



Charles N. Kahn III
President and CEO

July 22, 2024

Via electronic submission at <http://www.regulations.gov>

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue SW
Washington, DC 20201

RE: Medicaid Program; Agency Information Collection Activities: Proposed Collection;
Comment Request (CMS-10856)

Dear Administrator Brooks-LaSure:

The Federation of American Hospitals (FAH) is the national representative of more than 1,000 leading tax-paying hospitals and health systems throughout the United States. FAH members provide patients and communities with access to high-quality, affordable care in both urban and rural areas across 46 states, plus Washington, DC and Puerto Rico. Our members include teaching, acute, inpatient rehabilitation, behavioral health, and long-term care hospitals and provide a wide range of inpatient, ambulatory, post-acute, emergency, childrens', and cancer services.

The FAH appreciates the opportunity to comment to the Centers for Medicare & Medicaid Services (CMS) on the proposed collection of information request pertaining to 42 C.F.R. § 438.6(c)(2)(ii)(H) following CMS' Notice of Agency Information Collection Activities: Proposed Collection, published in the Federal Register on May 21, 2024 (89 Fed. Reg. 44,686).

As explained in the FAH's letter of July 3, 2023 in response to the proposed rule entitled Medicaid and Children's Health Insurance Program (CHIP) Managed Care Access, Finance, and Quality, 88 Fed. Reg. 28,092 (May 3, 2023), the FAH strongly objects to CMS' efforts to reformulate the prohibition on hold harmless arrangements to reach so called "redistribution arrangements" that are purely between private parties and do not involve direct or indirect State action or guarantees. The FAH remains deeply concerned that CMS' recent articulations of the

prohibition on hold harmless arrangement—in the preambles to this proposed rule and the resulting final rule, 89 Fed. Reg. 41,002 (May 10, 2024) and in CMS’ enjoined February 17, 2023 informational bulletin on hold harmless arrangements (2023 Bulletin)¹—conflict with the clear statutory definition of a hold harmless provision under section 1903(w)(r) of the Act. As a result of this legal dispute and the nature of the attestation itself, the information collection would be extraordinarily burdensome for providers, with a cost orders of magnitude in excess of CMS’ estimate in the supporting statement.

Provider Burden

The FAH is concerned that the collection of attestation information will pose a significant and untenable burden on providers. In the Supporting Statement for the proposed collection of information request, CMS significantly underestimates the burden of the attestation requirement, opining that it will only take “a healthcare administrator at a provider 6 minutes to review and sign the attestation.” Even in the absence of legal disputes regarding the prohibition on hold harmless arrangements, in order to complete such an attestation, a provider would need more than 6 minutes to familiarize itself with the relevant facts surrounding the state directed payment (SDP) program at issue, as well as the scope of the legal prohibition on hold harmless arrangements to determine whether the SDP includes a prohibited hold harmless arrangement.

This endeavor is rendered far more burdensome in light of CMS’ legally erroneous position regarding purely private arrangements and the ongoing legal disputes on this issue. Against this backdrop, a provider completing the attestation would likely need to review the text of section 1903(w)(4) of the Act and 42 C.F.R. § 433.68(f)(3); CMS’ position—as expressed in preambular language in the Medicaid and CHIP Managed Care Access, Finance, and Quality rulemaking (88 Fed. Reg. 28,092 (May 3, 2023) and 89 Fed. Reg. 41,002 (May 10, 2024) and the 2023 Bulletin—on purely private arrangements and the hold harmless prohibition; and relevant judicial precedent, including the United States District Court for the Eastern District of Texas’s preliminary injunction order in *Texas v. Brooks-LaSure*.² The complexity of this endeavor may further necessitate consulting with legal counsel to assess whether a hold harmless arrangement is in place (either under the statute and regulation or under CMS’ recent articulations) and evaluate the risks of completing or declining to complete the attestation. **In short, the completion of an attestation would impose a cost on each provider that is orders of magnitude greater than the \$9.30 estimated in the supporting statement.**

The Medicaid Act Does Not Provide Authority for CMS to Impose a Private Payment Limitation Under the Auspices of the Hold Harmless Prohibition

The FAH continues to agree with the Eastern District of Texas’s determination that the hold harmless prohibition in section 1903(w)(3) of the Act does not encompass private arrangements between private parties. CMS’ interpretation of the hold harmless provision in the

¹ CMCS Informational Bulletin, Health Care-Related Taxes and Hold Harmless Arrangements Involving the Redistribution of Medicaid Payments (Feb. 17, 2023), at <https://www.medicaid.gov/federal-policy-guidance/downloads/cib021723.pdf>.

² Case No. 6:23-cv-161-JDK, 2023 WL 4304749 (E.D. Tex. June 30, 2023).

preambles of the Medicaid and CHIP Managed Care Access, Finance, and Quality proposed and final rules³ is simply incompatible with the text of the Act.

In 1991, Congress enacted the Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991, which, among other things, added section 1903(w) of the Act. Under section 1903(w), the proceeds of health care-related taxes are deducted from a state’s Medicaid expenditures for purposes of determining FFP if they are not broad-based, and uniform, or if there is in effect a hold harmless arrangement.⁴ In relevant part, there is a hold harmless arrangement when “[t]he State or other unit of *government* imposing the tax *provides* (directly or indirectly) for any payment, offset, or waiver *that guarantees* to hold taxpayers harmless for any portion of the costs of the tax.”⁵ As explained by the *Texas v. Brooks-LaSure* Court, “the statute includes a ‘tight grammatical link between *the government*, as the actor proving for something, and a *guarantee*, as the thing provided for.’”⁶ Nothing in the plain language of the statute prohibits redistributive arrangements between private parties. Rather, the defining characteristic of a hold harmless arrangement is a guarantee by the *government*—not a private party—to the taxpayer.

