



February 5, 2018

Michele Phinney, Director
Office of Regulation and Policy Coordination
Maryland Department of Health
201 West Preston Street, Room 512
Baltimore, MD 21201

Re: Comments on Proposed Medicaid Participation Regulation
Amendments: COMAR 10.09.36
January 5, 2018 Maryland Register

Dear Ms. Phinney:

Following are comments jointly submitted by the Maryland Hospital Association and the Health Facilities Association of Maryland on the above-referenced proposed amendment to the Medical Assistance Program (the "Program") regulations on provider enrollment at COMAR 10.09.36. The regulations propose to enable the Program to terminate a provider or other entity's participation in Medicaid, not as a result of any violation by that provider or entity but solely because a 5% owner of that provider or entity owns an interest in another terminated provider. In fact, the proposed amendment seeks to vest the Program with authority to terminate all "affiliated lines of business," which is broadly defined and not limited to entities that are themselves Medicaid providers.

We acknowledge that (a) the purpose of the proposed amendment is to enable the Program to cease the participation in Medicaid of providers that are linked by common ownership to another provider who is no longer participating in Medicaid due to certain kinds of misconduct, and that (b) the Program's right to terminate providers and affiliated lines of business would be discretionary, not mandatory. While the proposed amendment has the primary objective of enabling the Program to avoid improper billing and related regulatory violations, we are concerned about the foundation and breadth of the regulation, which we believe goes well beyond its goals.

We urge that the proposed amendment not be adopted. There should be further discussions about the agency's goals, its current authority and the best way to address legitimate concerns. Following are some of our key reasons we believe this action is warranted.

1. Lack of statutory foundation for the proposed amendment.

The proposed amendment relies on stated provisions of the Health-General Article, none of which provide the Program with statutory authority to adopt this proposed amendment and to terminate the participation of providers or "affiliated lines of business" that have not engaged in any misconduct. Rather the sole basis of such termination is the identity of a 5% or more ownership interest of a person who has not been excluded from Medicaid and who owns a 5% interest in another, terminated provider. In addition, the proposed amendment seeks to terminate participation of management companies or other "affiliated lines of business" that are not themselves Medicaid providers under COMAR 10.09.36.

The Maryland Register notice states correctly that no federal law requires the Program to adopt this regulation. Indeed, the federal Centers for Medicare & Medicaid Services, while also vigilant in identifying and acting on billing and other regulatory violations, does not have correspondingly broad and general regulations on terminations of this kind.

2. Failure to Assess Impact.

The Maryland Register notice states that the proposed amendment will have no impact on small business, even though the effect would be to prevent providers and "affiliated lines of business" to participate in Medicaid, not as a result of any misconduct by them. We find this to be a confusing conclusion in light of the breadth and impact of the proposed amendment and a procedural deficit in the adoption of this regulation. An impact statement is needed.

3. Right to Appeal.

We appreciate that the Program's authority would be discretionary, which is the kind of action for which a contested case appeal is essential. We need to discuss a description of the appeal process that would pertain to any action of this kind along with confirmation that any such termination action would be stayed while the appeal is pending. We note that, while there are regulations governing the suspension of payments to a provider based on findings related to credible allegations of billing fraud, this proposed regulation refers to terminations that are solely based on the identity of an owner, which is far different and does not result in suspension of payment.

4. Terminations versus Exclusions.

The proposed amendment refers to "terminations" although the effect is more in the nature of an "exclusion." The distinction is not a semantic one. First, terminations can be voluntary or involuntary; but any Program termination initiated by a provider should not trigger the termination or exclusion under any such proposed amendment. Second, provider participation can be involuntarily terminated for a myriad of reasons, only some of which relate to billing violations or quality of care violations. A "one size fits all" approach referring to terminations should not be used.

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A 5% ownership interest linking an individual or entity to another terminated provider is insufficient to infer a causal connection that should prompt termination of another provider or line of business. Moreover, even if there is a basis to terminate or exclude a person from owning an interest in another provider, there needs to be an opportunity for the other provider to divest any tainting ownership interest before any termination or exclusion on this basis.

The proposed amendment, as drafted, should not be adopted as a regulation. We urge that it be withdrawn and that we engage in substantive discussion about the Program's goals. We look forward to further dialogue about this important matter.

Sincerely,



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Maryland Hospital Association



Tracy Strong, Director of Policy and Government Relations
Health Facilities Association of Maryland

cc: Mr. Dennis R. Schrader
Ms. Susan J. Tucker
Howard L. Sollins, Esq.