

(b)(6)

Subject: MO Follow Up (DEHPG Closed Session)

Location: Conference Room A / WebEx: (b)(6); ID: (b)(6)

Start: Tue 7/16/2019 10:00 AM

End: Tue 7/16/2019 10:15 AM

Show Time As: Tentative

Recurrence: (none)

Meeting Status: Not yet responded

Organizer: CMS CMCS_Scheduling

Required Attendees: Lynch, Calder (CMS/OA); Shields, Karen (CMS/CMCS); Deboy, Alissa M. (CMS/CMCS); Harris, Melissa L. (CMS/CMCS); Smith, Carrie A. (CMS/CMCS); Anderson, Debbie (CMS/CMCS); Gibson, Alexis E. (CMS/CMCS)

Optional Attendees: Truffer, Christopher J. (CMS/OACT); Fan, Kristin A. (CMS/CMCS); Cope, Tristan P. (CMS/OACT); Sumeracki, Jodie M. (CMS/CMCS); Delozier, Adrienne M. (CMS/CMCS); Howe, Rory (CMS/CMCS) (Rory.Howe@cms.hhs.gov)

Agenda:



07162019 CLOSED
DEH Clearance ...

Materials:

1. MO Follow Up (paper)

Action Needed By: ASAP

Decision Requested: Next steps to bring the issue to resolution based on the options identified in the paper.

Summary: (b)(5)

(b)(5)

(b)(5) Based on the memorandum of understanding between the health plans and the hospital association, the payment arrangement violates the hold harmless provisions under tax law and is an impermissible cost included in the capitation rates. We identify the options for resolution in the attached paper.



1. MO FMP SFY 19
options v6 cl...

Access Information

1. Please call the following number:

WebEx: (b)(6)

2. Follow the instructions you hear on the phone.

Your WebEx Meeting Number: (b)(6)

Message

Sent: 5/1/2023 3:33:47 PM
To: Bonelli, Anna (CMS/CMCS); (b)(6)
(b)(6); Snyder, Laura
(CMS/CMCS); (b)(6)
(b)(6)
CC: Giles, John (CMS/CMCS); (b)(6)
(b)(6); Gentile, Amy (CMS/CMCS)
(b)(6); Gibson, Alexis
(CMS/CMCS); (b)(6)
(b)(6)
Subject: RE: RE: Deadline: Noon today NPRM slides for all state call.

Hi, Anna and Laura. I agree with Anna's language below.

From: Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>
Sent: Monday, May 1, 2023 9:20 AM
To: Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>; Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>
Cc: Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>; Gentile, Amy (CMS/CMCS) <Amy.Gentile@cms.hhs.gov>;
Gibson, Alexis (CMS/CMCS) <alexis.gibson@cms.hhs.gov>
Subject: RE: Deadline: Noon today NPRM slides for all state call.

Thanks for pulling this together, Laura.

Rory, how about:

(b)(5)

From: Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>
Sent: Monday, May 1, 2023 9:04 AM
To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>; Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>
Cc: Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>; Gentile, Amy (CMS/CMCS) <Amy.Gentile@cms.hhs.gov>;
Gibson, Alexis (CMS/CMCS) <alexis.gibson@cms.hhs.gov>
Subject: Deadline: Noon today NPRM slides for all state call.
Importance: High

Hi Rory,

I've been chatting with Anna B this morning; Dan provided handwritten edits to the slide deck for the all state call on 5/2; edits are due by **noon today**. There is a handwritten note – the best we can tell, says, "Connect with Rory note this as simply compliance with statute around hold harmless"

(b)(5)

Message

From: Snyder, Laura (CMS/CMCS) (b)(6)
(b)(6)
Sent: 5/1/2023 1:04:02 PM
To: Howe, Rory (CMS/CMCS) (b)(6)
(b)(6) Bonelli, Anna (CMS/CMCS)
(b)(6)
CC: Giles, John (CMS/CMCS) (b)(6)
(b)(6) Gentile, Amy (CMS/CMCS)
(b)(6) Gibson, Alexis
(CMS/CMCS) (b)(6)
(b)(6)
Subject: Deadline: Noon today NPRM slides for all state call.
Attachments: Image.jpeg

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All State Call Slides – Slide 25 on state directed payments has the following bullet:

- Ensure that existing requirements for allowable sources of non-federal share are explicitly applied to SDPs, ~~enabling~~ and noting CMS ~~to~~ may disapprove and take enforcement action on SDPs that do not comply with non-federal financing requirements. Additionally, require states to ensure that providers attest that they do not have an ~~arrangement to redistribute Medicaid payments to other providers~~.

Not sure what to do with the bullet given the strikeouts; here is an idea, but open to other suggestions:

- Ensure that existing requirements for allowable sources of non-federal share are explicitly applied to SDPs, ~~enabling~~ and noting CMS ~~to~~ may disapprove and take enforcement action on SDPs that do not comply with non-federal financing requirements. Additionally, require states to ensure through the collection of provider attestations compliance with existing statutory requirements around hold harmless. that providers attest that they do not have an ~~arrangement to redistribute Medicaid payments to other providers~~.

Laura Snyder
(she/her/hers)
Technical Director
Division of Managed Care Policy
Centers for Medicaid and CHIP Services
Phone: 410-786-3198
Laura.Snyder1@cms.hhs.gov

Message

From: Howe, Rory (CMS/CMCS) (b)(6)
(b)(6)
Sent: 5/1/2023 6:29:47 PM
To: Arnold, Charlie (CMS/CMCS) (b)(6)
(b)(6)
CC: Clark, Jennifer (CMS/CMCS) (b)(6)
(b)(6)
Subject: RE: RE: Tax TA Email to NV

Per our conversation

As an alternative to obtaining provider attestations, CMS is open to state ideas regarding how it can provide information to CMS to support that its hospital tax program does not likely include a hold harmless arrangement. For example, the state could hold a meeting with its providers. Please find below an example of state talking points that could be used for such a meeting:

From: Arnold, Charlie (CMS/CMCS) <Charlie.Arnold@cms.hhs.gov>
Sent: Tuesday, April 18, 2023 8:03 AM
To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>
Cc: Clark, Jennifer (CMS/CMCS) <Jennifer.Clark@cms.hhs.gov>
Subject: FW: Tax TA Email to NV

Good morning Rory,

I am moving this to the top of your email. Once you complete your review, we can make any requested edits and send to the state. They are awaiting our TA.

Thanks,

Charlie Arnold
Director
CMCS/FMG/DFP
(443) 962-2499

Any opinion expressed in this email communication does not represent the opinion of the agency and will not bind or obligate CMS. CMS has relied on the facts and information presented and if any material facts have not been disclosed, any opinion/advice is without force and effect. Any advice is limited to the facts presented and is part of informal discussions of the issues raised.

From: Arnold, Charlie (CMS/CMCS)
Sent: Thursday, April 6, 2023 7:50 AM
To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>
Cc: Endelman (he/him), Jonathan (CMS/CMCS) <Jonathan.Endelman@cms.hhs.gov>; Goldstein, Stuart (CMS/CMCS) <STUART.GOLDSTEIN@cms.hhs.gov>; Clark, Jennifer (CMS/CMCS) <Jennifer.Clark@cms.hhs.gov>; Maccarroll, Amber (CMS/CMCS) <Amber.MacCarroll@cms.hhs.gov>
Subject: Tax TA Email to NV

Good morning Rory,

I am attaching the draft email to NV regarding the state's question. Also attached is the attestation that can be used as a template for the state to provide to its providers. This is the original information that was sent to the state previously, with on minor changes: ensuring the consistent use of "the Act" throughout the document and

CMS02511cv1712

Message

From: Howe, Rory (CMS/CMCS) (b)(6)
(b)(6)
Sent: 1/4/2023 4:52:56 PM
To: adams, lia (CMS/CMCS) (b)(6)
(b)(6)
CC: Boston, Beverly (CMS/CMCS) (b)(6)
(b)(6); Maccarroll, Amber
(CMS/CMCS) (b)(5)
(b)(6); Silanskis, Jeremy
(CMS/CMCS) (b)(6)
(b)(6)
Subject: RE: RE: Due Today: Update FMG Blurb for CMCS Issues 01/13/23 -

I am done with the Issues blurb. Missouri will go on the 18th. Also, I sent a separate email to Dan/Anne Marie/Sara, but could we request from OCD SAs a placeholder for an exec session topic at the end of Mega Clearance on a CA MCO Tax Issue?

