DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850

MEDICARE PARTS C & D OVERSIGHT AND ENFORCEMENT GROUP

June 27, 2019

Mr. Ivan E Colon, Former President and CEO
Dr. Erika L. Ramos, Compliance Officer & Regulatory Affairs Director
Constellation Health, LLC
P.O. Box 364547
San Juan, PR 00936

Mr. Javier Rivera-Rios
Commissioner of Insurance of Puerto Rico
B5 Tabonuco St.
Suite 216, PMB 356
Guaynabo, P.R. 00968-3029

Re: Notice of Expedited Termination of Medicare Advantage – Prescription Drug Contract Numbers H3054, H4876, and H8266

Dear Mr. Colon, Dr. Ramos and Commissioner Rivera-Rios:

The Centers for Medicare & Medicaid Services ("CMS") notifies you of its decision to terminate (effective 11:59:59 P.M. Eastern Daylight Time (EDT) June 30, 2019) Constellation Health, LLC's (Constellation) Medicare Advantage-Prescription Drug ("MA-PD") contracts H3054, H4876, and H8266 pursuant to 42 U.S.C. 1395w-27 (h)(2), 42 C.F.R. §422.510(a) and (b)(2)(i)(B), 42 C.F.R. §423.509(a) and (b)(2)(i)(B), and Art. VIII.B.1.(a) and (d) of the contracts (numbers H3054, H4876 and H8266) between CMS and Constellation.

CMS has determined that Constellation has failed substantially to carry out its contracts with CMS by failing to ensure enrollees receive access to services in accordance with CMS requirements. At this time, Constellation's financial situation is so severe that providers are not accepting Constellation enrollees due to non-payment of services, and enrollees are not being provided necessary services that Constellation is required to provide under its contracts. Thus, CMS finds that Constellation's ability to make necessary health services available is impaired to the point of posing an imminent and serious risk to the health of its enrollees. Therefore, CMS is taking action to terminate Constellation's contracts, immediately on June 30, 2019.

I. Medicare Advantage Requirements – Access to and Provision of Benefits and Financial Requirements

An MA-PD enters into a contract with CMS, pursuant to which the MA-PD agrees to abide by a number of requirements based upon statute, regulations and program instructions. An MA-PD's central mission is to provide Medicare enrollees with required Medicare items and services within a framework of Medicare requirements that provide those enrollees with a number of beneficiary protections.

Pursuant to 42 C.F.R. §422.100(a), an MA-PD offering an MA plan must provide enrollees in that plan with coverage of the basic benefits by furnishing the benefits directly or through arrangements, or by paying for the benefits. Use of a provider network requires the MA organization to have a written agreement (also known as an arrangement or contract) between an MA organization and each provider or provider network, under which the provider or provider network agrees to furnish specified services to the organization's enrollees and the organization retains the responsibility for the services. Under these written agreements, there must be agreed upon terms of payment for both timing and amount of payment to the providers (See 42 C.F.R. §422.520(b)(1)). Pursuant to 42 C.F.R. § 422.520(b)(2), the MA-PD is obligated to pay the contracted providers under these terms of the contract. Failing to pay the providers pursuant to these terms, may result in a breach of the contract and the provider refusing to afford services to the MA-PD's enrollees. Under sections 1852(a) and 1857(f) of the Act and 42 C.F.R. §§ 422.214 and 422.520, if the coverage or benefits are provided using a provider with which the MA organization does not have a written agreement, the MA organization is required to pay (when taking into account cost sharing and the plan's payment) the amount the provider would have been paid by Fee-for-Service (FFS) Medicare under Part A or Part B for the covered services and that payment must be made consistent with the prompt payment requirements for FFS Medicare.

In addition to the requirement for prompt payment to providers, MA-PDs are required to maintain a fiscally sound operation by, at least, maintaining a positive net worth, which means the MA-PD's total assets exceed its total liabilities. These requirements help protect Medicare beneficiaries from potential harm if the MA-PD is not able to meet its financial obligations. MA-PDs must also submit certified financial information to CMS that demonstrates that the MA-PD has a fiscally sound operation. (*See* requirements at 42 C.F.R. §§ 422.504(a)(14), 423.505(b)(23) and 422.504(f)(1), 423.505(f)(1)).

