

# PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to

submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

**Symbols in proposed rule text.** Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

## TITLE 1. ADMINISTRATION

### PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

#### CHAPTER 353. MEDICAID MANAGED CARE SUBCHAPTER O. DELIVERY SYSTEM AND PROVIDER PAYMENT INITIATIVES

##### 1 TAC §353.1301

The Texas Health and Human Services Commission (HHSC) proposes amendments to §353.1301, concerning General Provisions.

##### BACKGROUND AND PURPOSE

In March of 2017, HHSC adopted a series of rules governing delivery system and provider payment initiatives through Medicaid managed care organizations (MCOs) (42 TexReg 1737). These initiatives are, generally, funded through intergovernmental transfers (IGT) from local governmental entities. Given that these programs are not funded with state general revenue, HHSC must ensure, to the greatest extent possible, that no state dollars are at risk through the operation of these programs. A disallowance by the Centers for Medicare & Medicaid Services (CMS) is one potential risk to general revenue, unless HHSC can ensure that funds from another source are available.

Section 353.1301(j) describes the procedure HHSC would use in the case of a disallowance. The rule delineates between a disallowance for impermissible provider-related donations and all other disallowances. At present, if there is a disallowance for impermissible provider-related donations, the rule requires HHSC to recoup the disallowed amount from transferring governmental entities that caused the disallowance. If there is a disallowance for reasons other than an impermissible provider-related donation, HHSC reserves the right to recoup the disallowed amount from MCOs, providers, or governmental entities.

In an effort to provide HHSC more flexibility when determining the appropriate entity from which to recoup, HHSC proposes to amend §353.1301 to remove the requirement that it recoup only from governmental entities in the case of a disallowance for impermissible provider-related donations. Instead, HHSC will reserve the right to recoup from MCOs, providers, or governmental entities in any disallowance. In order to ensure that there is no risk to general revenue, to the greatest extent possible, HHSC will require that if a recoupment for a disallowance results in a subsequent disallowance, the entity that HHSC initially recouped against will face a recoupment for the subsequent disallowance.

In addition, HHSC will clarify the heading for §353.1301(k) by changing the name from "Recoupment" to "Overpayment."

##### SECTION-BY-SECTION SUMMARY

Proposed amendments to §353.1301(b) add the acronym "SDA" to the definition of "service delivery area."

Proposed amendments to §353.1301(j) change the requirements for recoupments in the case of a disallowance for impermissible provider-related donations. Further, the amendments require the same entities that pay for any initial disallowance to pay for subsequent recoupments resulting from that initial disallowance.

Proposed amendment to §353.1301(k) changes the heading for the subsection from "Recoupment" to "Overpayment."

##### FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years that the amendment will be in effect, there are no anticipated implications to costs or revenues of state or local governments as a result of enforcing and administering the rule as proposed.

##### SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Rymal has also determined that there is no anticipated adverse economic impact on small businesses or micro-businesses required to comply with the changes to the section proposed. Participants referred to in this rule are hospitals and nursing facilities. No Texas hospital meets the definition of a small business or micro-business. Nursing facility participation in the programs described in this subchapter is voluntary.

##### ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the amendment as proposed.

There is no anticipated negative impact on local employment.

##### PUBLIC BENEFIT

Pam McDonald, Director of Rate Analysis, has determined that for each year of the first five years the amendment is in effect, the public will benefit from adoption of the amendment. The public benefit anticipated as a result of enforcing or administering the amendment is that HHSC will have greater flexibility in determining the appropriate entity from which to recoup funds in the event of a disallowance. Further, the public will benefit from the greater certainty surrounding general revenue.

##### TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Charles Greenberg, Director of Policy for Legal Services, 4900 N. Lamar Blvd., Mail Code 1100, Austin, Texas 78751; by fax to (512) 424-6586; or by e-mail to charles.greenberg@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 1R061" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with board rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32; and with Texas Government Code §533.002, which authorizes HHSC to implement the Medicaid managed care program.

§353.1301. General Provisions.

(a) Purpose. The purpose of this subchapter is to describe the circumstances and programs under which the Texas Health and Human Services Commission may direct expenditures for delivery system and provider payment initiatives through its contracts with Medicaid managed care organizations. Federal authority for such directed expenditures is codified at 42 C.F.R. §438.6(c).

(b) Definitions. The following definitions apply when the terms are used in this subchapter. Terms that are used in only one program described in this subchapter may be defined in the section of this subchapter describing that program.

(1) - (10) (No change.)

(11) Service delivery area (SDA)--The counties included in any HHSC-defined geographic area as applicable to each MCO.

(12) Sponsoring governmental entity--A state or non-state governmental entity that agrees to transfer to HHSC some or all of the non-federal share of program expenditures under this subchapter.

(c) - (i) (No change.)

(j) Disallowance of federal funds.

[(1) If an arrangement associated with the funding of payments under this subchapter is determined by CMS to constitute an impermissible provider donation, resulting in a disallowance of federal matching funds, the governmental entities responsible for the non-federal share of such payments must transfer funds to HHSC in the amount of the disallowed federal funds. HHSC notifies the governmental entities of the amount and timing of the required transfers.]

[(2)] If payments under this subchapter are disallowed by CMS [on grounds other than those described in paragraph (1) of this subsection; to the extent allowed by federal and state law and contract], HHSC may recoup the amount of the disallowance from MCOs,

providers, or governmental entities that participated in the program associated with the disallowance. If the recoupment from an MCO, provider, or governmental entity for such a disallowance results in a subsequent disallowance, HHSC will recoup the amount of that subsequent disallowance from the same entity.

(k) Overpayment. [Recoupment.]

(1) If payments under this subchapter result in an overpayment to an MCO, HHSC may recoup the amount of the overpayment from the MCO, pursuant to the terms of the contract between them.

(2) If payments under this subchapter result in an overpayment to a provider, the MCO may recoup an amount equivalent to the overpayment.

(3) Payments made under this subchapter may be subject to any adjustments for payments made in error or due to fraud, including without limitation adjustments made under the Texas Administrative Code, the Code of Federal Regulations, and state and federal statutes. The MCOs may recoup an amount equal to any such adjustments from the providers in question. Nothing in this section may be construed to limit the independent authority of another federal or state agency or organization to recover from the provider for a payment made due to fraud.

(l) State's cost of administering programs. To the extent authorized under state and federal law, HHSC will collect the state's cost of administering a program authorized under this subchapter from participants in the program generating the costs.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 7, 2017.

TRD-201702954

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: September 17, 2017

For further information, please call: (512) 730-7450