From: adams, lia (CMS/CMCS) <Lia.Adams@cms.hhs.gov>
Sent: Wednesday, January 4, 2023 11:39 AM
To: Maccarroll, Amber (CMS/CMCS) <Amber.MacCarroll@cms.hhs.gov>; Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>; Silanskis, Jeremy (CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>
Cc: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>
Subject: Due Today: Update FMG Blurb for CMCS Issues 01/13/23 -
Importance: High

Re-flagging as a reminder!

Also, please let me know NLT by 12 PM if the Missouri paper should be moved forward.

Link: [Missouri paper](#)

Link: [Missouri blurb](#)

From: adams, lia (CMS/CMCS)
Sent: Wednesday, January 4, 2023 10:11 AM
To: Maccarroll, Amber (CMS/CMCS) <Amber.MacCarroll@cms.hhs.gov>; Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>; Silanskis, Jeremy (CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>
Cc: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>
Subject: RE: Update FMG Blurb for CMCS Issues 01/13/23

Took a first pass in revising the blurb. Link to where the blurb needs to be edited:

(b)(6)
(b)(6) /CMCS%20Issues%20Draft%20Agenda Jan.13.23.docx?web=1

From: Hakim, Alyson (Aly) (CMS/CMCS) <Alyson.Hakim@cms.hhs.gov>
Sent: Wednesday, January 4, 2023 10:05 AM
To: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>; adams, lia (CMS/CMCS) <Lia.Adams@cms.hhs.gov>
Subject: Update FMG Blurb for CMCS Issues 01/13/23
Importance: High

Message

From: Tsai, Daniel (CMS/CMCS); (b)(6)
(b)(6)
Sent: 3/5/2023 7:42:21 PM
To: Briskin, Perrie (CMS/CMCS); (b)(6)
(b)(6)
Subject: Re: Re-Up Medicaid Financing Overview

Thanks. Do we have the paper on the Mc rule that gets at acr (average commercial rate)? Thanks

From: Briskin, Perrie (CMS/CMCS) <Perrie.Briskin@cms.hhs.gov>
Sent: Sunday, March 5, 2023 11:24:34 AM
To: Tsai, Daniel (CMS/CMCS) <Daniel.Tsai@cms.hhs.gov>
Subject: FW: Re-Up Medicaid Financing Overview

Dan – Is it also worth noting the following for ACBL. I can send to her, if yes.

- On February 17, CMS released a CMS Informational Bulletin (CIB) on “healthcare-related taxes” that include impermissible hold-harmless provider taxes: <https://www.medicaid.gov/federal-policy-guidance/downloads/cib021723.pdf>
- On February 22, CMS also took the following actions:
 - a. FLORIDA: Notified Florida of a CMS Financial Management Review (FMR) of the state’s managed care state directed payments (SDPs) funded by the state’s health-related tax (the same taxes highlighted by the CIB).
 - b. MISSOURI: CMS sent Missouri a question set in advance of a CMS-64 review regarding the state’s pooling/redistribution of funds. Form CMS-64 is a statement of expenditures for which states are entitled to federal reimbursement.
- TEXAS: OIG is currently investigating the provider tax arrangements in Texas.

From: Ellis (she/her), Kyla (CMS/OA) <Kyla.Ellis@cms.hhs.gov>
Sent: Sunday, March 5, 2023 2:12 PM
To: (b)(6) Administrator (CMS/OA); (b)(6)
Cc: Tsai, Daniel (CMS/CMCS) <Daniel.Tsai@cms.hhs.gov>; Briskin, Perrie (CMS/CMCS) <Perrie.Briskin@cms.hhs.gov>
Subject: Re-Up Medicaid Financing Overview

Hi Chiquita,

On Friday we mentioned re-upping the SDP and provider taxes overview document ahead of some additional conversations about state activities this week. Here’s what I could find from late last year.

Dan and Perrie may know of other helpful materials.

All the best,
Kyla

Kyla Ellis (she/her/hers)
Senior Advisor to the CMS Administrator



Message

From: Briskin, Perrie (CMS/CMCS); (b)(6)
(b)(6)
Sent: 3/5/2023 7:24:34 PM
To: Tsai, Daniel (CMS/CMCS); (b)(6)
(b)(6)
Subject: FW: FW: Re-Up Medicaid Financing Overview
Attachments: State Directed Payments Overview_10.13.22_V2.docx

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CMS04847cv1712

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In the recommendation it only mentions deferrals and not a disallowance. Do we want to add that in to be consistent or should I leave as is?

Recommendation: CMCS recommends issuing a deferral in the amount of \$236,629,533 FFP for the CMS-64 quarter ending December, 31 2022 by the 60th day, March 31, 2023. CMCS also recommends pursuing deferrals for additional quarters until the state demonstrates its FRA tax meets federal requirements.

From: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>

Sent: Tuesday, March 14, 2023 1:00 PM

To: adams, lia (CMS/CMCS) <Lia.Adams@cms.hhs.gov>

Cc: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>; Ferguson, Dorothy (CMS/CMCS) <Dorothy.Ferguson@cms.hhs.gov>; Curry, Celestine (CMS/CMCS) <Celestine.Curry@cms.hhs.gov>; Maccarroll, Amber (CMS/CMCS) <Amber.MacCarroll@cms.hhs.gov>; Silanskis, Jeremy (CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>

Subject: RE: OGD Review Requested: March 22 - OA Issues

Hi, Lia. I finished my edits to the paper on SharePoint and we should be good to go. Would you mind taking one last look through the paper for any errors before moving it forward? Thanks to everyone who worked on this. I know it was required a very quick turnaround!

From: adams, lia (CMS/CMCS) <Lia.Adams@cms.hhs.gov>

Sent: Monday, March 13, 2023 11:19 AM

To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>; Maccarroll, Amber (CMS/CMCS) <Amber.MacCarroll@cms.hhs.gov>; Silanskis, Jeremy (CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>

Cc: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>; Ferguson, Dorothy (CMS/CMCS) <Dorothy.Ferguson@cms.hhs.gov>; Curry, Celestine (CMS/CMCS) <Celestine.Curry@cms.hhs.gov>

Subject: RE: OGD Review Requested: March 22 - OA Issues

Thanks, Rory!

+ Dorothy/Celestine – here is what moved forward:

I. Missouri Deferral – Federal Reimbursement Allowance (FRA) Tax

CMCS will brief and seek concurrence from the Administrator on a recommended Missouri deferral related to the state's FRA tax. As part of the action plan to enforce compliance with non-federal share financing requirements in Missouri (previously briefed on May 26, 2022), CMCS conducted a focused review of Missouri's hospital tax, known as the FRA tax, to determine compliance with statutory and regulatory requirements, specifically whether a hold harmless arrangement exists due to providers redistributing Medicaid payments. The review confirmed our previous concerns that the tax may be unallowable, and as a result, CMCS recommends issuing a deferral in the amount of approximately \$236,000,000 to temporarily hold a portion of Medicaid funding while CMS continues to review information from the state to make a final determination of the allowability of the tax. Regulations require that a deferral must be taken within 60 days of receipt of the state's quarterly expenditure report, which is March 31, 2023.

- Decision deadline: March 20, 2023
- Briefer: Rory Howe, Director, Financial Management Group
- IRA-Related Policies: N/A

From: Briskin, Perrie (CMS/CMCS)
Sent: Sunday, March 5, 2023 2:49 PM
To: Tsai, Daniel (CMS/CMCS) <Daniel.Tsai@cms.hhs.gov>
Subject: RE: Re-Up Medicaid Financing Overview

We have the SDP Deep Dive paper that has a section on provider payment limits (attached).

