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August 13, 2018

SUBMITTED ELECTRONICALLY TO:
http://www.regulations.gov

The Honorable Seema Verma, Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health & Human Services
Attention: CMS-2413-P
P.O. Box 8016
Baltimore, MD 21244-8016

Re: "Medicaid Program: Reassignment of Medicaid Provider Claims"
File Code CMS-2413-P

Dear Administrator Verma:

I write to request that the Department of Health and Human Services ("HHS") withdraw the Proposed Rule issued on July 12, 2018, entitled "Medicaid Program: Reassignment of Medicaid Provider Claims." As mentioned in my July 23, 2018 letter to Secretary Azar, the Proposed Rule would potentially alter the way in which payments are made to tens of thousands of personal care attendants ("PCAs") in Massachusetts and millions more across the country. The Commonwealth of Massachusetts permits unionizing by these workers—hired by individual plan benefit recipients—to provide personal care services. Among other things, the Proposed Rule may impair the Commonwealth's ability to deduct payments for collectively bargained-for benefits, including authorized union dues. I submit this comment in strong opposition to the Proposed Rule, as it is not only unnecessary, but it threatens the Commonwealth's system that has enhanced the quality care to 32,000 MassHealth plan members ("consumers") and the working conditions and training for more than 40,000 PCAs.

As the text of the Proposed Rule and associated regulatory material make plain, HHS lacks information to support such a dramatic change in its regulations. In fact, HHS admits that it does not know what the economic impact will be and has sought a variety of information during the comment period to ascertain the real-world effects. Seemingly at odds with the need for so much new information, HHS is looking to rush this Proposed Rule through the regulatory process, giving the public only 30 days to comment. As explained in more detail below, the

Proposed Rule is not supported by the legal arguments advanced by HHS. Moreover, the current rule meets its objective of ensuring that better trained, higher quality, and longer-tenured workers are available to serve as PCAs. There is no need for a change.

1. Overview of the Massachusetts PCA Program

States may provide coverage for PCA services generally through two payment models: (1) agency-directed, where a qualified agency acts as the PCA employer; or (2) self-directed, where the consumer has decision-making authority over the services provided. Massachusetts has elected to make PCA services available to MassHealth consumers through the Massachusetts Personal Care Attendant program that uses the "self-directed" model. 130 C.M.R. §§ 422.00 *et seq.*

Under this program, the consumer acts as a statutory "employer." *See*, *e.g.*, Centers for Medicare and Medicaid Services ("CMS"), Division of Long Term Services and Supports, Disabled and Elderly Health Programs Group, Center for Medicaid and CHIP Services, *Increasing Fiscal Protections for Personal Care Services*, at 5.[1] Each MassHealth consumer is deemed an "employer"—fully responsible for recruiting, hiring, scheduling, training, time-keeping, and terminating their PCAs. 130 C.M.R. § 422.420. Roughly 40,000 PCAs in Massachusetts provide a range of services to approximately 32,000 consumers living at home. These critical services must be prescribed by the consumer's doctor or nurse practitioner and may include help with medications, bathing and grooming, dressing, exercises, eating, and toileting. Section 422.410(A). PCAs also assist consumers with daily household tasks, such as laundry, shopping, cooking, and housekeeping, and they may accompany consumers to medical appointments. Section 422.410(B).

Consumers are assisted by fiscal intermediaries, as well as personal care management agencies, who oversee the working relationship between PCA service providers and the consumers. Section 422.419. The fiscal intermediary is responsible for "issuing checks for PCAs equal to the PCA wage component of the PCA rate, with appropriate taxes withheld and other applicable required withholdings," Section 422.419(B)(12), and for "paying unemployment insurance taxes, purchasing worker's compensation insurance, and preparing the PCA payroll," Section 422.402. MassHealth pays fiscal intermediaries' contractual administrative fees for these services. Section 422.411(C).

Since 2006, Massachusetts PCAs are deemed to be public employees for collective bargaining purposes under M.G.L. c. 150E and for payroll deductions for union dues, fees, insurance and other "employee benefit," as permitted by M.G.L. c. 180, §§ 17A, 17G, and 17J. *See* M.G.L. c. 118E, § 73(b) (added by St. 2012, c. 224, § 131, formerly St. 2006, c. 268). At the same time, the Massachusetts Personal Care Attendant Quality Home Care Workforce Council

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[1] https://www.medicaid.gov/medicaid/hcbs/downloads/hcbs-increasing-fiscal-protections-v6.pdf (Aug. 13, 2018).

