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Centers for Medicare and Medicaid Services
Department of Health and Human Services
Dockets Management Staff (HFA-305)
P.O. Box 8010
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Docket: CMS–2393–P
Proposed Rule - Medicaid Program; Medicaid Fiscal Accountability Regulation (MFAR)

Background

Citizens Against Government Waste (CAGW) is a private, nonpartisan, nonprofit organization representing more than one million members and supporters nationwide. Founded in 1984 by the late industrialist J. Peter Grace and syndicated columnist Jack Anderson to implement the recommendations of President Ronald Reagan’s Private Sector Survey on Cost Control, also known as the Grace Commission, CAGW’s mission is to eliminate waste, mismanagement, and inefficiency in government.

Comment

As you know, Title XIX of the Social Security Act established Medicaid as a federal-state partnership to provide medical assistance to millions of Americans, including eligible low-income adults, children, pregnant women, elderly adults, and people with disabilities. Medicaid while jointly funded, is administered by the states.

Federal matching funds are available to states for different types of payments that states make. Claim-based payments are made directly by the states to providers based on established payment rates for services provided. The Medicaid and CHIP Payment and Access Commission explains that some “states make substantial payments to providers above what they pay for individual services through Medicaid rates. These additional payments fall into two categories: disproportionate share hospital (DSH) payments, which help offset uncompensated hospital care costs, and UPL (upper payment limit) supplemental payments, which are intended to make the difference between fee-for-service payments and the amount that Medicare would have paid for the same service.”^{vi}

The Centers for Medicare and Medicaid Services (CMS) reports that the “last several years have seen a rapid increase in Medicaid spending from \$456 billion in 2013 to an estimated \$576 billion in 2016. Much of this growth came from the federal share that grew from \$263 billion to an estimated \$363 billion during the same period. Supplemental payments, or additional payments to providers beyond the base Medicaid payment for particular services, have steadily increased from 9.4 percent of all other payments in FY 2010 to 17.5 percent in FY 2017.” The

hospital UPL supplemental payments “increased for Medicaid benefits between 2001 and 2016, resulting in a total of \$16.4 billion in supplemental payments for 2016.”ⁱⁱ

The November 12, 2019 CMS proposed rule (Docket CMS-2393-P), or MFAR, is designed to suppress “impermissible payment arrangements” in order to protect taxpayers, strengthen accountability, ensure the sustainability of Medicaid, and improve program integrity to protect the needs of beneficiaries.ⁱⁱⁱ

When the proposed rule was announced, CMS Administrator Seema Verma said, “We have seen a proliferation of payment arrangements that mask or circumvent the rules where shady recycling schemes drive up taxpayer costs and pervert the system. Today’s rule proposal will shine a light on these practices, allowing CMS to better protect taxpayer dollars and ensure that Medicaid spending is directed toward high-value services that benefit patient needs.”

An April 30, 2019 Senate Finance Committee report, “Greater Transparency of Supplemental Payments Needed,” sought to offer “a clearer lens into one of the most opaque areas of health care financing.” It noted that “reporting requirements for states do not provide information conducive to evaluation. Disclosure forms, state plans, and data tracking systems do not mandate usable and specific provider-level disbursement information from states, obscuring the financial relationship between state Medicaid agencies and providers. These systems have a common goal of accumulating data for the purposes of assessing utilization and valuing the weight of different aspects of the Medicaid program. For supplemental payments, the current system of gathering information does not include transparency measures to adequately oversee state distribution.”^{iv}

These questionable payment “arrangements,” certain “schemes,” and “opaque areas” regarding the spending of tax dollars must be addressed. It is disturbing to learn that CMS was “aware of numerous schemes states have used that are not consistent with federal statute. Some examples include states that generate extra payments for private nursing facilities that enter into arrangements with local governments to bypass tax and donation rules, and the use of a loophole to tax managed care entities 25 times higher for Medicaid business than for similar commercial business. States can then use that tax revenue to generate additional payments, with no commensurate increase in state spending.”^v

The November 12, 2019 *Inside Health Policy* reported that Administrator Verma stated to reporters after a speech with the National Association of Medicaid Directors with respect to federal matching of supplemental payments, “You’re seeing some of what we call shenanigans go on.” The article cited the following examples:

- “One CMS official described an arrangement in which a state uses a tax on hospitals to generate revenue that is then spent on Medicaid supplemental payments, triggering federal matching funds. The supplemental payments – including the federal funds – are paid out to hospitals, and the hospitals then pool the money behind the scenes and redistribute it among themselves, ensuring that each hospital receives at least as much money as it paid in the tax. Such an arrangement would violate federal requirements that provider taxes not include ‘hold harmless’ provisions for the providers subject to them.”

- “Another arrangement might involve a private hospital donating money to a local government, which would then send an equivalent amount of money to the state through an intergovernmental transfer. The state would use that money to trigger federal matching funds, and those funds would be used for supplemental payments that flow back to the original hospital that made the donation.”
- “A third arrangement ... involves a local government buying area nursing homes, then sending money to the state to be used to trigger federal matching funds – funds which are then returned to the local government entity.”^{vi}

CAGW believes that the proposed rule is reasonable and should be adopted. Providing more detailed reporting beyond the currently required aggregate payment amounts on supplemental payments; clarifying Medicaid financing definitions, like base and supplemental payments; refining current regulations to align with statutory language to reduce the “questionable” funding mechanisms that have occurred; prohibiting financial arrangements that are designed to cover up inappropriate transactions; and, strengthening and improving the oversight of DSH payments will go a long way to protect taxpayer dollars.

ⁱ Medicaid and CHIP Payment and Access Commission, “Supplemental Payments,” <https://www.macpac.gov/subtopic/supplemental-payments>

ⁱⁱ CMS Newsroom, “Fact Sheet: 2019 Medicaid Fiscal Accountability Regulation (MFAR),” Nov. 12, 2019, <https://www.cms.gov/newsroom/fact-sheets/fact-sheet-2019-medicaid-fiscal-accountability-regulation-mfar>

ⁱⁱⁱ Centers for Medicare and Medicaid (CMS), Proposed Rule Medicaid Program; Medicaid Fiscal Accountability Program (FMAP), CMS-2393-P, <https://www.federalregister.gov/documents/2019/11/18/2019-24763/medicaid-program-medicaid-fiscal-accountability-regulation>

^{iv} U.S. Senate Finance Committee, “Greater Transparency of Supplemental Payments Needed,” April 30, 2019, pages 3, 11; <http://bit.ly/2GzwWLG>

^v CMS Newsroom, “Trump Administration Proposes Historic Steps to Strengthen Oversight and Fiscal Integrity of the Medicaid Program,” November 12, 2019, <https://www.cms.gov/newsroom/press-releases/trump-administration-proposes-historic-steps-strengthen-oversight-and-fiscal-integrity-medicaid>

^{vi} *Inside Health Policy*, “CMS Seeks to Curb ‘Shenanigans’ In Medicaid Supplemental Payments,” November 12, 2019, <http://bit.ly/2S111dE>