What may be better for ACBL – the Sec briefing deck on the MC Rule (also attached – text on SDPs pasted here):

Background: *State directed payments (SDPs) are a payment mechanism by which states contractually obligate their managed care plans to pay a portion of their capitation payments to specific provider types for specific services. SDPs have become a significant payment vehicle for states, accounting for **more than \$25B annually across 37 states**.*

- *SDPs allow states to take a more proactive role in directing managed care plans towards key policy and delivery system investments. However, some SDPs are correlated with financing challenges.*

(b)(5)

From: Tsai, Daniel (CMS/CMCS) <Daniel.Tsai@cms.hhs.gov>
Sent: Sunday, March 5, 2023 2:42 PM
To: Briskin, Perrie (CMS/CMCS) <Perrie.Briskin@cms.hhs.gov>
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Senior Advisor to the CMS Administrator



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Message

From: Briskin, Perrie (CMS/CMCS) (b)(6)
(b)(6)
Sent: 3/5/2023 7:49:10 PM
To: Tsai, Daniel (CMS/CMCS) (b)(6)
(b)(6)
Subject: RE: RE: Re-Up Medicaid Financing Overview
Attachments: CMS-HHS Sec briefing_Managed Care Rule_2022.12.07_Final clean.pptx; SDP Deep Dive Paper 08.22.2022 FINAL.docx

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What may be better for ACBL – the Sec briefing deck on the MC Rule (also attached – text on SDPs pasted here):

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From: Ellis (she/her), Kyla (CMS/OA) <Kyla.Ellis@cms.hhs.gov>

Sent: Sunday, March 5, 2023 2:12 PM

To: (b)(6), Administrator (CMS/OA) (b)(6) >

Cc: Tsai, Daniel (CMS/CMCS) <Daniel.Tsai@cms.hhs.gov>; Briskin, Perrie (CMS/CMCS) <Perrie.Briskin@cms.hhs.gov>

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Kyla

Kyla Ellis (she/her/hers)
Senior Advisor to the CMS Administrator



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Cc: Briskin, Perrie (CMS/CMCS) <Perrie.Briskin@cms.hhs.gov>; Costello, Anne Marie (CMS/CMCS) <AnneMarie.Costello@cms.hhs.gov>; Vitolo, Sara (CMS/CMCS) <Sara.Vitolo@cms.hhs.gov>; Maccarroll, Amber (CMS/CMCS) <Amber.MacCarroll@cms.hhs.gov>; Silanskis, Jeremy D. (CMS/CMCS) (Jeremy.Silanskis@cms.hhs.gov) <Jeremy.Silanskis@cms.hhs.gov>; Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>

Subject: MO Tax Deferral - DRAFT Letter/OA Talking Points

Hi Dan,

Please see attached for your review and comment the draft Missouri deferral letter and draft talking points for the OA/ MO Gov phone call. We also plan to send these in your book for tomorrow night, but are sharing early by email if you would prefer to review directly. We also plan to share the requested timeline for calls/releases tomorrow.

Please let us know if you have any questions in the interim.

Thanks,
Rory

Message

From: adams, lia (CMS/CMCS); (b)(6)
(b)(6)
Sent: 1/4/2023 4:38:41 PM
To: Maccarroll, Amber (CMS/CMCS); (b)(6)
(b)(6) } Howe, Rory
(CMS/CMCS) (b)(6)
(b)(6) } Silanskis, Jeremy
(CMS/CMCS) (b)(6)
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CC: Boston, Beverly (CMS/CMCS); (b)(6)
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Subject: Due Today: Update FMG Blurb for CMCS Issues 01/13/23 -

Re-flagging as a reminder!

Also, please let me know NLT by 12 PM if the Missouri paper should be moved forward.

Link: [Missouri paper](#)

Link: [Missouri blurb](#)

From: adams, lia (CMS/CMCS)
Sent: Wednesday, January 4, 2023 10:11 AM
To: Maccarroll, Amber (CMS/CMCS) <Amber.MacCarroll@cms.hhs.gov>; Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>; Silanskis, Jeremy (CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>
Cc: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>
Subject: RE: Update FMG Blurb for CMCS Issues 01/13/23

Took a first pass in revising the blurb. Link to where the blurb needs to be edited:

(b)(6)
(b)(6) /CMCS%20Issues%20Draft%20Agenda_Jan.13.23.docx?web=1

From: Hakim, Alyson (Aly) (CMS/CMCS) <Alyson.Hakim@cms.hhs.gov>
Sent: Wednesday, January 4, 2023 10:05 AM
To: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>; adams, lia (CMS/CMCS) <Lia.Adams@cms.hhs.gov>
Subject: Update FMG Blurb for CMCS Issues 01/13/23
Importance: High

Morning! AMC asked that this be moved to discussion/informational section given that we don't typically seek approval of a CIB since it's not new policy. Please adjust the background decision blurb. I need to submit to OSORA asap. Thank you!!!

(b)(5)

Message

From: Howe, Rory (CMS/CMCS) (b)(6)
(b)(6)
Sent: 5/8/2023 7:09:14 PM
To: Briskin, Perrie (CMS/CMCS) (b)(6)
(b)(6)
CC: Costello, Anne Marie (CMS/CMCS) (b)(6)
(b)(6) Tsai, Daniel
(CMS/CMCS) (b)(6)
(b)(6) Maccarroll, Amber
(CMS/CMCS) (b)(6)
(b)(6) Silanskis, Jeremy D.
(CMS/CMCS) (Jeremy.Silanskis@cms.hhs.gov) (b)(6)
(b)(6) Boston, Beverly (CMS/CMCS)
(b)(6)
(b)(6)
Subject: RE: RE: OGC/DOJ Revisions to Draft Letter
Attachments: Draft FRA Tax Letter (OGC-DOJ Edits 5-08-23 CMSD, FMG.docx)

Hi, Perrie. FYI – this will not be in the books tonight. After I sent the email below, OGC staff clarified that they are still awaiting OGC leadership sign-off on these edits. If anyone is interested in the interim, I have attached the OGC staff-level comments and our responses. Apologies for any confusion.

From: Howe, Rory (CMS/CMCS)
Sent: Monday, May 8, 2023 10:55 AM
To: Briskin, Perrie (CMS/CMCS) <Perrie.Briskin@cms.hhs.gov>
Cc: Costello, Anne Marie (CMS/CMCS) <AnneMarie.Costello@cms.hhs.gov>; Tsai, Daniel (CMS/CMCS) <Daniel.Tsai@cms.hhs.gov>; Maccarroll, Amber (CMS/CMCS) <Amber.MacCarroll@cms.hhs.gov>; Silanskis, Jeremy D. (CMS/CMCS) (Jeremy.Silanskis@cms.hhs.gov) <Jeremy.Silanskis@cms.hhs.gov>; Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>
Subject: FW: OGC/DOJ Revisions to Draft Letter

Hi Perris,

FYI, as you asked us to keep you in the loop on (b)(5) hold harmless letter status. FMG just received feedback from OGC and DOJ (see attached) and the comments were relatively minor. We plan to put an updated version in Dan and Anne Marie's book for tonight. Please let us know if you need anything in the interim.

Thanks,
Rory

From: Campbell, Matthew (HHS/OGC) <Matthew.Campbell@hhs.gov>
Sent: Monday, May 8, 2023 10:37 AM
To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>
Cc: Kaiser, Bridgette (HHS/OGC) <Bridgette.Kaiser@hhs.gov>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>
Subject: OGC/DOJ Revisions to Draft Letter

Rory,

Attached is a draft of (b)(5) with some proposed revisions from OGC and DOJ. Please let us know if you have any comments or questions. Thanks.

CMS04776cv1712

- Context:
 - MO has a hospital tax that is used to finance the non-federal share of certain Medicaid payments. Some or all of the tax-paying hospitals have entered into private arrangements under which they pool and redistribute those payments to ensure all hospitals recoup all or almost all of their tax amounts. Based on our interpretation of the statute, those arrangements violate the statutory prohibition against hold-harmless arrangements.
 - Over the past several years, CMS has been on the record indicating the impermissibility of this tax (see more detail below). However, details about the hold harmless arrangement were newly revealed to CMS over the past several years.
 - Last month, CMS released guidance affirming that hold harmless arrangements of this type violate the statutory prohibition on hold harmless.
 - Missouri and other states contend that our interpretation is inconsistent with the Medicaid statute and regulations, and Missouri specifically contends that CMS has known about and approved of its health care-related tax and related Medicaid payment redistribution arrangement for many years.

- CMS/HHS must decide how to move forward on enforcement action

(b)(5)

- After additional consultation with OGC, we are proposing:

(b)(5)

- The alternative we considered was (b)(5)

(b)(5)

(b)(5)

Additional background

CMS' concerns with the MO hold-harmless arrangement

(b)(5)

(b)(5)

2. CMCS Information Bulletin on Health Care-Related Taxes and Hold Harmless Arrangements Involving the Redistribution of Medicaid Payments

- **Issue Summary:** Overview of an upcoming CMCS Information (CIB) to states reiterating certain federal statutory and regulatory requirements that pertain to health-care related taxes. Recently, CMS has discovered a few states with health care-related tax programs that appear to involve impermissible agreements among providers to redistribute their Medicaid payments to hold all taxpayers harmless for the cost of the tax. The CIB reminds states that such arrangements are prohibited by the statute and regulations and re-emphasizes our goal of assisting states in ensuring appropriate sources of non-federal share financing.
- **Target Release Date:** January 23, 2023
- **IRA-Related Policies:** No
- **CMS Cross-Component Coordination:** N/A
- **Background/Context:** Over the past few years, it appears that health care-related tax programs with problematic hold harmless arrangements are starting to proliferate nationally. Several states have been imposing taxes on health care providers to finance the non-federal share of Medicaid expenditures, known as health care-related taxes, that contain impermissible arrangements whereby providers are guaranteed to receive a portion of their tax cost back. These arrangements occur when certain high-Medicaid volume providers redistribute a portion of their Medicaid payments to low-Medicaid volume providers to hold the latter harmless for the cost of the tax and ensure that they are not harmed financially. This arrangement often occurs to garner political support from low-Medicaid volume providers to impose the tax as part of the state legislative process. CMS has been encountering this issue more recently as part of reviewing the sources of non-federal share financing for Medicaid managed care state-directed payments (SDPs).

