

# Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

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December 3, 2010

Dr. Donald M. Berwick, Administrator  
Centers for Medicare & Medicaid Services  
Dept. of Health and Human Services  
Hubert H. Humphrey Bldg. Room 314G  
Washington, D.C. 20201

RE: Indian Health Addendum for Medicare Part D Pharmacy Contracts –  
Further Comments on CMS-10137 and CMS-10237; FED. REG. NOTICE June 11, 2010

Dear Dr. Berwick:

By letter dated August 10, 2010, submitted in response to the captioned notice, the CMS Tribal Technical Advisory Group (TTAG) recommended several revisions to the Indian Health Addendum containing standard contracting terms which CMS regulations require Medicare Part D Plan sponsors to use when contracting with pharmacies operated by the Indian Health Service, Indian tribes/tribal organizations, and urban Indian organizations (collectively "I/T/U"). We requested the revisions to the Indian Health Addendum to reflect changes to Federal law made by the Affordable Care Act.

At its November 11, 2010, meeting, the TTAG learned from representatives of the Center for Medicare – Marla Rothouse and Linda Anders – that CMS accepted all but one of the revisions the TTAG requested. The one exception was the proposed re-write of Indian Health Addendum Sec. 17 which currently reads:

## **17. Payment Rate.**

Claims from the provider shall be paid at rates that are reasonable and appropriate.

The TTAG had sought to revise this provision to reflect enactment of a revised Sec. 206 of the Indian Health Care Improvement Act<sup>1</sup> which gives I/T/U providers the right to recover from third parties (including insurance companies) and describes the amount subject to recovery. The TTAG initially proposed a revision that the IHS Office of General Counsel declined to clear for reasons that were not articulated. Subsequently, TTAG proposed the following re-write which tracks the text of amended Sec. 206<sup>2</sup>:

## **17. Payment Rate.**

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<sup>1</sup> The IHCA Amendments, as reported to the Senate in the bill S. 1790, were enacted into law by Sec. 10221 of the Affordable Care Act, Pub.L. 111-148, and became effective on March 23, 2010.

<sup>2</sup> Sec. 206 of the IHCA is codified at 25 USC §1621e.

Pursuant to Sec. 206 of the IHCIA (made applicable to the IHS, Indian tribes and tribal organizations in Sec. 206(a), and to urban Indian organizations in Sec. 206(i)), the Provider shall have the right to recover from the Part D Plan Sponsor the reasonable charges billed by the Provider, or, if higher, the highest amount the Part D Plan Sponsor would pay providers other than governmental entities, to any individual to the same extent that such individual, or any nongovernmental provider of such services, would be eligible to recover reimbursement if (1) such services had been provided by a nongovernmental provider; and (2) such individual had been required to pay such charges or expenses and did pay such charges or expenses.

At the November 11 meeting, Ms. Rothouse informed the TTAG that this proposed version of Sec. 17 would not be approved by CMS because the Part D law prohibits the Secretary from interfering with Plan sponsor payment rates. The TTAG pointed out that IHCIA Sec. 206 applies to the Secretary as the official responsible for the Indian Health Service and for enforcement of the IHCIA. Thus, its directive should be reflected in the Medicare Part D Indian Health Addendum. Although the TTAG requested the views of the IHS Office of General Counsel on the proposed revision, none were provided.

The TTAG continues to believe that the right of recovery set out in IHCIA Sec. 206 applies to I/T/U pharmacy relationships with Part D Plan sponsors. In an effort to reach accord on the wording of Sec. 17 of the Indian Health Addendum, the TTAG suggests another version that we hope will overcome the CMS reluctance to become involved in Plan sponsor payment rates, while also reflecting the fact that Federal law contains directives regarding the right of recovery by these providers. We asked the CMS representatives to consider the following text:

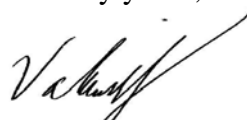
**17. Payment Rate.**

Claims from the provider shall be paid in accord with Federal law.

It is our hope that this suggested compromise language can and will be approved by CMS and included in the version of the Indian Health Addendum required for use by Medicare Part D Plan sponsors in 2011 and subsequent years.

The Tribal Technical Advisory Group remains grateful for the interest and support you have demonstrated for our common goal of assuring full participation by Indian people and Indian health programs in Medicare, Medicaid and CHIP.

Sincerely yours,



Valerie Davidson, Chair  
CMS Tribal Technical Advisory Group

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