II. Legal Basis for Immediate Termination

CMS may make the decision to terminate a contract if it determines that the MA-PD has failed substantially to carry out the contract; is carrying out the contract in a manner that is inconsistent with the efficient and effective administration of Part C and D of the Medicare statute and parts 422 and 423 of 42 C.F.R.; or is no longer substantially meeting the applicable conditions of parts 422 and 423 (see 42 C.F.R. §§ 422.510(a) and 423.509(a)). In addition, CMS may terminate a contract if it fails substantially to provide medically necessary items or services (under law or under the contract) that are required to be provided to an individual covered under the contract, and if the failure has adversely affected (or has the substantial likelihood of adversely affecting) the individual (see 42 C.F.R. §§ 422.510(a)(4)(xiv), 422.752(a)(1), 423.509(a)(4)(xiv), and

423.752(a)(1)). Further, CMS may immediately terminate an MA-PD's contract where CMS finds that the MA-PD organization experiences financial difficulties so severe that its ability to make necessary health services available is impaired to the point of posing an imminent and serious risk to the health of its enrollees, or otherwise fails to make services available to the extent that such a risk to health exists. (*See* requirements at 42 C.F.R. §§ 422.510(b)(2)(i)(B) and 423.509(b)(2)(i)(B)).

III. Summary of Constellation's Non-Compliance

A. History of Financial Difficulties

Since its inception in 2014, Constellation has had a longstanding history of financial difficulties with CMS and the Commonwealth of Puerto Rico. Constellation has reported a negative net worth to CMS for four consecutive contract years (2014, 2015, 2016, and 2017). CMS sent Constellation a notice of non-compliance on October 5, 2017 and a warning letter on December 20, 2018 for these failures. Based on unaudited financial statements for year-2018, Constellation is again expected to show a negative net worth for the fifth year in a row. Due to Constellation's financial difficulties, it has been in receivership with the Office of the Commissioner of Insurance of Puerto Rico (OCI) since April of 2016, pursuant to a rehabilitation order issued by the Superior Court of San Juan. The goal of the court-ordered receivership was to provide space for Constellation to seek capital investment needed to overcome its difficult financial situation. CMS was hopeful that the receivership would result in financial stability for Constellation, based on capital investments and plans to increase enrollment by expanding Constellation's service area. However, such plans did not materialize. Constellation's financial situation has continued to deteriorate to the point where in the past few months, CMS has been informed that nonpayment of providers has resulted in providers restricting services to enrollees, only providing emergency services, or leaving Constellation's network altogether.

In a letter from the OCI, dated February 21, 2019, the Commissioner stated that by February 1, 2019 the outstanding provider claims exceeded $80 million and that Constellation continued to fail to find the required capital investments. As a result of Constellation's insolvency, on April 30, 2019, OCI filed a writ with the San Juan court that issued the rehabilitation order, petitioning for the liquidation of Constellation. In another letter from the OCI, dated June 14, 2019, the Commissioner informed CMS that the plan's debts had continued to increase and that the plan now had over $89 million in invoices immediately due or overdue to providers and only $11,283,637 in cash to pay this debt. The Commissioner stated that given the magnitude of the debt and Constellation's noncompliance with the Puerto Rico Insurance Code, it was unlikely that OCI would renew Constellation's certificate of authority for the 2019-2020 year.

On June 7, 2019, the Superior Court of San Juan issued a temporary liquidation order, suspending all business activities and contracts of Constellation, including suspension of its certificate of authority and suspension of coverage for all enrollees. However, on June 10, 2019, the Court of Appeals of Puerto Rico issued an order staying the liquidation order entered by the district court. It is our understanding that proceedings related to the liquidation order are continuing in the Court of Appeals.

B. Providers are Not Receiving Payment for Services

CMS has been receiving numerous complaints through its 1-800 Medicare Call Center (recorded in its Complaints Tracking Module) regarding unpaid medical claims that have led to Constellation's contracted providers either terminating their contracts or not accepting Constellation patients. Since January 1, 2019, CMS has received 85 complaints about Constellation, with 73 of those complaints related to provider payments and/or access to services due to failing to pay providers. Over 35% of these complaints (31 complaints) were received in the month of June. Complaints indicate that hospitals, specialists, and primary care doctors are increasingly refusing services to patients due to unpaid provider claims.

On June 12, 2019, CMS received a complaint from [*Provider Name Redacted*], a key provider of End-Stage Renal Disease (ESRD) services for Constellation, stating it will no longer be accepting new patients due to the long-standing nonpayment from Constellation. This provider also stated it is at a point where it needs to make "finite decisions in how [the provider] can further support a failing to thrive and non-sustainable program." According to the provider, Constellation owes the provider almost $800,000 in outstanding claims. This ESRD provider also stated that a transportation company, that transports ESRD patients to its facility, will no longer provide transportation services for Constellation enrollees.