Some of these states claim that because the state is not directly involved in running these redistribution arrangements, it is not the responsibility of the state or CMS to ensure that they are not in place. Essentially, states argue that the redistribution arrangements are private business arrangements involving third parties that cannot be regulated. CMS disagrees that this interpretation is consistent with the statute and regulations. The effect of the arrangement, not necessarily the parties directly involved, is the relevant consideration. Because the arrangement has the effect of holding some providers harmless, it is a hold harmless arrangement that is impermissible under statute and regulation.

The CIB aims to ensure that states clearly understand the existing requirements so that they can develop approvable methodologies and make modifications as necessary to

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Message

From: Snyder, Laura (CMS/CMCS) (b)(6)
(b)(6)
Sent: 1/9/2023 1:41:15 PM
To: Gentile, Amy (CMS/CMCS) (b)(6)
(b)(6) Giles, John (CMS/CMCS)
(b)(6)
Subject: RE: RE: FMG section

Bless you – I'll flag for Anna and offer some time to meet if she wants to discuss.

Thanks,
Laura

From: Gentile, Amy (CMS/CMCS) <Amy.Gentile@cms.hhs.gov>
Sent: Monday, January 9, 2023 8:40 AM
To: Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>; Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>
Subject: RE: FMG section

Having this text in (c)(2) doesn't seem a good fit as the lead in for (2) is "the contract arrangement must..." A contract arrangement can't ensure that providers sign attestations. A state could or a plan could, but the contract arrangement itself can't. I think moving it to (c)(7) makes more sense. Also, given the unique nature of the provision (we don't have other provider attestations), it might help to segregate it in its own number in case it doesn't get finalized.

From: Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>
Sent: Saturday, January 7, 2023 10:08 AM
To: Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>; Gentile, Amy (CMS/CMCS) <Amy.Gentile@cms.hhs.gov>
Subject: FMG section

Hi John and Amy,

I am trying to defer to Anna on her section, but something I was thinking would make sense to flag for her. Jess had a comment in the reg text on I12 asking if their new requirement is on the state or on the contract. Anna is responding that it is a requirement on the state (which I agree). However, the structure of that section of the reg is requirements on the contract arrangement, which I think is what Jess was getting at. I think that this requirement needs to move out of 438.6(c)(2)(ii) and into either a new 438.6(c)(2)(x) or 438.6(c)(7) (moving the applicability dates out from 438.6(c)(7) to 438.6(c)(8)) in order to maintain the requirement on the state and not the contract arrangement.

I am looking for feedback if this is outside my lane and I should let FMG go or if this is the time to address it...

Here is the reg text consolidated for ease:

(ii) All contract arrangements that direct the MCO's, PIHP's, or PAHP's expenditures must meet the standards in paragraphs (c)(2)(ii)(A) through (I) of this section. Specifically, the contract arrangement must:

(H) Ensure that each provider receiving payment under the contractual arrangement under paragraphs (c)(1)(i) through (iii) of this section attests that it does not participate in any hold harmless arrangement with

Gibson, Alexis (CMS/CMCS) <alexis.gibson@cms.hhs.gov>

Subject: Deadline: Noon today NPRM slides for all state call.

Importance: High

Hi Rory,

I've been chatting with Anna B this morning; Dan provided handwritten edits to the slide deck for the all state call on 5/2; edits are due by **noon today**. There is a handwritten note – the best we can tell, says, “Connect with Rory note this as simply compliance with statute around hold harmless”

All State Call Slides – Slide 25 on state directed payments has the following bullet:

- Ensure that existing requirements for allowable sources of non-federal share are explicitly applied to SDPs, ~~enabling~~ and noting CMS ~~to~~ may disapprove and take enforcement action on SDPs that do not comply with non-federal financing requirements. Additionally, require states to ensure that providers attest that they do not have an ~~arrangement to redistribute Medicaid payments to other providers~~.

Not sure what to do with the bullet given the strikeouts; here is an idea, but open to other suggestions:

- Ensure that existing requirements for allowable sources of non-federal share are explicitly applied to SDPs, ~~enabling~~ and noting CMS ~~to~~ may disapprove and take enforcement action on SDPs that do not comply with non-federal financing requirements. Additionally, require states to ensure through the collection of provider attestations compliance with existing statutory requirements around hold harmless. that providers attest that they do not have an ~~arrangement to redistribute Medicaid payments to other providers~~.

Laura Snyder
(she/her/hers)
Technical Director
Division of Managed Care Policy
Centers for Medicaid and CHIP Services
Phone: 410-786-3198
Laura.Snyder1@cms.hhs.gov

State Directed Payments

Background: State directed payments (SDPs) are contractual obligations where states direct Medicaid managed care plans' expenditures for services under the contract. SDPs have become a significant payment vehicle for states, accounting for more than \$25B annually across 37 states. SDPs allow states to take a more proactive role in directing managed care plans towards key policy and delivery system investments. However, some SDPs are correlated with financing challenges.

CMS is proposing several regulatory changes that will strengthen SDP oversight and better ensure that SDPs advance the objectives of Medicaid:

- Establish a payment rate ceiling at the average commercial rate for hospital services, nursing facility services, and professional services furnished at academic medical centers.
- Eliminate unnecessary regulatory limitations on value-based purchasing arrangements to enable states to more easily link SDP payments to quality metrics and other performance-based data.
- Ensure that existing ^{and not} requirements for allowable sources of non-federal share are explicitly applied to SDPs, ~~enabling CMS to~~ ^{may} disapprove and take enforcement action on SDPs that do not comply with non-federal financing requirements. Additionally, require states to ensure that providers attest that they do not have an ~~arrangement to redistribute Medicaid payments to other providers.~~ ^{connect w/ Reg} ~~note this arrangement of states~~ ^{and hold harmless}
- Require states to condition fee schedule based SDPs on actual utilization during the rating period and prohibit post-payment reconciliation process that initially condition payment on historical utilization outside the rating period.
- Strengthen evaluation requirements for SDPs and require states to submit evaluation results to CMS and post publicly.

Message

From: Tsai, Daniel (CMS/CMCS); (b)(6)
(b)(6)
Sent: 4/12/2023 2:36:05 PM
To: Schubel, Jessica L. EOP/WHO (b)(6)
CC: Pryor, Rachel (HHS/OS/IOS) (b)(6)
(b)(6)
Subject: RE: RE: Action Alert: DPP Dear Colleague

And may be best to discuss live...

Thanks

From: Schubel, Jessica L. EOP/WHO (b)(6)
Sent: Wednesday, April 12, 2023 9:38 AM
To: Tsai, Daniel (CMS/CMCS) <Daniel.Tsai@cms.hhs.gov>
Cc: Pryor, Rachel (HHS/OS/IOS) <Rachel.Pryor@hhs.gov>
Subject: Re: Action Alert: DPP Dear Colleague

Interesting. I met with the Saving Hospitals, Saving Lives folks yesterday. It wasn't a great meeting. They alleged that you and (b)(6) have ignored them, but I thought you met with them in Texas?

On Apr 11, 2023, at 9:57 PM, Tsai, Daniel (CMS/CMCS) <Daniel.Tsai@cms.hhs.gov> wrote:

FYI below...

<image001.jpg>

TO: FHA Member Chief Executive Officers, Chief Financial Officers and Government Relations Executives
FROM: Mary C. Mayhew, President and Chief Executive Officer, Florida Hospital Association
SUBJECT: Action Alert: DPP Dear Colleague
DATE: April 11, 2022

Dear FHA Members,

This email is intended to provide an update on current actions to ensure the CMS informational bulletin regarding redistribution arrangements in the context of directed payment programs is not implemented:

1. Today, Representatives Moskowitz and Bean sent a "dear colleague" to members of Florida's delegation regarding the February 17 CMS directed payment program (DPP) informational bulletin. The letter, addressed to HHS Secretary Becerra, CMS Administrator Brooks-LaSure, and Medicaid Director Tsai, calls on the Centers for Medicare and Medicaid Services to withdraw the informational bulletin, which "creates needless uncertainty for the hospitals that

Message

From: Badaracco, Andrew (CMS/CMCS); (b)(6)
(b)(6)
Sent: 3/28/2023 4:25:48 PM
To: Snyder, Laura (CMS/CMCS); (b)(6)
(b)(6) Goldstein, Stuart
(CMS/CMCS); (b)(6)
(b)(6) Endelman (he/him),
Jonathan (CMS/CMCS); (b)(6)
(b)(6)
CC: Giles, John (CMS/CMCS); (b)(6)
(b)(6)
Subject: RE: RE: WA STATE IS REQUESTING EXPEDITED RESPONSE BY 3/28***Technical Assistance Request-WSHA Safety Net***
Attachments: RE: RE: Technical Assistance-WA-IGT

Thanks, Laura – We'll be looking out for follow ups on this.

