

CMS-2264-P-1

Submitter : Mr. David Hebert

Date & Time: 08/20/2007

Organization : American Health Care Association

Category : Health Care Professional or Association

Issue Areas/Comments

GENERAL

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SEE ATTACHMENT

CMS-2264-P-1-Attach-1.DOC

ahca American Health Care Association

1201 L Street, NW, Washington, DC 20005-4046
Main Telephone: 202-842-4444
Main Fax: 202-842-3860 2nd Main Fax: 202-289-4253
Writer's Telephone: 202-898-2830
Writer's E-Mail: ddmare@ahca.org
www.ahca.org

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August 20, 2007

Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2264-P
P.O. Box 8014
Baltimore, Maryland 21244-8014

**RE: CMS 2264-P Medicaid Integrity Program; Limitation on Contractor Liability;
Proposed Rule, 72 FR 39776 (7/20/07)**

To Whom It May Concern:

The American Health Care Association (AHCA) appreciates the opportunity to comment briefly on the Department of Health and Human Services (HHS), Center for Medicare & Medicaid Services' (CMS) proposed rule, *Medicaid Integrity Program; Limitation on Contractor Liability*. AHCA is the nation's leading long term care organization, and both the Association and its members are committed to performance excellence and *Quality First*, a covenant for healthy, affordable and clinical long term care. AHCA represents more than 10,000 non-profit and proprietary facilities dedicated to continuous improvement in the delivery of professional and compassionate care provided daily by millions of caring employees to more than 1.5 million of our nation's frail, elderly and disabled citizens who are in nursing facilities, assisted living residences, subacute centers and homes for persons with mental retardation and developmental disabilities.

Under the Deficit Reduction Act of 2005 (DRA), section 6034, the federal government establishes the Medicaid Integrity Program (MIP), and requires the HHS Secretary to enter into contracts with eligible individuals and entities to carry out specific activities (e.g., reviewing, auditing and educating providers furnishing items or services to beneficiaries and claiming Medicaid payments) to promote Medicaid integrity. CMS' proposed rule would limit a contractor's liability for actions taken to carry out a contract under the MIP. It also would require the federal government to provide legal counsel or services to MIP contractors for expenses incurred in the defense of any legal action brought against them.

General Comments:

AHCA is concerned that CMS' first MIP proposed rule on contractor liability fails to give the health care community or the public any real information about the federal government's discussions on the MIP contractor role, responsibilities and qualifications. By December 2007, CMS is tasked with securing a pool of MIP contractors to devise and implement new processes for reviewing billing practices, conducting audits, identifying strategies for targeting overpayments and furnishing technical assistance to states and providers on integrity; but to our knowledge, CMS has not yet engaged any healthcare providers in MIP discussion or development. In fact, it is our understanding that the government stakeholders currently working on the development and implementation of MIP have signed agreements of confidentiality, making it impossible for them to share information with provider stakeholders.

THE AMERICAN HEALTH CARE ASSOCIATION IS COMMITTED TO PERFORMANCE EXCELLENCE AND QUALITY FIRST, A COVENANT FOR HEALTHY, AFFORDABLE AND ETHICAL LONG TERM CARE. AHCA REPRESENTS MORE THAN 10,000 NON-PROFIT AND FOR PROFIT MEMBERS DEDICATED TO CONTINUOUS IMPROVEMENT IN THE DELIVERY OF PROFESSIONAL AND COMPASSIONATE CARE FOR OUR NATION'S FRAIL, ELDERLY AND DISABLED CITIZENS WHO LIVE IN NURSING FACILITIES, ASSISTED LIVING RESIDENCES, SUBACUTE CENTERS AND HOMES FOR PERSONS WITH MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES.

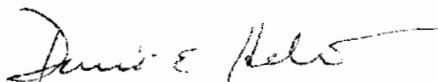
In section 6038(c)(2)(A) of the DRA, for example, it states that MIP contractors must demonstrate capability, among other things, to carry out the actions and services of “entities furnishing items or services” paid for under Medicaid and audit claims for payments under the state Medicaid program. This underscores AHCA’s concern that MIP contractors may not understand state-specific payment methodologies; resulting in a significant learning curve as contractors work with state-specific practices. The MIP contractors also may not be familiar with long term care populations, services or providers. Nursing facilities and assisted living facilities are residential care providers that have patient outcomes that are distinct from acute care settings, and the MIP contractors may not fully grasp the focus of long term care services (increasing functionality or delaying or preventing functional decline). Such a knowledge gap could create significant problems as MIP contractors provide technical assistance to states and health care providers on quality and financial oversight activities. Therefore, the lack of public information about the capabilities of the contractors prevents the transparency which all federal government programs should strive to achieve.

Provisions of the Proposed Rule

Under section 6038(c)(2)(A) of the DRA, the HHS Secretary has the discretion, but is not required, to limit the liability of MIP contractors. Therefore, the Secretary retains discretion to extend the limitation of liability only so far as is necessary to protect the contractors from frivolous claims while, at the same time, making sure that they operate properly and in good faith. A balanced approach to limiting liability will assure that the MIP contractors are accountable — a legitimate concern if MIP contractors are allowed to keep a portion of their recovery. Needless to say, this scenario would create a market place incentive for the MIP contractors to be quite aggressive in their recoveries; and place a significant burden on long term care providers otherwise under funded, to choose between expending scarce resources to challenge the propriety of a contractor recovery or waive their right to do so in the hope that it would end the ordeal. Accordingly, the proposed standard for MIP contractors is that they will be protected from civil and criminal liability in performing their duties, as long as their duties are performed with “due care.” AHCA is concerned that the federal government cannot ensure that MIP contractors that are generally immune from legal prosecution will be adequately accountable for their actions? How does CMS ensure the beneficiaries, the providers and the public that the MIP contractors are carrying out their duties when there is no legal check or balance? The federal government must have some sort of formal process in place. AHCA is anxious to assist the Secretary in learning more about this matter by providing him a comprehensive understanding of the problems our members have experienced to date with the Recovery Audit Contractors (RACs) program under the Medicare program.

AHCA is critically interested in the development and implementation roll-out of the MIP as the majority of nursing facility residents in long term care are covered under the Medicaid program. We understand that a new CMS Medicaid Integrity Director has just been named, David Frank, and we look forward to having an opportunity to sit down with him, and discuss some of our concerns. I will have Dianne De La Mare from my staff contact him within the next several weeks to schedule a possible meeting.

Sincerely,



David Hebert
Senior Vice President, Policy & Government Relations