. We are also available to provide technical assistance during the development of state oversight policies and programs.

Conclusion

CMS will continue to approve payment proposals that are supported by permissible health care-related taxes that do not contain hold harmless arrangements and meet all other applicable Federal requirements. These taxes often finance critical health care programs that pay for care furnished to Medicaid beneficiaries and shore up the health care safety net. As always, CMS intends to work collaboratively with states by providing technical assistance as necessary to ensure the programmatic and fiscal integrity of the Medicaid program. For questions on health care-related taxes and related waivers, please contact the CMS Tax Waiver Mailbox at taxwaiver@cms.hhs.gov. For questions on state-directed payments, please contact the CMS State Directed Payment mailbox at statedirectedpayment@cms.hhs.gov.