Copying the email thread with Edwin for reference.

In this particular instance, they didn't say anything as of yet about which entities will be providing an IGT, but we'll be sure to advise on the upcoming drafts/SDPs. One thing to keep in mind, in particular in Edwin's email, they're talking about possibly shaving off some of the Medicaid SDPs and paying that money to the MCOs as an "assessment" of some kind. If there's no FFP involved in the state's payment to the MCO, then we're not super concerned about it. If there *is* FFP mixed into the amounts the MCOs are able to keep, then we would likely say that keeping revenue from a provider payment would not be allowable under 42 CFR 447.10. I don't know if you all have any similar regulations in MCOs, but considering as these are state directed payments, I would think that the whole of the Medicaid payment would be directed to the providers.

From: Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>
Sent: Tuesday, March 28, 2023 8:02 AM
To: Goldstein, Stuart (CMS/CMCS) <STUART.GOLDSTEIN@cms.hhs.gov>; Endelman (he/him), Jonathan (CMS/CMCS) <Jonathan.Endelman@cms.hhs.gov>; Badaracco, Andrew (CMS/CMCS) <Andrew.Badaracco@cms.hhs.gov>
Cc: Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>
Subject: FW: WA STATE IS REQUESTING EXPEDITED RESPONSE BY 3/28***Technical Assistance Request-WSHA Safety Net***
Importance: High

Hi Jonathan and Stuart,

Sorry to ask for a quick turnaround, but WA is asking for some feedback by COB today. As you'll see in the draft below, we don't have any kind of submission in house at this point. All that's been shared with us is a draft bill in the WA legislature for a new series of payments (SDPs and it looks like some FFS payments as well. We are making clear to the state that CMS doesn't comment on draft legislation, but wanted to give them some level of general TA. In that spirit, are you comfortable with the highlighted bullet that calls out the recent guidance you all put out on hold harmless?

Andrew – I added you as you were on the chain at one point from Edwin in DPO; there is definitely IGT funding involved in the legislation. I suspect this will be one that DMCP and FMG will want to discuss more if the legislation/state moves ahead with the proposal.

Thanks,

State Directed Payments – Provider Tax Non-Federal Share Issues Overview October 2022

What are next steps the Center for Medicaid and CHIP Services (CMCS) can take on State Directed Payments (SDPs) to ensure that the underlying state sources of non-federal share meet statutory and regulatory requirements?

- For each of the states (Florida, Missouri, Texas) we suspect are financing Medicaid managed care SDPs using an impermissible source of non-federal share in which providers redistribute their Medicaid payments, **CMCS is taking a consistent approach:**
 - **Approve the SDP proposal** (if non-federal share arrangement was in place prior to the current SDP proposal).
 - **Send a companion letter** (in Texas it was different written communication) that indicates we are starting the financial management review (FMR) process and/or support the Office of Inspector General's (OIG) audit of SDPs and the source of non-federal share funding.
 - **If CMCS confirms that the non-federal share source is unallowable, initiate recovery of federal funds** by issuing a disallowance (for which states may appeal).
- Continue to provide technical assistance to states that are currently developing SDP proposals where CMS has preliminary concerns that the funding source may be impermissible (e.g. possible Texas-like arrangements in Nevada and North Carolina).
- In the managed care notice of proposed rulemaking, **the following proposed provisions are included to address SDP financing:**
 - **Codifying requirements of the non-federal share that apply across delivery systems** more explicitly to enhance CMCS' ability to formally disapprove SDPs;
 - Requiring states to **ensure providers attest that they are in compliance** with certain tax-related non-federal share statute and regulations.
 - **Establish an appeal process for States** to appeal to the Department Appeals Board (DAB) any formal disapprovals of SDPs made by CMS.
- ***NEW*: In late 2022/early 2023, CMCS intends to issue a short informational bulletin (CIB) that clearly states that the current non-federal share financing arrangement proliferating relating to SDPs (and in other FFS arrangements) is not a permissible non-federal share source.**

What are SDPs?

- SDPs are contractual obligations in which the State directs how the managed care plans pay providers for Medicaid covered services provided to Medicaid enrollees covered under the managed care contract. This can include minimum fee schedules, maximum fee schedules, uniform increases and VBP arrangements. Sometimes the SDP is a directive that plans must pay no less than a certain level (minimum fee schedule); other times the State may require that an additional amount be paid in addition to negotiated rates (e.g. uniform increase).

C State Directed Payments

Background: State directed payments (SDPs) are a payment mechanism by which states contractually obligate their managed care plans to pay a portion of their capitation payments to specific provider types for specific services. SDPs have become a significant payment vehicle for states, accounting for **more than \$25B annually across 37 states**.

- SDPs allow states to take a more proactive role in directing managed care plans towards key policy and delivery system investments. However, some SDPs are correlated with financing challenges.

Proposals for rulemaking: Given the size, scope, and ongoing interest in SDPs, CMS intends to propose several regulatory changes that will **strengthen SDP oversight** and better **ensure that SDPs advance the objectives of Medicaid**.

- **Establish an SDP payment rate ceiling** for hospital services, nursing facilities, and professional services furnished at academic medical centers, set at the average commercial rate
- **Eliminate unnecessary regulatory limitations on value-based purchasing arrangements** for SDPs, allowing states to more easily tie SDP payments to quality metrics and other performance-based data
- **Codify existing requirements for allowable sources of non-federal share**, enabling CMS to disapprove and take enforcement action on the increasing number of SDPs that do not comply with non-federal financing requirements
 - Additionally, **require providers to attest** that they do not have an arrangement to redistribute Medicaid payments to other providers
- Require states to **link SDP payments to actual utilization of services**, rather than historical projections, to ensure that states cannot use retrospective reconciliation processes to pay out SDPs for other (impermissible) contract years.



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Message

From: Katch (she/her), Hannah (CMS/OA) (b)(6)
(b)(6)
Sent: 2/17/2023 5:32:07 PM
To: Ellis (she/her), Kyla (CMS/OA) (b)(6)
(b)(6) Arguello, Andres (OS/IOS)
(b)(6); Hitchcock, Angela
(CMS/OA) (b)(6)
(b)(6) Cabinet Affairs Report
[Cabinet-Affairs-Report@hhs.gov.mail.onmicrosoft.com]
CC: Richardson (she/her), Erin (CMS/OA) (b)(6)
(b)(6); Harris, Will (CMS/OA)
(b)(6) Bellios, Toula
(CMS/OSPR) (b)(6)
(b)(6) Armstead, Andrea
(CMS/OA) (b)(6)
(b)(6)
Subject: RE: RE: CMS's submission - Feb 14, 2023

This CIB is being released today.

From: Ellis (she/her), Kyla (CMS/OA) <Kyla.Ellis@cms.hhs.gov>
Sent: Friday, February 17, 2023 12:30 PM
To: Arguello, Andres (OS/IOS) <Andres.Arguello@hhs.gov>; Hitchcock, Angela (CMS/OA) <Angela.Hitchcock@cms.hhs.gov>; Cabinet Affairs Report <Cabinet-Affairs-Report@hhs.gov.mail.onmicrosoft.com>
Cc: Richardson (she/her), Erin (CMS/OA) <Erin.Richardson@cms.hhs.gov>; Harris, Will (CMS/OA) <William.Harris@cms.hhs.gov>; Bellios, Toula (CMS/OSPR) <Toula.Bellios@cms.hhs.gov>; Armstead, Andrea (CMS/OA) <Andrea.Armstead@cms.hhs.gov>; Katch (she/her), Hannah (CMS/OA) <Hannah.Katch@cms.hhs.gov>
Subject: RE: CMS's submission - Feb 14, 2023

+Hannah.

