THE MEDICARE COST CONTRACTORS ALLIANCE
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January 10, 2018

Seema Verma
Administrator, Centers for Medicare & Medicaid Services
Department of Health and Human Services
P.O. Box 8013
Baltimore, MD 21244–8013.

Attention: CMS–4182–P

Dear Ms. Verma:

The Medicare Cost Contractors Alliance ("Cost Alliance") is submitting these comments in response to the notice of proposed rulemaking, dated November 28, 2017, "Medicare Program; Contract Year 2019 Policy and Technical Changes to the Medicare Advantage, Medicare Cost Plan, Medicare Fee-for-Service, the Medicare Prescription Drug Benefit Programs, and the PACE Program."

The Cost Alliance is a coalition of ten Medicare cost plans that currently provide services to over 600,000 Medicare beneficiaries who are enrolled in their plans. Medicare cost plans operate under the authority of Section 1876 of the Social Security Act and CMS' implementing regulations at 42 CFR Part 417. The Cost Alliance is commenting on the proposed amendments to Part 417 concerning the establishment of the preclusion list. Our comments are below.

Preclusion List

Assuming that CMS adopts its proposal to establish a preclusion list and to prohibit payments to individuals and entities on that list, the Cost Alliance recommends that CMS revise the language to convey as clearly as possible which payments to individuals or entities on the preclusion list are permissible and which payments are impermissible. Based on our long-standing experience with the payment prohibitions for persons on the OIG's exclusion list, the issues we discuss below will arise, and we believe it is preferable to address them in the final regulations.

The language in proposed §422.222(a) conveys that CMS intends that the prohibition applies to payments for health care items and services. Assuming that prohibition applies only to health care services, a person or entity that is listed on the preclusion list could still be paid for administrative services furnished to the sponsor. Is that CMS' intent? If so, this intention is not conveyed clearly in other places this requirement is discussed in the proposed amendments. In a

number of instances, the prohibition is stated in terms of a prohibition against payments, not just payments for health care items and services. See, for example, the proposed amendments to §417.484, §417.478, §422.224(a), §422.504(a)(17)(i)(2)(v), and §422.752(a)13). The Cost Alliance recommends that CMS review and modify the proposed language, as appropriate, to be clear regarding the scope of this prohibition. This change could be made in one of two ways. One option would be to reference health care items and services in these sections. A second option would be to cross-reference the provisions in §422.222 and §422.224 in these provisions.

The Cost Alliance believes that there are three additional, related issues that need clarification. Section 422.224(a), as proposed, excludes from the prohibition payment for emergency or urgently needed services. This qualification is not addressed anywhere else in the proposed amendments to Part 422, including in §422.222. We recommend that CMS give more prominence to the exception for emergency and urgency needed services, including adding it to §422.222.

Second, §422.224(a) combines the payment prohibitions arising from an OIG exclusion and an inclusion in the preclusion list in the same sentence. This sentence is misleading because a sponsor is precluded from paying a person who has been excluded by the OIG for both health services and administrative services. See §422.752(a)(8). In contrast, it appears that CMS intends the preclusion list prohibition applies only to the provision of health care items and services. To provide additional clarity, we recommend that CMS expressly explain this distinction in §422.224.

In addition, §422.224(a) applies the payment prohibition to Medicare enrollees of the MAO/Medicare cost plan. An MAO or Medicare cost plan commonly offers other product lines besides the Medicare Advantage program or Medicare cost plan program that will cover Medicare enrollees. An example is the offering of commercial health plan coverage where an enrollee is covered under Medicare either as primary or secondary payer. The OIG exclusion prohibitions extend to payments for these persons as well. Does CMS intend to extend this prohibition to non-MA/cost enrollees of an MAO or a Medicare cost plan? We recommend that CMS clarify the applicability of this prohibition to non-MA/Medicare cost enrollees who are Medicare beneficiaries.

We appreciate the opportunity to submit these comments. If you would like to discuss these comments, please contact me at marksjoffe@gmail.com or (202) 457-6633.

Sincerely,

Mark S. Joffe

cc: Members, Medicare Cost Contractors Alliance