CMS received another complaint on June 19, 2019 from a contracted cardiovascular hospital alleging that the hospital has $3 million in unpaid claims with Constellation. This hospital stated that Constellation has not responded to its calls and that the debt is continuing to increase to the point where the hospital has restricted admission and is providing access only to emergency services for enrollees of the MA organization's plans.

In addition to the complaints that CMS has received, the Deputy Receiver contracted with OCI attested in a sworn statement dated June 21, 2019 (attached to this letter), that Constellation has insufficient assets to pay all outstanding debt. In the month of May, Constellation's call center registered 144 calls from providers and 551 calls from members, asking for payment of services (at least 90 provider calls and 489 member calls were about providers requesting immediate payment). The Deputy Receiver attested that providers are canceling their contracts or not accepting new patients because of Constellation's lack of payment.

C. Enrollees are Not Able to Access Medically Necessary Items and Services

The impact of not paying providers is that Constellation enrollees are now having difficulty with accessing necessary medical care. CMS has received 45 complaints from Constellation enrollees related to access to care since the beginning of 2019 and the rate of those complaints is increasing (25 of those complaints were received between June 1 and June 25). The majority of the complaints received so far in June are categorized as immediate need or urgent.

[Complaint Details Redacted for Privacy Consideration]

The above examples are just a subset of a larger number of complaints that repetitively state that enrollees cannot find providers that will accept Constellation.

Constellation's response to these complaints is to make assurances to its enrollees that providers are still furnishing benefits. However, information from enrollees and providers indicates that enrollees are increasingly unable to access Medicare services. For example, in several complaints received by CMS (one on June 21, 2019 and one on May 3, 2019), the enrollees state that Constellation gave a list of doctors to them but then when the enrollees called the doctors they were told the doctors do not accept the plan.

Beneficiaries are also leaving Constellation to find other coverage because of issues with accessing medical care. Constellation has had a sharp decline in its enrollment since the beginning of 2019. At the end of 2018, Constellation had 17,903 enrollees in its Medicare contracts. Many organizations expect to receive an increase in enrollment during the annual election period, which occurs at the end of each year (October 15 through December 7) for a January 1st effective date of coverage. However, Constellation lost almost 4,800 enrollees during this period. Then between January and March of 2019 (also known as the open enrollment period), all Medicare enrollees were permitted to make an election to enroll in a different plan or obtain Original Medicare if they chose to make such an election. After this period concluded, the number of enrollees in Constellation had declined to 6,501 in April 2019. By July 1st, there will be only 3,079 enrollees in Constellation's three contracts. Since the annual election period and open enrollment period are now closed, many enrollees have been granted special elections to move out of Constellation due to claims that they are not able to access medical services. The severe drop in enrollment is also concerning for financial reasons because Constellation will be receiving significantly less payments to cover both past debts and current claims.

The Deputy Receiver has also attested that beneficiaries are in imminent and serious risk of not receiving services. The Deputy Receiver states that an increasing number of the Plan's health providers have canceled their contracts and others are not accepting new patients because of the plan's lack of payment. For example, a health system that operates 12 hospitals and clinics (including one of only three psychiatric hospitals in Puerto Rico), and which has service agreements with over 5,000 providers, has canceled Constellation's contract due to lack of payment and mounting debt. The Deputy Receiver attested that "the number of medical providers, still offering services is dwindling and as a result, the Plan's member are having unreasonable difficulties and delays in obtaining health services" and that the numerous complaints they are receiving "are evidence that the Plan's financial impairment is of such severity that the lives and physical wellbeing of beneficiaries are in jeopardy."

The recent ongoing litigation related to Constellation's potential liquidation has also created uncertainty among providers and enrollees regarding Constellation's future. CMS believes that this uncertainty has exacerbated the problem of enrollees being unable to access care, as providers may become more hesitant to provide services or continue contracting with the plan given the litigation. In her sworn statement dated June 21, 2019, the Deputy Receiver noted that an unintended consequence of the ongoing litigation has been that "care coordination has become extremely difficult" for patients, and that prompt government action is thus necessary.

IV. Determination to Immediately Terminate Constellation's Contracts

As a result of Constellation's lack of fiscal soundness, inability to meet its financial obligations and provide adequate access to care to its enrollees, CMS has made the determination that:

Constellation has substantially failed to comply with its contracts pursuant to 42 C.F.R. §§ 422.510(a)(1) and 423.509(a)(1). Constellation is carrying out its contracts in a manner that is inconsistent with the efficient and effective administration of Part C and D of the Medicare statute and parts 422 and 423 of 42 C.F.R. pursuant to 42 C.F.R §§ 422.510(a)(2) and 423.509(a)(2). Constellation no longer substantially meets the applicable conditions of parts 422 and 423 pursuant to 42 C.F.R. §§ 422.510(a)(3) and 423.509(a)(3).