("the Council") was established within the Executive Office of Health and Human Services, M.G.L. c. 118E, §§ 71-75 (added by St. 2012, c. 224, § 131, formerly St. 2006, c. 268) "to ensure the quality of long-term, in home, personal care by recruiting, training and stabilizing the work force of personal care attendants." M.G.L. c. 118E, § 71(a). Among other things, the Council acts on behalf of MassHealth consumers, as the employers' representative, to collectively bargain with Massachusetts PCAs.

In 2007, PCAs in Massachusetts voted to elect 1199SEIU United Healthcare Workers East to be their exclusive bargaining representative, and their first collective bargaining agreement with the Council was executed in 2009. Under the Agreement, MassHealth consumers retain the right to hire, supervise, manage, and terminate PCAs from their service. The Agreement also provides that "[e]ach PCA who chooses to become a Union member shall have union dues deducted from his or her wages," in addition to other permissible withholdings for taxes and insurance referenced above.[2]

2. The Legal Position Adopted in the Proposed Rule is Unsupported

The Proposed Rule fails to take into consideration that the Congressional purpose in banning service providers from assigning their right to payment to third parties was to prevent providers from selling their entitlement at discounted rates to factoring agents—a widespread practice that Congress determined encouraged inflated and fraudulent claims. Consistent with the purpose of the assignment ban, Congress created a number of exceptions to this prohibition, including allowing States to pay a service provider through a fiscal intermediary.

With certain exceptions relevant here, Title XIX of the Social Security Act (Medicaid), 42 U.S.C. § 1396a(32) requires that "[a] State plan for medical assistance must—…provide that no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service, under an assignment or power of attorney or otherwise…."[3] *See also* 42 C.F.R. § 447.10(h) ("*Prohibition of payment to factors.* Payment for any service furnished to a beneficiary by a provider may not be made to or through a factor, either directly or by power of attorney.").

It is well-established that this reassignment ban was intended to prevent physicians and other healthcare providers from transferring their entitlement to payment from a state to third parties at discounted rates—a practice commonly known as "factoring" of Medicaid accounts

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[2] *See* the parties' initial collective bargaining agreement at 3, available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiu2ouU887cAhXxlOAKHZCqAnAQFjAAegQIARAC&url=https%3A%2F%2Fwww.mass.gov%2Ffiles%2Fdocuments%2F2017%2F12%2F27%2Fpca-contact.rtf&usg=AOvVaw1wNbWTwmYZLvnR_fjGpLHl

[3] Section 1902(a)(32) was added by Pub. L. 92-603, 86 Stat. 1329 (Oct. 30, 1972), and amended by the Medicare-Medicaid Anti-Fraud and Abuse Amendments, § 2(a)(3), Pub. L. 95-142, 91 Stat. 1175 (Oct. 25, 1977).

receivables—because it was believed to encourage inflated and fraudulent charges. *See, e.g.*, *In re Missionary Baptist Found. of Am., Inc.,* 796 F.2d 752, 757 n.6. (5th Cir. 1986); *Danvers Pathology Assoc., Inc. v. Atkins,* 757 F.2d 427, 428-31 (1st Cir. 1985) (Breyer, J.) (citing H.R. Rep. No. 393, 95th Cong., 1st Sess. 48, reprinted in 1977 U.S. Code Cong. & Admin. News 3039, 3051; H.R. Rep. No. 231, 92d Cong. 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 4989, 5090); *Michael Reese Physicians & Surgeons, S.C. v. Quern,* 606 F.2d 732, 734-35 (7th Cir.1979), *adopted en banc,* 625 F.2d 764 (7th Cir.1980), *cert. denied,* 449 U.S. 1079 (1981); *Transitional Serv. of New York for Long Island, Inc. v. New York State Office of Mental Health*, 91 F. Supp. 3d 438, 443 (E.D.N.Y. 2015). *See also* 95th Cong. 1st Sess., 123 Cong. Rec. Vol. 123, at 31769 (Sept. 30, 1977) (describing addition of the use of a power of attorney to ban on "factoring" arrangements).[4]

Notwithstanding the reassignment ban to prohibit "factoring," Section 1396a(32)(B)(ii) permits a State to make payment to a provider's agent

> if (but only if) such agent does so pursuant to an agency agreement under which the compensation to be paid to the agent for his services for or in connection with the billing or collection of payments due such person or institution under the plan is unrelated (directly or indirectly) to the amount of such payments or the billings therefor, and is not dependent upon the actual collection of any such payment....