From: Arguello, Andres (OS/IOS) <Andres.Arguello@hhs.gov>
Sent: Thursday, February 16, 2023 8:55 PM
To: Hitchcock, Angela (CMS/OA) <Angela.Hitchcock@cms.hhs.gov>; Cabinet Affairs Report <Cabinet-Affairs-Report@hhs.gov.mail.onmicrosoft.com>
Cc: Richardson (she/her), Erin (CMS/OA) <Erin.Richardson@cms.hhs.gov>; Ellis (she/her), Kyla (CMS/OA) <Kyla.Ellis@cms.hhs.gov>; Harris, Will (CMS/OA) <William.Harris@cms.hhs.gov>; Bellios, Toula (CMS/OSPR) <Toula.Bellios@cms.hhs.gov>; Armstead, Andrea (CMS/OA) <Andrea.Armstead@cms.hhs.gov>
Subject: RE: CMS's submission - Feb 14, 2023

Hi Angela,

We received the following follow-up from Cabinet Affairs. Can you let us know answers to their questions tomorrow before 12 pm? Thanks!

"Can you please confirm if this happens tomorrow or what the anticipated date is if not tomorrow? Can you please add a line or two explaining the significance of the release? Is this something you would recommend elevating to the President's Executive Summary?"

To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>

Subject: Re:

Is tomorrow afternoon ok with you, or do you need to meet with us before then?

Garrett

From: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>

Sent: Sunday, April 9, 2023 1:39:37 PM

To: Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>

Cc: Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Lyons, Susan (HHS/OGC) <Susan.Lyons@HHS.GOV>

Subject: Re:

Thanks for sharing, Garrett. I think it would be helpful to set up a call to discuss. Please let me know when it would make sense to aim for, particularly if you need some time to digest.

Rory

From: Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>

Sent: Sunday, April 9, 2023 11:07:41 AM

To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>

Cc: Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Lyons, Susan (HHS/OGC) <Susan.Lyons@HHS.GOV>

Subject:

Good morning Rory,

This email is to apprise you of a suit filed Tuesday challenging a February 17, 2023 CMCS Informational Bulletin. *Texas v. Brooks-LaSure*, No. 6:23-cv-161 (E.D. Tex. filed April 5, 2023) (the complaint and the challenged CIB are attached to this email). This lawsuit is related to an issue with Texas's State Directed Payments that came up previously in a different *Texas v. Brooks-LaSure* case—that earlier case dealt primarily with Texas's Medicaid 1115 Demonstration Project and has since been dismissed as moot. This current lawsuit challenges a guidance document issued by CMS that explains the agency's interpretation of the Medicaid statute related to permissible sources of the non-federal share of states' Medicaid payments, and a final rule issued by CMS in 2008. Specifically, the bulletin addresses the statutory limitation on provider taxes used to finance the non-federal share if "hold harmless" arrangements exist. 42 U.S.C. § 1396b(w)(1)(A)(iii) and (w)(4). The statute defines a hold harmless arrangement as including an arrangement in which the "State or other unit of government imposing the tax provides (directly or indirectly) for any payment, offset, or waiver that guarantees to hold taxpayers harmless for any portion of the costs of the tax." *Id.* The CMCS Informational Bulletin explained CMS's interpretation of the statutory hold harmless prohibition and its own regulations. Under that interpretation, private agreements among taxpaying providers to redistribute Medicaid payments for which the state's share is financed using provider taxes would constitute an impermissible hold harmless arrangement where the existence of the redistribution arrangement results in a reasonable expectation that taxpaying providers will be repaid all or a portion of their tax payments.

Texas's lawsuit claims that the CMCS Informational Bulletin violates the Administrative Procedure Act because it (1) contradicts the plain language of the Medicaid statute and CMS's regulations; (2) constitutes a legislative rule and CMS issued it without first going through notice and comment rulemaking; and (3) is arbitrary and capricious because CMS failed to acknowledge its change in position. The lawsuit also claims that CMS's 2008 final rule addressing impermissible hold harmless arrangements is inconsistent with the plain language of the Medicaid statute.

Please feel free to share this information with anyone else in CMS who should be aware of the lawsuit. And please reach out if you have any questions or if you'd like to set up a call to discuss.

Best,

Message

From: Howe, Rory (CMS/CMCS) (b)(6)
(b)(6)
Sent: 1/25/2023 5:03:29 PM
To: Bonelli, Anna (CMS/CMCS) (b)(6)
(b)(6)
Subject: RE: RE: ILOS and SDP denial authority questions

Thanks!

From: Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>
Sent: Wednesday, January 25, 2023 12:02 PM
To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>
Subject: RE: ILOS and SDP denial authority questions

It's in this folder:

https://(b)(6)
(b)(6)

You can't miss it.

From: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>
Sent: Wednesday, January 25, 2023 12:01 PM
To: Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>
Subject: RE: ILOS and SDP denial authority questions

Sounds good. Can you share the link to the latest version of the NPRM? Thanks.

From: Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>
Sent: Wednesday, January 25, 2023 12:00 PM
To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>
Subject: FW: ILOS and SDP denial authority questions

Looks like this is late breaking: focus of call today is likely to be on financing.

From: Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>
Sent: Wednesday, January 25, 2023 11:51 AM
To: Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>
Subject: FW: ILOS and SDP denial authority questions

FYI – ahead of today's call in case you are joining.

From: Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>
Sent: Wednesday, January 25, 2023 11:40 AM
To: Arroyo, Anna R. EOP/OMB (b)(6); Burch Mack, Rebecca (CMS/CMCS) <Rebecca.BurchMack@cms.hhs.gov>; Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>
Cc: Duguay, Vanessa J. EOP/OMB (b)(6); Giles, John (CMS/CMCS)

Message

From: Burch Mack, Rebecca (CMS/CMCS); (b)(6)
(b)(6)
Sent: 1/25/2023 1:54:14 PM
To: Giles, John (CMS/CMCS); (b)(6)
(b)(6) Gentile, Amy (CMS/CMCS)
(b)(6)
Subject: RE: RE: ILOS and SDP denial authority questions

Minor edits frankly just to quote the NPRM language and also just put in in black. I also slightly framed the intro as I worried that Anna may be your initial write-up inferred the responses were from OGC directly.

Hi Anna –

DMCP and OGC have reviewed these questions, and below are our responses:

CMS Response to ILOS Questions:

(b)(5)

CMS Response to SDPs Questions:

(b)(5)

Rebecca M. Burch Mack, M.P.P.

Technical Director – Medicaid Managed Care

Division of Managed Care Policy – Disabled and Elderly Health Programs Group – Centers for Medicare & Medicaid Services

Mailstop S2-14-26, 7500 Security Blvd., Baltimore, MD 21244

☎ (303) 844-7355 | ✉ rebecca.burchmack@cms.hhs.gov

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CMS04767cv1712

to persons not authorized to receive the information. Unauthorized disclosure may result in prosecution to the full extent of the law.”

From: Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>

Sent: Wednesday, January 25, 2023 6:49 AM

To: Burch Mack, Rebecca (CMS/CMCS) <Rebecca.BurchMack@cms.hhs.gov>; Gentile, Amy (CMS/CMCS) <Amy.Gentile@cms.hhs.gov>

Cc: Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>

Subject: RE: ILOS and SDP denial authority questions

Hi Anna –

OGC was able to quickly review your questions. Here are the responses:

On ILOS:

(b)(5)

On SDPs:

(b)(5)

John Giles, MPA

Director, Division of Managed Care Policy
Disabled and Elderly Health Programs Group
Center for Medicaid and CHIP Services
Centers for Medicare and Medicaid Services
Department of Health and Human Services
Phone: 240-904-2341
E-mail: John.Giles1@cms.hhs.gov

From: Arroyo, Anna R. EOP/OMB (b)(6)

Sent: Tuesday, January 24, 2023 1:38 PM

To: Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>; Burch Mack, Rebecca (CMS/CMCS)

Appointment

Sent: 4/11/2023 4:54:31 PM
To: Howe, Rory (CMS/CMCS); (b)(6)
(b)(6) Campbell, Matthew
(HHS/OGC) [Matthew.Campbell@hhs.gov]; Maccarroll, Amber (CMS/CMCS) (b)(6)
(b)(6)
Silanskis, Jeremy D. (CMS/CMCS) (Jeremy.Silanskis@cms.hhs.gov) (b)(6)
(b)(6) Fan, Kristin (CMS/CMCS) (b)(6)
(b)(6)
CC: Kaiser, Bridgette (HHS/OGC) (b)(6)
(b)(6) Vogel, Jeremy
(HHS/OGC) (b)(6)
(b)(6) Mannchen, Garrett
(HHS/OGC) (b)(6)
(b)(6)
Subject: Texas v. Brooks-LaSure, No. 6:23-cv-161
Start: 4/12/2023 5:00:00 PM
End: 4/12/2023 6:00:00 PM
Show Time As: Busy

