

Congress of the United States
Washington, DC 20515

March 29, 2004

The Honorable Tommy G. Thompson
Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Thompson:

In January, the Centers for Medicaid and Medicare Services (CMS) issued a *Federal Register* notice requesting emergency clearance of a change in the way the Federal Government pays its share of Medicaid funding. This change would require prior federal approval of state Medicaid budgets and a more detailed and lengthy process before states could receive necessary federal Medicaid funding. Although the CMS ultimately withdrew the emergency clearance request in recognition of a faulty notice process, press reports have indicated that CMS intends to advance a very similar policy again in the near future.

Though the stated purpose of the major change is to combat fraud, waste, and abuse, this overbroad budget pre-approval requirement could hurt the most vulnerable among us, including children, pregnant women, those living with disabilities, seriously and persistently mentally ill, and the elderly in nursing homes, among others. The Administration is now moving both to shift more costs and responsibilities for Medicaid to the states and to interfere with state discretion in setting state Medicaid budgets and financing the state share of Medicaid costs. This appears to be an attempt to make the program more difficult for states to administer, so that states will, under duress, accept a block grant or cap on their program in order to escape ever-increasing federal restrictions.

We appreciate your February 20, 2004, letter to Governor Kempthorne indicating you plan to allow for a formal comment period on proposed changes to the "Form CMS-37" but our concerns go to not only the process for making the change but to the very substance of the CMS proposal. We recommend that you table the proposal altogether for three reasons.

First, these proposed changes to the CMS-37 form constitute a dramatic shift in the guarantee of federal Medicaid funds that are distributed to states. This will have a dampening effect on states' willingness to provide health coverage under the Medicaid program. Currently, the Federal Government can only retrospectively disallow federal funding after proper notice and opportunity for states to appeal to through an independent judicial process. Under the CMS proposal, the Federal Government would prospectively withhold or delay access to funding if it believed the future use of such funds might be disallowed. Disputes between states and CMS could take months or even years to resolve, and it would appear that a state would bear the financial burden and uncertainty during this period of negotiation.

Even in the best economic times, Governors and state legislatures will be constrained in their ability to provide health coverage to a growing population of vulnerable citizens if there is extreme uncertainty around the Federal Government's commitment to provide its share of funding. The flexibility that comes from the assurance of federal matching dollars to cover all eligible individuals is key to the success of this program and the willingness of states to participate in it. The CMS-proposed changes eliminate that flexibility, and could thus jeopardize the continued existence of health coverage to families under Medicaid.

Second, the administrative burden caused by this proposal would divert staff attention away from providing health benefits to vulnerable populations, and would instead ensnare them in new and redundant bureaucratic tasks in order to respond to this new federal requirement. The Administration is already proposing cuts to state Medicaid budgets in its FY 2005 budget, and the loss of temporary fiscal relief money on June 30 will mean states will have \$11 billion less in funding this year, in spite of an expected state budget deficit of \$40 billion for the upcoming state fiscal year 2005. States will be hard pressed to continue their programs in the face of these funding reductions coupled with new and unduly burdensome bureaucratic requirements.

Third, CMS appears to be outside of its legal bounds in making such a change to the fundamental nature of the Medicaid program. The Medicaid statute allows for federal funding to states to be increased or decreased based on over or under payments in *prior* quarters; the statute does not allow reductions in funding for states based on expected future overpayments in subsequent quarters.¹ Likewise, current federal regulations enumerate the only reasons the Secretary may withhold federal funding from states, specifically for impermissible expenditures in *previous* quarters² or where a state's plan has changed so it no longer complies with federal requirements.³ There is no provision for withholding federal funds if the Secretary merely *believes*, without a full opportunity for a hearing, that the future use of such funds may be disallowed.

If CMS is concerned that states are inappropriately requesting federal funds through various financing mechanisms, it can seek legislative changes or propose new regulations to address those problems, as it has previously. The failure to clearly identify and define specific forms of impermissible financial gamesmanship by states has contributed to the concern that the ultimate purpose of the new policy is to strangle the states with bureaucratic requirements and denial of federal funds and to coerce states into accepting capped federal payments in exchange for regulatory relief.

¹Social Security Act § 1903(d)(2)(A)

²42 C.F.R. 430.30(d)(2)

³Social Security Act § 1904; 42 C.F.R. 430.15

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In conclusion, we urge you to rethink and not republish this proposal which would jeopardize funding for health insurance coverage for the most vulnerable in our society. At a time when the number of uninsured continues to grow unabated, such a policy is unwise in the extreme.

Sincerely,



JOHN D. DINGELL



EDWARD M. KENNEDY



SHERROD BROWN



JEFF BINGAMAN



CHARLES B. RANGEL



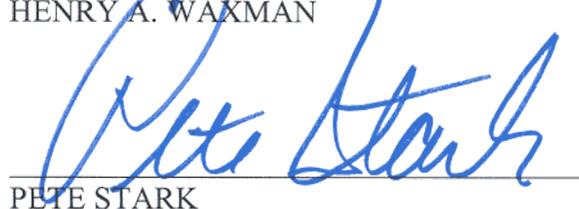
MAX BAUCUS



HENRY A. WAXMAN



JOHN D. ROCKEFELLER IV



PETE STARK