

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 400, 430, 431, 434, 435, 438, 440, and 447

[CMS-2001-F4]

RIN 0938-AL83

Medicaid Program; Medicaid Managed Care

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Withdrawal of final rule with comment period.

SUMMARY: This document withdraws all provisions of the final rule with comment period on Medicaid managed care that we published in the **Federal Register** on January 19, 2001 (66 FR 6228) with an initial effective date of April 19, 2001. This January 19, 2001 final rule, which has never taken effect, would have combined Medicaid managed care regulations in a new part 438, implemented Medicaid managed care requirements of the Balanced Budget Act of 1997 (Pub. L. 105-33), and imposed new requirements on entities currently regulated as "prepaid health plans" (PHPs). The regulations set forth in the final rule being withdrawn have been superseded by regulations promulgated in a subsequent rulemaking initiated on August 20, 2001 (66 FR 43613). In addition, this document addresses comments received in response to an interim final rule with comment period that we published on August 17, 2001 in the **Federal Register** (66 FR 43090) that further delayed, until August 16, 2002, the effective date of the January 19, 2001 final rule with comment period.

DATES: The final rule with comment period amending 42 CFR Parts 400, 430, 431, 434, 435, 438, 440, and 447 that was published in the January 19, 2001 **Federal Register**

(66 FR 6228), delayed in the February 26, 2001 **Federal Register** (66 FR 11546) until June 18, 2001, delayed further in the June 18, 2001 **Federal Register** (66 FR 32776) until August 17, 2001, and further delayed in the August 17, 2001 **Federal Register** (66 FR 43090) until August 16, 2002 is withdrawn effective [as of the date of publication of this **Federal Register**—OFR please insert date of publication].

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION

I. Background

In a final rule published in the **Federal Register** (66 FR 11546) on February 26, 2001, we announced a 60-day delay in the effective date of the January 19, 2001 final rule with comment period implementing Medicaid managed care provisions in the Balanced Budget Act of 1997 (BBA). This 60-day delay postponed the effective date of the final rule until June 18, 2001. This delay in effective date was necessary to give newly appointed Department officials the opportunity for review and consideration of the new regulations. During that review, we heard from key stakeholders in the Medicaid managed care program, including States, advocates for beneficiaries, and provider organizations. These parties expressed strong (sometimes opposing) views about the January 19, 2001 final rule. In particular, concerns were expressed about revisions made in the final rule that were based on public comments we received on the proposed rule. Other commenters raised concerns about how we chose to implement those provisions in the final rule without further opportunity for public

comment. As a result of these comments, on June 18, 2001, we published another final rule in the **Federal Register** that delayed the effective date of the January 19, 2001 final rule an additional 60 days, from June 18, 2001 until August 17, 2001, (66 FR 32776) for further review and consideration on the most appropriate way to address the concerns expressed by key stakeholders.

After careful consideration, we decided the best approach was to make some modifications to the January 19, 2001 final rule with comment period, and republish it as a proposed rule. This would enable the public the opportunity to comment on all of the provisions and revisions. Therefore, as noted above, on August 20, 2001 we published a new proposed rule in the **Federal Register** (66 FR 43613). In addition, in order to give us time to consider the public comments and take action on the new proposed rule, we also published an interim final rule with comment period on August 17, 2001 in the **Federal Register** (66 FR 43090) that further delayed until August 16, 2002, the effective date of the January 19, 2001 final rule with comment period.

In response to those comments submitted on the August 20, 2001 proposed rule, we have published, elsewhere in this **Federal Register** issue, a final rule amending the Medicaid regulations to implement the managed care provisions of the BBA, and to establish new standards for prepaid health plans (PHPs), which are, under this new final rule, divided into two categories, prepaid inpatient health plans (PIHPs) and prepaid ambulatory health plans (PAHPs). In light of the publication of the superseding final rule, we are withdrawing the provisions of the January 19, 2001 final rule with comment period.

II. Analysis of and Response to Public Comments on the August 17, 2001 Interim Final Rule with Comment Period

We received approximately 23 public comments expressing dissatisfaction with the delay in the effective date of the January 19, 2001 final rule with comment period.

Comment: Numerous commenters contended that “courts have held that the effective date of a regulation is a substantive term of the regulation itself, and the Administrative Procedure Act (APA) requires that the public be given prior notice and opportunity to comment before substantive terms of a regulation may be legally changed.”

Response: None of these commenters cited the court cases upon which they purport to rely for the proposition that withdrawing a regulation that has never taken effect constitutes a change in the regulations. We are not aware of any case that suggests that an agency must go through notice and comment to delay the effective date of a regulation that has not taken effect (or to withdraw a regulation, as we are doing here). Under the APA, notice and comment generally is required to promulgate new rules or to change rules that are already in place. Currently, the Medicaid managed care regulations that are in effect are those set forth in part 434, because the regulations published on January 19, 2001 have not become effective. We would agree that notice and comment is required to change the Medicaid managed care regulations in part 434, and we have done so in the final rule responding to comments on the August 20, 2001 proposed rule. We do not agree, however, that notice and comment is required in order to delay the effective date of regulations that have been published in the **Federal Register** but have never taken

effect. In that case, there is no “rule” in effect, just an announcement of a “future” rule.

We do not believe that notice and comment was required to change the effective date of a “future rule.” Nor do we believe that notice and comment is required in order to withdraw a rule before it takes effect. We note that even if notice and comment were required, we have engaged in public notice and comment on the final rule that supersedes the rule we are withdrawing.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: _____

Thomas A. Scully,
Administrator,
Centers for Medicare & Medicaid
Services.

Approved: _____

Tommy G. Thompson,
Secretary.

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