From: Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>
Sent: Sunday, April 9, 2023 11:07:41 AM
To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>
Cc: Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Lyons, Susan (HHS/OGC) <Susan.Lyons@HHS.GOV>
Subject:

Good morning Rory,

This email is to apprise you of a suit filed Tuesday challenging a February 17, 2023 CMCS Informational Bulletin. *Texas v. Brooks-LaSure*, No. 6:23-cv-161 (E.D. Tex. filed April 5, 2023) (the complaint and the challenged CIB are attached to this email). This lawsuit is related to an issue with Texas's State Directed Payments that came up previously in a different *Texas v. Brooks-LaSure* case—that earlier case dealt primarily with Texas's Medicaid 1115 Demonstration Project and has since been dismissed as moot. This current lawsuit challenges a guidance document issued by CMS that explains the agency's interpretation of the Medicaid statute related to permissible sources of the non-federal share of states' Medicaid payments, and a final rule issued by CMS in 2008. Specifically, the bulletin addresses the statutory limitation on provider taxes used to finance the non-federal share if "hold harmless" arrangements exist. 42 U.S.C. § 1396b(w)(1)(A)(iii) and (w)(4). The statute defines a hold harmless arrangement as including an arrangement in which the "State or other unit of government imposing the tax provides (directly or indirectly) for any payment, offset, or waiver that guarantees to hold taxpayers harmless for any portion of the costs of the tax." *Id.* The CMCS Informational Bulletin explained CMS's interpretation of the statutory hold harmless prohibition and its own regulations. Under that interpretation, private agreements among taxpaying providers to redistribute Medicaid payments for which the state's share is financed using provider taxes would constitute an impermissible hold harmless arrangement where the existence of the redistribution arrangement results in a reasonable expectation that taxpaying providers will be repaid all or a portion of their tax payments.

Texas's lawsuit claims that the CMCS Informational Bulletin violates the Administrative Procedure Act because it (1) contradicts the plain language of the Medicaid statute and CMS's regulations; (2) constitutes a legislative rule and CMS

Message

From: Boston, Beverly (CMS/CMCS); (b)(6)
(b)(6)
Sent: 5/4/2023 5:54:40 PM
To: Howe, Rory (CMS/CMCS); (b)(6)
(b)(6) Silanskis, Jeremy
(CMS/CMCS); (b)(6)
(b)(6); Maccarroll, Amber
(CMS/CMCS); (b)(6)
(b)(6)
CC: adams, lia (CMS/CMCS); (b)(6)
(b)(6)
Subject: FW: FW: Question on Response Options for Texas and Florida Congressional SWIFTs

FYI below regarding the TX and FL taxes CIB correspondence. OGC (b)(5) and we've asked OSORA to follow-up directly with OGC.

Beverly

From: Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>
Sent: Thursday, May 4, 2023 1:49 PM
To: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>; Endelman (he/him), Jonathan (CMS/CMCS) <Jonathan.Endelman@cms.hhs.gov>; Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>; Campbell, Matthew (HHS/OGC) <Matthew.Campbell@hhs.gov>; Kaiser, Bridgette (HHS/OGC) <Bridgette.Kaiser@hhs.gov>
Cc: Arnold, Charlie (CMS/CMCS) <Charlie.Arnold@cms.hhs.gov>; Clark, Jennifer (CMS/CMCS) <Jennifer.Clark@cms.hhs.gov>; Cuno, Richard (CMS/CMCS) <Richard.Cuno@cms.hhs.gov>; Fan, Kristin (CMS/CMCS) <Kristin.Fan@cms.hhs.gov>; Goldstein, Stuart (CMS/CMCS) <STUART.GOLDSTEIN@cms.hhs.gov>; McClure, Deb (CMS/CMCS) <Deborah.McClure@cms.hhs.gov>; Mosley, Elle (CMS/CMCS) <larrica.mosley@cms.hhs.gov>; Schoonover, Matthew (CMS/CMCS) <matthew.schoonover@cms.hhs.gov>; adams, lia (CMS/CMCS) <Lia.Adams@cms.hhs.gov>
Subject: RE: Question on Response Options for Texas and Florida Congressional SWIFTs

Happy to field any follow up. Thank you, Beverly!

Jeremy Vogel (he/him)
Attorney, DHHS/OGC/CMSD
(202) 205-8778 | Jeremy.Vogel@hhs.gov

From: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>
Sent: Thursday, May 4, 2023 1:47 PM
To: Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Endelman (he/him), Jonathan (CMS/CMCS) <Jonathan.Endelman@cms.hhs.gov>; Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>; Campbell, Matthew (HHS/OGC) <Matthew.Campbell@hhs.gov>; Kaiser, Bridgette (HHS/OGC) <Bridgette.Kaiser@hhs.gov>
Cc: Arnold, Charlie (CMS/CMCS) <Charlie.Arnold@cms.hhs.gov>; Clark, Jennifer (CMS/CMCS) <Jennifer.Clark@cms.hhs.gov>; Cuno, Richard (CMS/CMCS) <Richard.Cuno@cms.hhs.gov>; Fan, Kristin (CMS/CMCS) <Kristin.Fan@cms.hhs.gov>; Goldstein, Stuart (CMS/CMCS) <STUART.GOLDSTEIN@cms.hhs.gov>; McClure, Deb (CMS/CMCS) <Deborah.McClure@cms.hhs.gov>; Mosley, Elle (CMS/CMCS) <larrica.mosley@cms.hhs.gov>; Schoonover, Matthew (CMS/CMCS) <matthew.schoonover@cms.hhs.gov>; adams, lia (CMS/CMCS) <Lia.Adams@cms.hhs.gov>
Subject: RE: Question on Response Options for Texas and Florida Congressional SWIFTs

We will connect with OSG to make OSORA aware that per OGC, (b)(5). Jeremy, we will note that OSORA should follow up with you directly with any questions.

Thank you

Beverly

From: Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>
Sent: Thursday, May 4, 2023 1:33 PM
To: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>; Endelman (he/him), Jonathan (CMS/CMCS) <Jonathan.Endelman@cms.hhs.gov>; Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>; Campbell, Matthew (HHS/OGC) <Matthew.Campbell@hhs.gov>; Kaiser, Bridgette (HHS/OGC) <Bridgette.Kaiser@hhs.gov>
Cc: Arnold, Charlie (CMS/CMCS) <Charlie.Arnold@cms.hhs.gov>; Clark, Jennifer (CMS/CMCS) <Jennifer.Clark@cms.hhs.gov>; Cuno, Richard (CMS/CMCS) <Richard.Cuno@cms.hhs.gov>; Fan, Kristin (CMS/CMCS) <Kristin.Fan@cms.hhs.gov>; Goldstein, Stuart (CMS/CMCS) <STUART.GOLDSTEIN@cms.hhs.gov>; McClure, Deb (CMS/CMCS) <Deborah.McClure@cms.hhs.gov>; Mosley, Elle (CMS/CMCS) <larrica.mosley@cms.hhs.gov>; Schoonover, Matthew (CMS/CMCS) <matthew.schoonover@cms.hhs.gov>; adams, lia (CMS/CMCS) <Lia.Adams@cms.hhs.gov>
Subject: RE: Question on Response Options for Texas and Florida Congressional SWIFTs

Hi again, Jonathan, Beverly + team,

We agree that (b)(5)

(b)(5)

(b)(5)

Please let us know if we can provide anything more on this. Thank you,

Jeremy Vogel (he/him)
Attorney, DHHS/OGC/CMSCD
(202) 205-8778 | Jeremy.Vogel@hhs.gov

From: Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>
Sent: Thursday, May 4, 2023 9:23 AM
To: Endelman (he/him), Jonathan (CMS/CMCS) <Jonathan.Endelman@cms.hhs.gov>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>
Cc: Arnold, Charlie (CMS/CMCS) <Charlie.Arnold@cms.hhs.gov>; Clark, Jennifer (CMS/CMCS) <Jennifer.Clark@cms.hhs.gov>; Cuno, Richard (CMS/CMCS) <Richard.Cuno@cms.hhs.gov>; Fan, Kristin (CMS/CMCS) <Kristin.Fan@cms.hhs.gov>; Goldstein, Stuart (CMS/CMCS) <STUART.GOLDSTEIN@cms.hhs.gov>; McClure, Deb (CMS/CMCS) <Deborah.McClure@cms.hhs.gov>; Mosley, Elle (CMS/CMCS) <larrica.mosley@cms.hhs.gov>; Schoonover, Matthew (CMS/CMCS) <matthew.schoonover@cms.hhs.gov>; adams, lia (CMS/CMCS) <Lia.Adams@cms.hhs.gov>
Subject: RE: Question on Response Options for Texas and Florida Congressional SWIFTs

Good morning Jeremy,

Please see attached so you are abundantly clear. The recommendation (b)(5) did not come from OSG. The recommendation came from Exec Sec per OSORA (see attached) should you need to reach out on this, it would be best to connect with OSORA.

