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Association**

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May 21, 2007

Leslie Norwalk, Esq.  
Acting Administrator  
Centers for Medicare & Medicaid Services  
Hubert H. Humphrey Building  
200 Independence Avenue, S.W., Room 445-G  
Washington, DC 20201

***Re: (CMS-2275-P) Medicaid Program; Health Care-Related Taxes (Vo. 72, No. 56), March 23, 2007***

Dear Ms. Norwalk:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, and our 37,000 individual members, the American Hospital Association (AHA) appreciates the opportunity to comment on the Centers for Medicare & Medicaid Services' (CMS) proposed rule changing Medicaid policy on health care-related taxes used by the states to support their share of Medicaid expenditures. The AHA raises serious concerns regarding CMS' changes to the standards for determining whether an impermissible hold harmless arrangement exists within a health care-related tax.

The proposed rule represents a substantial departure from long-standing Medicaid policy by imposing subjective, overly broad standards for determining the existence of hold harmless arrangements. These proposed policy changes could create great uncertainty for state governments and hospitals, making it difficult for them to adopt or implement Medicaid health care-related tax programs with reasonable assurance that they are compliant. As a result, states and hospitals will be left open to after-the-fact challenges. In addition, the vaguer and broader standards CMS proposes will limit states from implementing legitimate provider tax programs that are consistent with the Medicaid statute and congressional intent. The AHA recommends that CMS withdraw the proposed changes discussed below regarding the standards for determining an impermissible hold harmless arrangement.

### **STANDARDS FOR DETERMINING A HOLD HARMLESS ARRANGEMENT**

The current standards for determining the existence of impermissible hold harmless arrangements within health care-related taxes are: the positive correlation test; the Medicaid



payment test; and the guarantee test. Through the *Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991* (P.L. 102-234), Congress provided guidance on how to frame the standards for determining when a tax-paying provider is being held harmless for the payment of a tax. The implementing regulations further clarified the standards for the hold harmless test and were developed jointly with state governments and other key stakeholders. The agency sought to apply clear and specific rules for identifying a hold harmless arrangement because, as it noted in the 1993 final rule, a more subjective analysis would be administratively burdensome and virtually impossible to apply fairly (HCFA Final Rule, Health Care-Related Taxes, 58 Federal Register 43,156, 43166, 43167 (August 13, 1993)).

However, in this proposed rule, CMS clearly states in the preamble that some degree of subjectivity will be part of its analysis of hold harmless arrangements, and in doing so, the agency implies it is now willing to accept the uncertainty and potential unfairness of a subjective standard (FR Vol. 72, No. 56 13729). Furthermore, under the proposed rule, states and hospitals would no longer be able to rely on explicit standards contained in CMS regulations when considering provider tax programs, but would have to live with the uncertainty that subjective analysis undoubtedly brings.

#### **POSITIVE CORRELATION TEST**

The 1993 rule defined the term “positively correlated” to require a statistical analysis. However, in the proposed rule, CMS now argues that establishing a positive correlation should not be limited to a quantitative analysis but be broadened to include a more subjective analysis, such as finding linkages between a tax rate and other payments to providers. CMS claims that a positive correlation could be found simply by the fact that a provider payment, grant or credit program and a provider tax are enacted in the same legislative session. CMS appears to be reserving as much leeway as possible to determine what is and is not an appropriate tax. In doing so, the agency is making its guidance so broad as to be meaningless, using as a rationale that it is impossible to anticipate all the hold harmless arrangements that could be created.

#### **MEDICAID PAYMENT TEST**

Current federal law governing health care-related taxes states that the prohibition of hold harmless arrangements “...shall not prevent the use of the tax to reimburse health care providers in a class for expenditures under this subchapter, nor preclude States from relying on such reimbursement to justify or explain the tax in the legislative process” (U.S.C. Section 1936b(w)(4)). The law and current regulation recognize that a provider’s expenses for the Medicaid portion of a provider tax are an allowable Medicaid expenditure. CMS, through this proposed rule, would reverse policy and statute by asserting that a hold harmless arrangement is present when the state makes Medicaid payments to providers in a supplemental form or otherwise, and the payment is measured by the Medicaid portion of the provider’s tax liability.

#### **GUARANTEE TEST**

The third test the agency uses to determine if an impermissible hold harmless arrangement exists is whether the taxpayers are directly or indirectly held harmless for any portion of tax costs. CMS states in the preamble that a direct guarantee does not need to be an explicit promise or assurance of payment. The agency suggests that merely having a state statute, regulation or

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policy that provides for a payment to the provider would be enough to trigger the suspicion of a hold harmless arrangement. CMS reverses its own long-standing policy found in the 1993 regulation and acts contrary to the language of the statute when it states that a direct guarantee can be triggered even in the absence of an explicit assurance. Once more, CMS relies on subjective analysis to determine the existence of a hold harmless arrangement when looking at the direct guarantee test.

Through this proposed rule, CMS gives itself broad sweeping authority to determine when an impermissible hold harmless arrangement exists. CMS admits that it is using subjective analyses when making these determinations. The effect of this new rule may be to eliminate provider tax programs that are authorized by the statute and that Congress intended states to be able to maintain. The proposed rule also may reduce the ability of state government and hospitals to understand whether a provider tax program that is being developed will meet CMS' approval. This degree of subjective analysis and uncertainty is unacceptable. The AHA urges CMS to withdraw the proposed policy changes regarding the standards for determining an impermissible hold harmless arrangement that we have identified.

If you have any questions regarding our comments, please contact me or Molly Collins Offner, senior associate director for policy, at (202) 626-2326 or [mcollins@aha.org](mailto:mcollins@aha.org).

Sincerely,

Rick Pollack  
Executive Vice President