- Constellation has failed to ensure enrollees receive coverage of basic benefits through the provision of arrangements with providers or by paying for the services in violation of 42 C.F.R. § 422.100(a) and Art. III.A.1. of the contracts (numbers H3054, H4876 and H8266).
- Constellation has failed to pay its contracted providers in accordance with the terms of its contracts in violation of 42 C.F.R. § 422.520(b)(1) and Art. III.D.1. and 2 of the contracts (numbers H3054, H4876 and H8266)
- Constellation has failed to maintain a positive net worth for five consecutive years in violation of 42 C.F.R. §§ 422.504(a)(14) and 423.505(b)(23) and Art. XI.D. of the contracts (numbers H3054, H4876 and H8266) and Art XIII.F.of the MA-PD addendum.

Constellation has failed substantially to provide medically necessary items or services (under law or under the contract) that are required to be provided to an individual covered under the contract, which has adversely affected (or the substantial likelihood of adversely affecting) the individual pursuant to 42 C.F.R. §§ 422.510(a)(4)(xiv), 422.752(a)(1), 423.509(a)(4)(xiv), and 423.752(a)(1))

- Constellation's providers (in which it has arrangements to provide services) are refusing to furnish benefits to enrollees due to not receiving payment for outstanding claims.

Constellation's financial difficulties are so severe that its ability to make necessary health and prescription drug services available is impaired to the point of posing an imminent and serious risk to the health of its enrollees pursuant to 42 C.F.R. §§ 422.510(b)(2)(i)(B) and 423.509(b)(2)(i)(B).

- Constellation's decreasing net worth, its lack of a viable rehabilitation plan to move Constellation out of receivership, its financial insolvency, and the ongoing litigation that could result in its liquidation demonstrate the severity of Constellation's financial difficulties.
- Constellation is failing to pay providers and those providers are not furnishing necessary services to enrollees that Constellation is contracted to provide.
- Constellation's enrollees are unable to access care and in some cases cannot get urgently needed medications and services.

Therefore, it is imperative that CMS take steps to protect the health and safety of Medicare beneficiaries and immediately terminate Constellation's MA-PD contracts.

Right to Request a Hearing

This contract determination is effective at 11:59:59 P.M. EDT on June 30, 2019. Constellation may request a hearing before a CMS hearing officer in accordance with the procedures outlined in 42 C.F.R. Subpart N of Parts 422 and 423. Pursuant to 42 C.F.R. §§ 422.662 and 423.651, your written request for a hearing must be received by CMS within 15 calendar days from the date CMS notified you of this determination, or by July 15, 2019.[1] Please note that in accordance with 42 C.F.R. §§ 422.664(b)(2) and 423.665(b)(2) the contract between CMS and Constellation will be terminated effective 11:59:59 P.M. EDT June 30, 2019 and will not be postponed if a hearing is requested.

The request for hearing must be sent to the CMS Hearing Officer at the following address:

Benjamin Cohen
CMS Hearing Officer
Office of Hearings
ATTN: HEARING REQUEST
Centers for Medicare and Medicaid Services
2520 Lord Baltimore Drive
Suite L
Mail Stop LB-01-22
Baltimore, MD 20244-2670
Phone: (410) 786-3169
E-Mail: Benjamin.Cohen@cms.hhs.gov

A copy of the hearing request should also be sent to CMS at the following address:

Kevin Stansbury
Director, Division of Compliance Enforcement
Centers for Medicare & Medicaid Services
7500 Security Boulevard
MAIL STOP: C1-23-17
Baltimore, MD 21244
Email: Kevin.Stansbury@cms.hhs.gov

CMS will consider the date the Office of Hearings receives the email or the date it receives the fax or traceable mail document, whichever is earlier, as the date of receipt of the request. The request for a hearing must include the name, fax number, and e-mail address of the contact within Constellation (or an attorney who has a letter of authorization to represent the organization) with whom CMS should communicate regarding the hearing request.

If Constellation has any questions about this notice, please call or email the enforcement contact provided in the email notification.

[1] The 15th day fell on a weekend or holiday, therefore the date reflected in the notice is the next regular business day for you to submit your request.

Sincerely,

/s/

John A. Scott
Acting Director
Medicare Parts C and D Oversight and Enforcement Group

Attachment

OCI Sworn Statement – CH June 21, 2019

cc: Kevin Stansbury, CMS/CM/MOEG/DCE
Nancy Ng, CMS/CMHPO/Region II
Kelli Singleton, CMS/CMHPO/Region II
Rachel Walker, CMS/CMHPO/Region II