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MEMORANDUM

March 27, 2014

To: Tribal Health Clients

From: Hobbs, Straus, Dean and Walker LLP

Re: *CMS Releases Final 2015 Letter to Issuers in Federally Facilitated Marketplaces and Proposed Rule including Minimum QHP Certification Standards*

On March 14, 2014, the Centers for Medicare & Medicaid Services (CMS) issued its final 2015 Letter to Health Insurance Issuers (Final Letter) addressing requirements for certification and recertification of Qualified Health Plans (QHPs) in Federally-facilitated Marketplaces (FFMs) or Federally-facilitated Small Business Health Options Programs (FF-SHOPs). The letter requires QHPs to contract with all Indian health providers in the QHP's service area. CMS also published a proposed rule that includes minimum certification standards for QHPs on March 21, 2014. *See* 79 Fed. Reg. 15808 (Mar. 21, 2014).

Requirement to contract in good faith with all Indian health providers

QHPs are required to have a sufficient number and geographic distribution of “essential community providers” (ECPs) in their network. 45 C.F.R. § 156.235. ECPs are providers that serve predominantly low-income, medically underserved individuals. *Id.* CMS's 2014 Letter to Issuers provided that QHPs meet this requirement if they demonstrate that their network includes at least 20 percent of the ECPs in their service area and if they offer contracts to all Indian health providers. CMS's 2014 Letter provided a Model QHP Addendum (Indian Addendum) for the purposes of contracting with Indian health providers.¹

The 2015 Final Letter articulates a higher standard for meeting the ECP requirement. Insurers are required to include at least 30 percent of the ECPs in their networks. Further, CMS states that it expects issuers to offer contracts to “[a]ll available Indian health providers in the service area, to include Indian Health Service, Indian Tribes, Tribal organizations, and urban Indian organizations, using the recommended model QHP Addendum for Indian health providers.” (footnote omitted). The Final

¹ As noted in previous memoranda, we developed the Indian Addendum along with other tribal advocates and submitted it to CMS, but the final version CMS issued had changes that may not fully protect tribal rights. For instance, it is no longer certain that tribal sovereign immunity would be preserved by using CMS's Indian Addendum. Therefore, we do not recommend using the Indian Addendum and have instead supplied a redlined version that we recommend.

Letter states that CMS expects QHP applications to list the contract offers that have been extended to Indian health providers.

Additionally, QHPs must offer reasonable rates to Indian health providers. CMS's Final Letter provides that QHP offers to contract with Indian health providers must be made "in good faith." Although we proposed language that would require an offer to be at a reasonable rate, CMS instead states that "[t]o be offered in good faith, a contract should offer terms that a willing, similarly-situated, non-ECP provider would accept or has accepted."

Significantly, however, CMS's March 21st proposed rule does not mention requirements to contract with essential community providers or Indian health providers. Previously, CMS's proposed 2015 Letter to Health Insurance Issuers (Proposed Letter) stated that the agency planned to issue a rule including these ECP inclusion standards and requiring contracting in good faith, use of the Indian Addendum, and listing contract offers to Indian health providers on QHP applications. The proposed rule, however, does not include these important provisions. Instead, they are included in the final 2015 issuer letter.

Requirement to publish online provider directories

Other significant provisions of CMS's Final Letter were not included in the proposed rule promulgated by CMS. For instance, the Final Letter states that CMS, in accordance with 45 C.F.R. 156.230(b), will require QHPs to make provider directories available online and that a URL directory link should be provided as part of the QHP application. The Final Letter states that directory information for Indian health providers should describe the population served by each provider. These provisions were not included in CMS's proposed rule.

Limited non-discrimination exception for Indian health providers that are certified application counselors

CMS's March 21st proposed rule does, however, provide a limited exception to non-discrimination provisions for Indian health providers that are certified application counselors. The proposed rule states that "[u]nder this proposed exception, an organization receiving Federal funds to provide services to a defined population under the terms of Federal legal authorities (for example ... an Indian health provider) that participates in the certified application counselor program ... may limit its provision of certified application counselor services to the same defined population." Certified application counselors assist individuals in applying for coverage through health insurance exchanges. This exception in the proposed rule would allow Indian health providers to limit this assistance to the populations they serve.

The comment period on CMS's proposed rule provides an opportunity to support the limited non-discrimination exception for Indian health providers that are certified application counselors. It also provides an opportunity to request that the minimum QHP certification standards be revised to include the requirements in the 2015 issuer letter that QHPs contract in good faith with all Indian health providers using an Indian Addendum, list contract offers to Indian health providers on QHP applications, and publish online provider directories. CMS will accept comments on its proposed rule until 5:00 p.m. on April 21, 2014. Comments may be submitted at <http://regulations.gov> and should refer to file code CMS-9949-P.

If you would like assistance preparing a comment or have any questions, please contact Elliott Milhollin at (202)822-8282 or emilhollin@hobbsstrauss.com or Geoff Strommer at (503)242-1745 or gstrommer@hobbsstrauss.com.