Overview of CMS Enforcement Discretion Regarding Existing Health Care-Related Tax Programs with Impermissible Redistributions

April 22, 2024 CMCS Informational Bulletin

Financial Management Group- 09/09/2024

Agenda

1. Background
2. Key Provisions of Managed Care Final Rule
   - Managed Care Access, Finance, and Quality (**CMS-2439-F**)*
3. Summary of April 22, 2024 CMCS Informational Bulletin (CIB)**
4. CMS implementation approach for the CIB
5. Wrap-up and Questions
6. Appendix: Sample Redistribution Questions

*Managed Care Final Rule: https://www.federalregister.gov/public-inspection/2024-08085/medicaid-program-medicaid-and-childrens-health-insurance-program-managed-care-access-finance-and
**April 22 CIB: https://www.medicaid.gov/federal-policy-guidance/downloads/cib042224.pdf

1. Background

- Tax programs to fund nonfederal share. One way states fund the Medicaid non-Federal share is through health care-related tax programs.
  - Permissible class, broad based and uniform. Permissible tax programs must be imposed on a permissible class, must be broad based and uniform (unless a waiver is granted), and must not hold taxpayers harmless.
- Hold harmless arrangements. Some tax programs include impermissible hold harmless arrangements.

1. Background, continued

- Redistribution arrangements. In some impermissible arrangements, providers have pre-arranged agreements to redistribute Medicaid payments to repay all or a portion of the health care-related tax.
  - The redistribution of Medicaid payments typically involves funds shifting from providers with higher percentages of Medicaid-covered services toward providers with lower percentages of, or even no, Medicaid-covered services.
  - Hold harmless: Taxpaying providers are held harmless for all or a portion of their cost of the health care-related tax.

2. Key Provisions in Managed Care Final Rule

- SDP non-federal share compliance: Requires that state directed payments (SDPs) comply with all Federal requirements for the financing of the non-federal share. (42 CFR 438.6(c)(2)(ii)(G))

- Attestation Requirement: Requires states to ensure that providers receiving the SDP attest that they do not participate in an impermissible hold harmless arrangement.
    - Effective Date. Beginning on or after January 1, 2028, the attestation provision is applicable the first rating period for contracts with Managed Care Organizations (MCOs), Prepaid Inpatient Health Plans (PIHPs), and Prepaid Ambulatory Health Plans (PAHPs) (See 42 CFR 438.6(c)(8)(vii)).

3. CMCS Informational Bulletin (CIB)

- EXISTING ARRANGEMENTS: On April 22, 2024, CMS issued a CIB indicating that it will exercise enforcement discretion until January 1, 2028, with respect to health care-related tax programs with hold harmless arrangements that exist as of the date of the CIB .
  - *"CMS will not enforce section 1903(w)(1)(A)(iii) and (w)(4) of the Social Security Act (the Act) and 42 CFR § 433.68(b)(3) and (f) with respect to health care-related tax programs with hold harmless arrangements involving provider redistributions* ***that exist as of the date of this guidance."***

3. CIB, continued

- NEW ARRANGEMENTS: Health care-related taxes that do not meet federal requirements or new provider payment redistribution arrangements **may result in CMS disapproval** of state Medicaid payment proposals and/or disallowance of Federal Financial Participation (FFP).
  - *This applies to all arrangements- regardless of which Medicaid delivery system or type of payment the arrangement supports (e.g., SDPs, fee-for-service payments)*

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4. CMS Implementation Approach for CIB: → Period of Enforcement Discretion

- Before January 1, 2028:
  - We will identify and track all **existing** provider redistribution arrangements **as of the date of the CIB (April 22, 2024)**, when possible, through reviews of SDPs, state plan amendments, and other means.
  - We will assist states, where necessary, to identify and **transition to allowable sources** of non-Federal share while mitigating any program disruption to the greatest extent possible.

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4. CMS Implementation Approach for CIB: → Period of Enforcement Discretion

- <u>CIB alignment with Managed Care Rule attestation requirement:</u>
  - The CIB nonenforcement period generally aligns with the January 1, 2028 applicability date of 42 CFR 438.6(c)(2)(ii)(H), the attestation provision in the Managed Care Final Rule, requiring states to ensure that providers receiving an SDP attest that they do not participate in any hold harmless arrangement for any health care-related tax.

4. CMS Implementation Approach: → New v. Existing Determinations

- *How will CMS determine whether there is a redistribution arrangement?*
  - CMS intends to rely primarily on existing SDP, SPA, 1115, and tax waiver review processes and analyses.
  - This will also include routinely asking states questions** about redistribution arrangements in our review of the non-federal share financing of SDPs, SPAs, 1115s, and tax waivers.