Here, Congress chose to consider only the direct or indirect activity of the state (or unit of government imposing the tax) when prohibiting hold harmless arrangements. Moreover, without involvement by the state, private agreements cannot constitute a “guarantee[] to hold taxpayers harmless.”⁷ A guarantee denotes an obligation by the guarantor. But as a non-party to any agreement that may or may not exist, the state assumes no obligation regarding any reimbursements by private providers and, in the words of the preamble to the 2008 final rule, would not have any “reasonable expectation” that its payment would result in a provider being held harmless. And in the words of the *Texas v. Brooks-LaSure Court*, it would be improper to disallow funds “where a state provides no ‘guarantee[]’ at all.”⁸

CMS attempted to adopt a contrary view with respect to purely private arrangements in a 2019 rulemaking⁹ and in negotiations over Texas’s section 1115 waiver application in 2021.

³ 88 Fed. Reg. at 28,130–31; 89 Fed. Reg. at 41,074–82.

⁴ 42 U.S.C. 1396b(w)(1)(A)(iii) disallows the use of revenues from a broad-based health care related tax if there is in effect a hold harmless arrangement under paragraph (w)(4).

⁵ 42 U.S.C. 1396b(w)(4)(C) (emphasis added); *see also* 42 C.F.R. § 433.68(f)(3) (stating that a hold harmless arrangement exists where the “State (or other unit of government) imposing the tax *provides for any direct or indirect payment*, offset, or waiver such that the provision of that payment, offset, or waiver directly or indirectly guarantees to hold taxpayers harmless for all or any portion of the tax amount”) (emphasis added). Subparagraphs (A) and (B) are not relevant here. They describe hold harmless arrangements involving payments not made under Title XIX and payments that vary based only upon the amount of the total tax paid, respectively. 42 U.S.C. 1396b(w)(4)(C); *see also* 42 C.F.R. § 433.68(f)(1), (2).

⁶ *Texas v. Brooks-LaSure*, slip op. at 23, 2023 WL 4304749, at *10 (citing *Texas v. Brooks-LaSure*, 2022 WL 741065, at *8 (E.D. Tex. Mar. 11, 2022) (Barker, J.)).

⁷ 42 U.S.C. 1396b(w)(4)(C).

⁸ *Texas v. Brooks-LaSure*, slip op. at 23, 2023 WL 4304749, at *10.

⁹ Medicaid Program; Medicaid Fiscal Accountability Regulation (MFAR), 84 Fed. Reg. 63,722, 63,730–35 (Nov. 18, 2019).

Both efforts properly failed.¹⁰ More recently, CMS has taken the position in the 2023 Bulletin and preambles to the Medicaid and CHIP Managed Care Access, Finance, and Quality proposed and final rules that, despite the absence of any relevant statutory or regulatory change, the hold harmless prohibition applies to purely private arrangements.

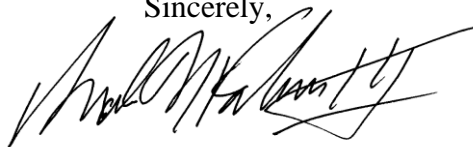
This view is unambiguously foreclosed by section 1903(w)(4) of the Act. As recently explained by the United States District Court for the Eastern District of Texas, an impermissible hold harmless arrangement under section 1903(w)(4) of the Act “requires that the state, not a private party, provide the ‘payment’ that ‘guarantees’ to hold taxpayers harmless.”¹¹ Private providers are not “[t]he State or other unit of government imposing the tax” and wholly private arrangements among providers do not implicate the hold harmless prohibition in section 1903(w)(4). Notably, the Supreme Court’s subsequent decision overruling *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984) concludes that agencies have “no special competence in resolving statutory ambiguities. Courts do.” *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

Based on the clarity of the statutory language alone, the FAH believes that CMS is without legal authority to treat private redistribution arrangements as prohibited hold harmless arrangements. Moreover, the FAH strongly opposes the use of preambular language and informational bulletins rather than notice-and-comment rulemaking to adopt or announce this substantive transformation and expansion of the hold harmless prohibition. This is particularly problematic when accompanied by a provider attestation requirement. Ultimately, these statements and the proposed attestation place providers in an untenable and burdensome position. The FAH supports eliminating the attestation requirement, or at a minimum, deferring implementation of the requirement until CMS accedes to the judicial interpretation of the statute. In addition, any efforts to implement the attestation requirement must be accompanied by realistic estimates of provider burdens that are informed by the complex legal dispute at issue.

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The FAH appreciates the opportunity to offer these comments. If you have any questions or would like to discuss our comments in detail, please do not hesitate to contact me or a member of my staff at (202) 624-1534.

Sincerely,



¹⁰ CMS ultimately withdrew its proposed MFAR rule, 86 Fed. Reg. 5105 (January 19, 2021), and the Texas SDPs were ultimately approved following a court order regarding Texas’ proposed SDPs, *Texas v. Brooks-LaSure*, Case No. 6:21-CV-00191 (E.D. Tex., Mar. 11, 2022).

¹¹ *Texas v. Brooks-LaSure et al.*, Case No. 6:23-cv-161-JDK, slip op. at 24-25, 2023 WL 4304749, at *11 (E.D. Tex. June 30, 2023) (order granting State of Texas’s preliminary injunction).