ONE HUNDRED EIGHTH CONGRESS

Congress of the United States

House of Representatives

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September 24, 2004

The Honorable Mark B. McClellan
Administrator
Centers for Medicare and Medicaid Services
7500 Security Boulevard
Baltimore, MD 21244

Dear Dr. McClellan:

Your agency has recently proposed a requirement that hospitals collect and maintain individualized citizenship records of their emergency patients who are undocumented aliens as a condition of receiving reimbursement for their care. This requirement would place an unwarranted burden on hospitals and threatens to keep desperately ill patients from seeking emergency care. In addition, implementing this proposed requirement would violate the Administrative Procedures Act. We urge you to select an alternative method of allocating hospital payments.

On July 22, 2004, the Centers for Medicare and Medicaid Services (CMS) announced an implementation approach to a provision of the Medicare Modernization Act. The law allots $250 million over four years to hospitals and healthcare providers who provide emergency services to undocumented aliens. The provision of such services is required by the Emergency Medical Treatment and Active Labor Act and by the ethical responsibilities of providers; the new law provides some limited reimbursement for costs incurred.

CMS has proposed, as a condition of receipt of funds, that providers seek and maintain records of individuals' citizenship status. The stated purpose of this provision is to ensure that the funds are being used to reimburse services for the target populations. The provisions, however, have been vigorously opposed by hospitals concerned about the excessive administrative burden and by advocates for immigrants, who believe it will block access to life-saving care. In proposing this requirement, CMS stated without explanation that it dismissed two alternative methods for determining the amount of care provided to undocumented alien populations.

In addition to serious problems with the merits of the recordkeeping requirement, we are concerned that implementing the new requirement without further opportunity for public comment would violate the Administrative Procedures Act (APA). The APA, which is designed to promote openness and fairness in government decisionmaking, requires that rule-making

follow a notice-and comment period. General notice must appear in the Federal Register and a comment period of no less than thirty days must follow.[1] In contrast, CMS posted its policy only on its website, and not in the Federal Register. It was posted on July 22, and comments were not accepted after August 16.

While the APA contains some exceptions to these procedural safeguards, the requirement does not qualify for any of them.

The APA exempts "interpretative rules,"[2] and most of the plan announced by CMS is interpretative, describing technical details on how the reimbursement program will work without setting undue burdens on patients or hospitals. However, the requirement that hospitals collect and keep records of the citizenship status of undocumented aliens who seek emergency care is not interpretative. Congress explicitly considered and rejected a measure requiring the collection and reporting of individual immigration status information. To resurrect a portion of such a plan is not an interpretation of congressional intent but a departure from it, if not a contradiction of it. It creates a new burden for hospitals and raises a host of policy issues. It is what courts would call a "substantive rule," requiring notice and comment under the APA.

The APA exempts matters relating to benefits,[3] but the Department of Health, Education and Welfare waived this exception in 1971 as it related to any of its benefit programs.[4] Courts

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[1] 5 U.S.C. § 553

[2] 5 U.S.C. § 553(b).

[3] 5 U.S.C. § 553 (a)(2).

[4] The 1971 statement of policy reads in substantial part:

> [The waiver of the exemption for public property, loans, grants, benefits, or contracts] should result in greater participation by the public in the formulation of this Department's rules and regulations. The public benefit from such participation should outweigh any administrative inconvenience or delay which may result from use of the APA procedures in the five exempt categories. Effective immediately, all agencies and offices of the Department which issue rules and regulations relating to public property, loans, grants, benefits, or contracts are directed to utilize the public participation procedures of the APA, 5 USC 553. Although the APA permits exceptions from these procedures when an agency for good cause finds that such procedures would be impracticable, unnecessary or contrary to the public interest, such exceptions should be used sparingly, as for example in emergencies and in instances where public participation would be useless or wasteful because proposed amendments to regulations cover minor technical matters."

Office of the Secretary, Department of Health, Education and Welfare, *Public Participation in Rule Making, Statement of Policy,* 36 Fed. Reg. 2532 (Feb. 5, 1971).

have consistently held this waiver to be binding on subsequent Departments of Health and Human Services.

The APA exemption for "good cause" is also inapplicable here. The APA states that notice and comment requirements do not apply when "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[5] However, as one court noted, case law has determined that the good cause exception "is to be narrowly construed and only reluctantly countenanced."[6]

In its announcement, CMS asserts that the APA's requirements do not apply. The agency notes that the applicable section of the Medicare law "does not delegate legislative rulemaking authority to the Secretary." This is a legally groundless argument. Such authority need not be explicitly granted. In fact, the APA's requirements are legally binding.

The CMS proposal is terrible policy. Implemented as proposed, it would also be illegal. There are multiple alternative methods of ensuring that funds go where they should. By selecting a method that respects the privacy of emergency care patients and the current procedures at hospitals, CMS will reflect the intent of Congress, protect patient access to care, and not create new burdens for hospitals. We urge you to follow this course.

Sincerely,

Henry A. Waxman
Ranking Minority Member
Committee on Government Reform

Hilda L. Solis
Chair
Task Force on Health
Congressional Hispanic Caucus

Edward M. Kennedy
Ranking Minority Member
Committee on Health, Education,
Labor and Pensions,
U.S. Senate

Jeff Bingaman
Senator
U.S. Senate

[5] 5 U.S.C. § 553 .

[6] *Tennessee Gas Pipeline Co. v. FERC*, 969 F. 2d 1141 (DC Cir. 1992), citing *State of New Jersey v. EPA*, 626 F. 2d 1038, 1045 (D.C. Cir 1980).