Similarly, 42 C.F.R. § 447.10(f) exempts payments— "made to a business agent, such as a billing service or an accounting firm, that furnishes statements and receives payments in the name of the provider, if the agent's compensation for this service is - (1) Related to the cost of processing the billing; (2) Not related on a percentage or other basis to the amount that is billed or collected; and (3) Not dependent upon the collection of the payment."[5]

CMS's basis for the addition of the current rule, 42 C.F.R. § 447.10(g)(4), was in recognition that the Medicaid program is the primary or only source of payment for many PCAs and as some States sought "to improve and stabilize the workforce by offering health and welfare

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[4] https://www.gpo.gov/fdsys/search/search.action?sr=2&originalSearch=%22October+11%2c+1977%22+fraudulent+activities&st=%22October+11%2c+1977%22+fraudulent+activities&ps=10&na=_accodenav_publishdatehier&se=_CRECBfalse_1977false&sb=re&timeFrame=&dateBrowse=&govAuthBrowse=&collection=&historical=false

[5] CMS itself has recommended that "Fiscal Management Services (FMS) should oversee self-direction programs," to curb opportunities for fraud, waste, and abuse. *Increasing Fiscal Protections for Personal Care Services*, *supra*, at 13. Internal Revenue Service rules expressly permit this type of payment arrangement—through an authorized fiscal intermediary acting on behalf of a home care recipient/employer's behalf for purposes of FICA, FUTA, and income tax withholdings. 26 C.F.R. § 31.3504-1(b); IRS Publ, Designation of Agent by Application, Rev. Proc. 2013-39, at 2-3 (interpreting 26 C.F.R. § 31.3504-1, Section 31.3504-1(b) as amended by T.D. 9649, effective December 12, 2013).

benefits to such practitioners," several requested adoption of additional exemptions to expressly permit them to make withholdings from payments due to individual practitioners for health and welfare benefits and other benefits customary for employees and to directly pay those amounts to third parties. 77 Fed. Reg. 26362, 26381-82, 92-93 (May 3, 2012). While acknowledging that 42 U.S.C. § 1396a(32) does not expressly provide for additional exemptions, CMS explained that the particular circumstances at issue here were not contemplated and therefore the reassignment ban should not apply since its application would be inconsistent with the purpose of the ban, *i.e.* to prohibit factoring arrangements. 77 Fed. Reg. at 26382.

3. The Proposed Rule Unnecessarily Threatens Efficient Payroll Processing by Fiscal Intermediaries that Benefits PCAs and Consumers Alike

In Massachusetts, fiscal intermediaries have helped MassHealth consumers by processing payroll for their PCA employees since the late 1990s. Fiscal intermediaries have routinely made authorized payroll deductions from the wages of PCAs for taxes and insurance premiums, and since 2009, for union dues as well. Such payroll deductions facilitate the administrative process by which a PCA who voluntarily chooses to join the union may authorize payment of membership dues. The collective bargaining agreement between the Council and 1199SEIU specifically provides for such payroll deductions for union dues, and the Agreement has resulted in marked improvements in the provision of personal care services—benefitting PCAs and consumers alike in Massachusetts.

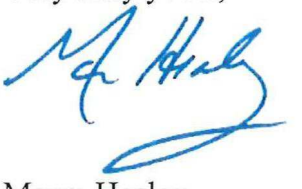
MassHealth consumers rely on personal care services to help them with daily living activities. In order to continue to live safely and with dignity in their own homes, consumers need a continuum of high quality, professional personal care services which can only be provided by a strong and stable pool of PCAs. Collective bargaining has led to better wages and more training, which has resulted in a more stable and standardized PCA workforce. Consumers served by the PCA program have found that unionization has increased the availability of PCAs, and they have benefitted by corresponding improvement in the quality of care PCAs provide.

Since 2009, PCAs have seen a steady rise in their wages. In July 2018, PCAs in Massachusetts became the first in the nation to receive a $15 per hour wage. Higher wage rates, as provided through collective bargaining, have helped to secure a stable, well-trained group of PCAs for consumers to hire—so that they are not left in the lurch if they require more care or when a replacement PCA is needed. And PCAs have enjoyed greater access to training and education under their collective bargaining agreement. PCAs now have access to orientation upon hire and to attend classes to upgrade their skills. 1199SEIU's trainings for PCAs have increased the baseline knowledge that all consumers can expect when they hire PCAs, who in turn are better prepared to serve the needs of the consumers as they continue to provide services. These improvements have increased the professionalization of the PCA workforce, legitimized their work, and improved retention rates of PCAs by MassHealth consumers.

The work of a PCA can be challenging, with varied or limited hours, and in direct competition with less demanding work with more stable hours and similar pay. If the Proposed Rule is adopted, it may undermine the success achieved in the Massachusetts program, which has improved the quality and quantity of PCAs available to meet the myriad and changing needs of consumers. The proposed change may create serious, unintended consequences, including consumers defaulting into nursing homes when they are unable to find adequate professional help.

For all the reasons stated above, I oppose the adoption of the Proposed Rule, and I strongly urge HHS to withdraw the Proposed Rule immediately.

Very truly yours,



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