DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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CMS
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JUL 25 2017

Jeffrey A. Meyers, Commissioner
New Hampshire Department of Health and Human Services
129 Pleasant Street
Concord, New Hampshire 03301

Dear Mr. Meyers:

Thank you for the information you have provided to the Centers for Medicare & Medicaid Services (CMS) regarding the non-federal share financing for New Hampshire's Health Protection Program. I know that you have put a lot of analysis into this matter and please be assured CMS has as well given the importance of the program to New Hampshire's citizens.

After careful review, CMS has identified concerns with New Hampshire's use of donations from health care providers in the New Hampshire Health Protection Fund (Trust Fund). The Medicaid statute at section 1903(w) of the Social Security Act (the Act) and implementing regulations at 42 C.F.R. §§ 433.54 and 433.66 establish a prohibition on provider-related donations except in very limited circumstances.[1]

A bona fide provider-related donation is a donation that has no direct or indirect relationship to Medicaid payments made to the donating provider, provider class, or any related entity, and where no hold harmless exists.[2] A hold harmless practice exists if all or any portion of a donation is returned directly or indirectly to the donating provider (or other parties responsible for the donation) or in circumstances where all or any portion of a Medicaid payment to the donating provider, provider class, or related entity varies based only on the amount of the donation, including where Medicaid payment is conditional on receipt of the donation.[3]

In the case of the New Hampshire's arrangement, CMS believes there is a relationship between the donations and Medicaid payments because Medicaid expansion is conditioned on the receipt of donations as articulated in New Hampshire legislation. The fundamental consideration for provider-related donations under section 1903(w) of the Act is whether there is an expectation that the donating provider, provider class, or any related entity can expect to receive – in a direct or indirect manner – all or any portion of the donation back through Medicaid or other payments.

[1] *See* section 1903(w)((1)(A)(i) of the Act.
[2] *See* section 1903(w)(2)(B) of the Act.
[3] *See* 42 C.F.R. §§ 433.54(c)(2)

An important aspect of New Hampshire's arrangement is the state's use of provider-related donations to pay for Medicaid service-related costs.

It might also be helpful to understand the differences between the health care-related tax hold harmless provisions and those that govern provider-related donations like those at issue here. The statute and regulations governing provider-related donations are distinct from those governing health care-related taxes; the relevant provisions of the latter refer to the taxpayer, but do not include reference to the provider class or any related entities. Health care-related taxes are further distinguished in that section 1903(w)(4) of the Act provides that the health care-related tax hold harmless provisions do not prevent a state from using the tax proceeds to reimburse a class of health care providers for Medicaid expenditures or from relying on such reimbursement to justify/explain the tax in the legislative process.

Given the timing of this information in relation to New Hampshire's implementation of the Medicaid expansion, we understand that there is a need for a transition period. While CMS has concerns that New Hampshire may be out of compliance with federal requirements, we expect that by the end of New Hampshire's next legislative session, changes will be put in place, effective during state fiscal year 2019, to bring the state's non-federal share financing into compliance with applicable federal statutes and regulations. To the extent that New Hampshire's next state budget does not include necessary changes to achieve compliance, the state may be faced with financial consequence that could include a deferral or disallowance action.

Again, we appreciate the work that New Hampshire has put into this process as well as the state's commitment to serving its Medicaid beneficiaries. CMS shares the state's desire to achieve the best outcomes for beneficiaries while protecting the fiscal integrity of the program. As always, we are available to provide technical assistance during this process.

Sincerely,

Brian Neale
Director