- *How will CMS determine whether the arrangement is new or existing as categorized under the CIB?*
  - CMS will assess all relevant factors of states' tax related or funded actions to determine whether such actions are new or existing arrangements under the CIB.
  - The following slides set forth those factors and provides illustrative examples.
  - Multiple factors may be applicable and therefore assessed for any one proposal.
  - CMS will take into account historical practices

**See Appendix for examples of questions CMS might send

4. CMS Implementation Approach: New vs. Existing

New SPAs, SDPs, 1115s, Tax Waivers:

We would likely regard as new, and therefore may be subject to disapproval, deferral, or disallowance:	**We would likely regard as existing, which therefore benefit from nonenforcement:**
The redistribution is itself new (implemented after the date of the CIB) **or** is tied to a new action.	The redistribution is both existing and not tied to a new action such as a new payment or tax.
Example: The SPA, SDP, or tax waiver includes a new payment or new tax. This includes items that were pending with CMS but not yet approved as of April 22, 2024. It is considered "new" because it did not exist before.	*Example:* A state submits its annual SDP funded by a tax that includes a redistribution arrangement. The SDP, tax, and redistribution are in line with historical activity or nominal inflationary (or similar) adjustments. It is considered existing because it is similar to or an extension of something that existed before.

4. CMS Implementation Approach: New vs. Existing

Magnitude of Tax or Payment Change

We would likely regard as new, and therefore may be subject to disapproval, deferral, or disallowance:	**We would likely regard as existing, which therefore benefit from nonenforcement:**
SDP, payment, or tax assessment is increased in amount or proportion in a manner not aligned with historic practices, etc. when compared to other or prior SDPs, prior payments, or taxes.	Payment or tax change is a nominal increase and aligned with historical practice.
Examples: • An SDP or SPA results in a significant increase, e.g. from \$200 million dollars to \$700 million dollars, with a new impact on budgets. • A tax is doubled from 3 to 6 percent.	*Examples:* • A state submits quarterly tax waivers with slight increases (e.g., the tax amount is \$110m, then \$112m) • Payment or tax change is to make an inflationary adjustment or to address changes in provider enrollment, causing a nominal increase.

4. CMS Implementation Approach: New vs. Existing

Tax Structures, Generally

We would likely regard as new, and therefore may be subject to disapproval, deferral, or disallowance:	We would likely regard as existing, which therefore benefit from nonenforcement:
If a structure of the tax changes, such as classes of providers taxed, tax rates, or new provider inclusions/exclusions changes in a fundamental, unanticipated or non-routine manner.	If the tax changes, such as classes of providers or tax rates, shifts marginally with the goal of maintaining the status quo and consistent with historical practice.
Example: A state establishes three new groups of providers to exempt from an existing tax.	*Example:* Because of changes in case mix, the state makes very small changes to thresholds across different tax tiers for groups of taxpayers.

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4. CMS Implementation Approach: New vs. Existing

Part / Whole

We would likely regard as new and therefore may be subject to disapproval, deferral, or disallowance:	We would likely regard as existing, which therefore benefit from nonenforcement:
Statewide initiatives, such as a change in an authority or delivery system, where the redistribution, tax, or payments, are altered from the predecessor system.	Statewide initiatives such as a change in authority or delivery system, where the status quo is maintained and the redistribution, structure, or tax and payment amounts, etc. are essentially the same as the predecessor system.
Example: • State shifts from FFS delivery system to managed care, but there is a new redistribution arrangement among providers associated with this shift.	*Example:* • A new SDP is part of a larger shift by the state between delivery systems where a prior supplemental payment becomes an SDP. The payment amounts, tax, and redistribution arrangement remain stable.

4. CMS Implementation Approach: New v. Existing

Legislative or Regulatory Tax Change:

We would likely regard as new, and therefore may be subject to disapproval, deferral, or disallowance:	**We would likely regard as existing, which therefore benefit from nonenforcement:**
State legislative action or state regulatory and/or administrative action that is a significant departure from historical practice.	State legislative action or state regulatory and/or administrative action that is: • Creating a standard, ongoing update; and redistribution is incidental to larger statewide initiative; or • Renewing a tax due to expiration of prior legislation
Example: A state legislature passed a targeted payment or tax increase that is tied to a redistribution arrangement which takes effect prior to 1/1/28.	*Example*: A state legislature passed a broad, multi-provider payment increase which takes effect prior to 1/1/28 and does not target provider classes with redistribution arrangements.