CMS04792cv1712

From: Endelman (he/him), Jonathan (CMS/CMCS) <Jonathan.Endelman@cms.hhs.gov>

Sent: Thursday, May 4, 2023 7:39:26 AM

To: Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Mannchen, Garrett (HHS/OGC) <Garrett.Mannchen@hhs.gov>

Cc: Arnold, Charlie (CMS/CMCS) <Charlie.Arnold@cms.hhs.gov>; Boston, Beverly (CMS/CMCS) <Beverly.Boston@cms.hhs.gov>; Clark, Jennifer (CMS/CMCS) <Jennifer.Clark@cms.hhs.gov>; Cuno, Richard (CMS/CMCS) <Richard.Cuno@cms.hhs.gov>; Fan, Kristin (CMS/CMCS) <Kristin.Fan@cms.hhs.gov>; Goldstein, Stuart (CMS/CMCS) <STUART.GOLDSTEIN@cms.hhs.gov>; McClure, Deb (CMS/CMCS) <Deborah.McClure@cms.hhs.gov>; Mosley, Elle (CMS/CMCS) <larrica.mosley@cms.hhs.gov>; Schoonover, Matthew (CMS/CMCS) <matthew.schoonover@cms.hhs.gov>

Subject: Question on Response Options for Texas and Florida Congressional SWIFTs

Dear Jeremy, Don, Garrett

On April 24, 2023, we received an inquiry through the SWIFT system from members of the Texas Congressional delegation, including Representative Sheila Jackson Lee, requesting that CMS withdraw the February 17, 2023 CIB. On April 25, 2023 we reached out to OGC and you advised us that, (b)(5)

(b)(5)

(b)(5)

On May 3, 2023, we received a communication through the SWIFT system from the members of the Florida Congressional delegation, including Representative Aaron Bean, requesting that CMS withdraw the proposed CIB.

Also, on May 3, we received a document containing a comment from Kate Kirchgraber with the Office of Legislation (OL). OL (b)(5)

(b)(5)

We are aware of two other states with Congressional representatives who want to arrange calls to discuss the matter with CMS. They are Virginia and Nevada. We understand that there is significant Congressional pressure from Texas and Florida around the CIB. OL further (b)(5)

(b)(5)

Thank you.

From: Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>

Sent: Friday, May 5, 2023 1:07 PM

To: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>; Burke, Sherry Lynn (HHS/OGC) <SherryLynn.Burke@hhs.gov>; Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>

Cc: Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Arnold, Charlie (CMS/CMCS) <Charlie.Arnold@cms.hhs.gov>; Silanskis, Jeremy (CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>

Subject: RE: QUICK confirmation needed

Another quote from the NPRM that might be helpful on this point is:

These redistribution arrangements are not described on the States' SDP applications; if an SDP preprint stated that Medicaid payments ultimately would be directed to a recipient without being based on the delivery of Medicaid-covered services, we could not approve the SDP, because section 1903(a) of the Act limits Federal financial participation to expenditures for medical assistance and qualifying administrative activities (otherwise stated, FFP is not available in expenditures for payments to third parties unrelated to the provision of covered services or conduct of allowable administrative activities).

From: Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>

Sent: Friday, May 5, 2023 1:05 PM

To: Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>; Burke, Sherry Lynn (HHS/OGC) <SherryLynn.Burke@hhs.gov>; Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>; Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>

Cc: Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Arnold, Charlie (CMS/CMCS) <Charlie.Arnold@cms.hhs.gov>; Silanskis, Jeremy (CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>

Subject: RE: QUICK confirmation needed

Hi, all. I think Sherry Lynn's assessment is accurate from the FMG perspective. Please let us know if you need anything else.

From: Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>

Sent: Friday, May 5, 2023 1:02 PM

To: Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>; Burke, Sherry Lynn (HHS/OGC) <SherryLynn.Burke@hhs.gov>; Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>; Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>; Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>

Cc: Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Arnold, Charlie (CMS/CMCS) <Charlie.Arnold@cms.hhs.gov>; Silanskis, Jeremy (CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>

Subject: RE: QUICK confirmation needed

Thanks, SLB and Laura, for getting everybody on a thread. My instinct (b)(5) from the FMG perspective (they will correct me if I'm wrong), but it's important that we get one CMS voice on this. Thx!

Jeremy Vogel (he/him)

Attorney, DHHS/OGC/CMDS

(202) 205-8778 | Jeremy.Vogel@hhs.gov

From: Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>

Sent: Friday, May 5, 2023 1:00 PM

To: Burke, Sherry Lynn (HHS/OGC) <SherryLynn.Burke@hhs.gov>; Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>; Bonelli, Anna (CMS/CMCS) <Anna.Bonelli@cms.hhs.gov>; Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>

Cc: Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Arnold, Charlie (CMS/CMCS) <Charlie.Arnold@cms.hhs.gov>; Silanskis, Jeremy (CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>
Subject: RE: QUICK confirmation needed
Importance: High

Hi Sherry Lynn,

No worries (hope it gets warmer).

I've looped in FMG colleagues who are leading this section of the NPRM.

FMG – I think SLB's assessment is accurate, but defer to you all.

Thanks,
Laura

From: Burke, Sherry Lynn (HHS/OGC) <SherryLynn.Burke@hhs.gov>
Sent: Friday, May 5, 2023 12:57 PM
To: Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>; Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>
Cc: Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>
Subject: RE: QUICK confirmation needed

Sorry! I meant John. I am a bad typist and it is freezing in my home office so typos are everywhere

From: Burke, Sherry Lynn (HHS/OGC)
Sent: Friday, May 5, 2023 12:54 PM
To: Giles, John (CMS/CMCS) <John.Giles1@cms.hhs.gov>; Snyder, Laura (CMS/CMCS) <Laura.Snyder1@cms.hhs.gov>
Cc: Kosin, Donald (HHS/OGC) <Donald.Kosin@HHS.GOV>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>
Subject: QUICK confirmation needed
Importance: High

Johan and Laura,
Do you agree that this is accurate:

(b)(5)

The NPRM states, "The proposed new attestation requirement would help ensure appropriate transparency regarding the use of Medicaid payments and any relationship to the non-Federal share source(s), and aims to do so without interfering with providers' normal business arrangements." 88 FR 28131

(b)(5)

(b)(5)

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From: Katch (she/her), Hannah (CMS/OA) <Hannah.Katch@cms.hhs.gov>

Sent: Tuesday, March 28, 2023 6:59 AM

To: Tsai, Daniel (CMS/CMCS) <Daniel.Tsai@cms.hhs.gov>; Mannchen, Garrett (HHS/OGC)

<Garrett.Mannchen@hhs.gov>; Rodriguez, Paul (HHS/OGC) <PaulR.Rodriguez@hhs.gov>; Hoffman, Janice (HHS/OGC)

<Janice.Hoffman@HHS.GOV>; Vogel, Jeremy (HHS/OGC) <Jeremy.Vogel@hhs.gov>; Costello, Anne Marie (CMS/CMCS)

<AnneMarie.Costello@cms.hhs.gov>; Howe, Rory (CMS/CMCS) <Rory.Howe@cms.hhs.gov>; Silanskis, Jeremy

(CMS/CMCS) <Jeremy.Silanskis@cms.hhs.gov>; Briskin, Perrie (CMS/CMCS) <Perrie.Briskin@cms.hhs.gov>

Cc: Vitolo, Sara (CMS/CMCS) <Sara.Vitolo@cms.hhs.gov>; Hebert, Krista (CMS/CMCS) <krista.hebert@cms.hhs.gov>

Subject: RE: MO follow up

See if this works.

- Context:
 - MO has a hospital tax with a voluntary hold harmless arrangement between hospitals, which we believe violates the statutory requirement that provider taxes apply to facilities uniformly.
 - Over the past several years, CMS has been on the record indicating the impermissibility of this tax (see more detail below). However, details about the hold harmless arrangement were newly revealed to CMS over the past several years.
 - Last month, CMS released guidance affirming that hold harmless arrangements of this type violate the statutory prohibition on hold harmless.
- CMS/HHS must decide how to move forward on enforcement action
 - Note: the size of the payments at stake are ~\$236M/quarter, or close to \$1B a year of FFP. This financially supports close to \$1.2B annually, or almost 10%, of MO's Medicaid program
- After additional consultation with OGC, we are proposing:

(b)(5)

- The alternative we considered was (b)(5)

(b)(5)