5. Wrap-up and Questions: State Oversight- Optional Best Practices

- *What are some methods states can use with their providers to detect these arrangements?*
  - States have a wide variety of methods available for them to detect redistribution arrangements.
  - This could include producing attestations to distribute for signature by providers. <u>Note: Provider attestations are NOT required before the first rating period beginning on or after January 1, 2028</u>.
  - This could also include holding a meeting with providers to go over the hold harmless requirements, ask about the presence of such arrangements, and attempt to confirm that no such arrangements are in place.
- *What are some resources CMS can provide to states?*
  - CMS can review or share draft attestation language for providers to sign.
  - CMS can also make available talking points states can use in meetings with providers.

5. Wrap-up and Questions: CMS Technical Assistance Available

- CMS encourages states, where feasible, to end arrangements that do not appear to comport with statute and regulations as soon as possible before January 1, 2028.

- We have already partnered with states that have taken steps to prevent or end these arrangements, and we will provide technical assistance to additional states informed by those experiences. We are also available to provide technical assistance during the development of state oversight policies and programs.

5. Wrap-up and Questions:
CMS Technical Assistance Available, cont'd

- CMS is committed to working with state Medicaid agencies in furtherance of achieving full compliance with applicable Federal requirements with as little burden and disruption as possible.

- **We encourage states to contact CMS before submitting their tax waiver, SPA, SDP, etc. to obtain technical assistance as to how the new vs. existing distinction applies to their arrangement.** However, we note that final determination will be made upon review of the actual submission.

- CMS will continue to approve permissible health care-related taxes that do not contain hold harmless arrangements and meet all other applicable Federal requirements.

5. Wrap-up and Questions

For questions on health care-related taxes and related waivers, please contact the CMS Tax Waiver Mailbox at taxwaiver@cms.hhs.gov

6. Appendix: Sample Redistribution Questions, 1 of 5

- Is the state aware of any arrangements among providers or other entities that involve the redistribution of Medicaid payments (or other provider funds that are replenished by Medicaid payments) financed by the tax or taxes that are related to or that fund this proposal, as applicable? These redistribution payments may be made directly from one taxpaying provider to another, or the funds may be contributed first to an intermediary redistribution pool.
  - a. If so, please provide a detailed description of such agreements and/or arrangements, including how the state became aware of them, how long the arrangement(s) has been in place, the parties to the arrangement, and how the arrangement works.

6. Appendix: Sample Redistribution Questions, 2 of 5

- Has the state asked providers or provider associations whether there are Medicaid payment redistributions among providers?
  - a. If so, what did the state learn from communications with providers or provider associations that is not described in the answer to question 1?
- If such arrangements exist, please provide any available information and documentation on the subject, in particular the text of any written materials or spreadsheets detailing the transfers. Examples of written materials/documentation include signed agreements, spreadsheets, PowerPoints, PDFs, legislative hearing records, contracts, hospital association resolutions or guidance documents, instructional videos, etc.

6. Appendix: Sample Redistribution Questions, 3 of 5

- Please describe what monitoring, oversight, and enforcement programs are in place to ensure permissibility of the state's/locality's/localities' health care-related tax program. What oversight systems does the state have to identify any impermissible hold harmless arrangements and prevent them? Please describe any reporting requirements from providers to the state that relate to the state's hold harmless oversight efforts.
- Please confirm that the state is reporting its health care-related tax collections accurately on a quarterly basis, in accordance with 42 CFR 433.74. Under that regulation, CMS has the authority to request any additional information related to any donations made by, or any taxes imposed on, health care providers. As such, please also confirm the state is maintaining supporting documentation that is readily available upon request by CMS.
  - a. As a reminder, on the quarterly CMS-64, along with the reporting described, the state is certifying that its sources of non-federal share comply with federal requirements. If the state needs technical assistance to support the accurate reporting of health care related taxes on the CMS-64, please let us know.

6. Appendix: Sample Redistribution Questions, 4 of 5

- Is this a new arrangement? In this context, the word “arrangement” could refer to the tax, the redistribution arrangements, the payment vehicle (i.e. SDP or SPA), the payment amount, or any combination of the aforementioned.
  - a. When was this arrangement first created?
  - b. Which component of the arrangement is the piece(s) that is new?
- Even if certain aspects of a redistribution arrangement already exist, there may be changes to certain aspects of the health care-related tax program that make it a new arrangement. Please provide additional information on the following aspects of this proposal:
  - a. What prompted this change? For example, is this a regular update? In response to a legislative mandate? An inflationary update or an update to base year data? Etc.
  - b. What components of the arrangement were in place prior to the current proposal?

6. Appendix: Sample Redistribution Questions, 5 of 5

- When did you first become aware of this arrangement?
- How many providers are involved?
- What are the amounts of the transfers?
- Which providers are transferring, and which are receiving transfers?
- Please provide the tax amounts for each provider.
- Please provide the amount paid to each provider financed by the provider tax.