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of **ALASKA**  
GOVERNOR MIKE DUNLEAVY

Department of Health  
and Social Services

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June 30, 2022

The following information represents a record of tribal comments (verbatim) and state responses from tribal consultation on a proposed state plan amendment (SPA), revising the third-party (TPL) liability process to comply with federal requirements.

[Tribal Comment #1 – Exclude Tribal Health Organizations from TPL Requirements](#)

As we discussed during our in-person meeting, our principal request and strong recommendation is that the Department formally recognize, and memorialize in the language of the SPA, that because the Indian health system is the ultimate “payer of last resort,” secondary even to Medicaid, tribal health programs have no obligation to bill other potentially liable third parties before Medicaid, and enjoy a complete exemption from the “third party liability” requirements that would otherwise apply under the proposed SPA.

We recognize that this is a new request, and that tribal providers have not previously raised any formal objection to the Department’s past practice of applying the same TPL requirements to tribal and non-tribal providers alike. But with TPL requirements about to be applied to previously-waived services, it is time to revisit and reconsider that past practice, which we believe is contrary to federal law.

Consequently, we hereby formally advise and request the Department to include language in the SPA that recognizes a TPL exemption for tribal health programs. We respectfully suggest some wording to accomplish this, based on the draft SPA you generously provided for our review. We provide four options:

- Add the underlined language to the proposed language in Paragraph I: “Exceptions exist for Tribal Health Organizations, claims specified in 42 C.F.R. 433.139(b)(3)(i) and (ii), and any approved cost avoidance waivers.” To us, this is the clearest and simplest option.
- Alternatively, instead of expressly referring to tribal health providers, substitute the statutory authority that makes them payers of last resort, by adding the underlined language to Paragraph I: “Exceptions exist for providers that are payers of last resort under the authority of 25 U.S.C. 1623(b), claims specified in 42 C.F.R. 433.139(b)(3)(i) and (ii), and any approved cost avoidance waivers.”
- To more broadly recognize an exception for all programs that pay second to Medicaid under federal law, add the underlined language to Paragraph I; “Exceptions exist for programs and providers that under federal law pay second to Medicaid, claims specified in 42 C.F.R. 433.139(b)(3)(i) and (ii), and any approved cost avoidance waivers.”
- Finally, it may be possible to make no changes to the current draft language, *if the Department and CMS confirm in writing* that the following italicized language in the draft provides an exception for tribal health programs pursuant to 25 U.S.C. 1623. “*Unless federal law excludes claims for medical services, claims are*

cost-avoided when a third-party liability policy exists within the claims payment system.”

If the Department is not confident of its authority or duty to recognize a TPL exception for tribal health programs, we would be pleased, if the Department would find it helpful, to raise the issue with CMS or to engage with the Department in a joint consultation with CMS on the subject.

State Response – The state cannot exempt tribal health organizations from TPL requirements.

CMS Response –

*(No) if a beneficiary has other private insurance (e.g., Blue Cross), Tribal providers must bill the legally liable third party before Medicaid will pay the claim. If Medicaid receives the claim and is aware of a legally liable third party, Medicaid will reject the claim by sending it back to the provider noting the third party that Medicaid believes to be legally responsible for paying the claim.*

*Again, one exception is if a beneficiary has Medicare, and the Tribal provider is not enrolled in Medicare, then the provider is not required to bill Medicare. Another exception is if the item/service in question is never covered by Medicare.*

Tribal Comment #2 – Exclude Tribal Self-Insurance Plans (TSIPs) from TPL

For similar reasons, we ask the Department to recognize a TPL exception for “tribal self-insurance plans (TSIPs)” which are recognized under federal law as payers of last resort secondary not only to Medicaid, but even to the IHS itself. Although we do not know whether there are any such plans in Alaska now, it would be prudent for the SPA to anticipate the possibility that they will be established in the future, and to make clear that they are not subject to Medicaid’s TPL requirements.

As you may know, the Indian Health Service operates a “Purchased and Referred Care Program (PRC), formerly known as “contract health services,” which authorizes and pays for services furnished by no-IHS/tribal providers to IHS beneficiaries, subject to certain limitations and the availability of funds. The PRC program has TPL and Coordination of Benefit Rules TPL rules that are similar to Medicaid’s: if a patient has an “alternate resource” that could cover the cost of the care, that resource must be exhausted before the PRC program will pay anything for the patient’s care.

We thus ask that the Department include language in the SPA that exempts both Tribal health programs and TSIPs from the Medicaid TPL requirements. This could be done, for example, by adding the underlined language to the proposed language in Paragraph I: “Exceptions exist for Tribal Health Organizations, Tribal Self-Insurance Plans, claims specified in 42 C.F.R. 433.139(b)(3)(i) and (ii), and any approved cost avoidance waivers.” If the Department is not confident of its authority or duty to recognize a TPL exception for TSIPs we would be pleased to raise the issue with CMS or to engage with the Department in a joint consultation with CMS on the subject.

State Response – Tribal health organizations are not required to seek reimbursement from tribal self-insurance plans (as payers of last resort) before submitting claims to Medicaid.

CMS Response –

*(Yes,) Tribal Self Insurance plans are payers of last resort. However, the question of whether TPL applies to Tribal Self Insurance Plans does not apply, as it would be the provider that is responsible for billing the legally liable third party, not the Tribal Self Insurance plan.*

Tribal Comment #3 – Opting Out of Medicare

During our in-person consultation (and in our separate discussions on the Tribal Clinic “four walls” issue and the “Tribal FQHC” option), the Department confirmed that Tribal programs may elect to be Tribal FQHCs for Medicaid only, and they are not required to enroll in Medicare. Further, you confirmed that the decision not to enroll the FQHC in Medicare would not adversely affect the amount Medicaid would pay for the FQHC’s covered services.

Kindly confirm in writing that this is also the case with respect to other provider types and services. Our understanding has been that Tribal Health Organizations are *never* required to enroll in Medicare as a condition of billing Medicaid for their services, even if Medicare would cover some or all of its services if the tribal organization did enroll in Medicare. Rather, as payers of last resort, tribal health organizations may always choose to be Medicaid-only providers, and that choice does not mean they cannot bill Medicaid for services they furnish to patients who are dually eligible for both Medicare and Medicaid, or reduce the amount they will be reimbursed by Medicaid for those services.

[State Response](#) – Please see the responses to tribal comment #4.

#### [Tribal Comment #4 – Services Furnished to “Dually Eligible” Beneficiaries](#)

For tribal health organizations that are enrolled providers in both Medicaid and Medicare, kindly clarify whether the TPL rules would apply to them for services they furnish to dually eligible patients. As payers of last resort, are tribal health organizations free to bill Medicaid promptly and without first billing Medicare or waiting 90 days, regardless of whether Medicare also covers the service?

What if the service is one that Medicare does not cover, but it is not on the “never covered list” because some other insurance plan does cover it? Could the Department publish a separate list of “Medicare Never Covers” codes, or clearly identify in its “never covered” which services, if any Medicare covers?

[State Response](#) – Tribal health organizations serving dual-eligible beneficiaries are not currently required to enroll in Medicare for TPL purposes.

#### [CMS Response –](#)

*States have the discretion to require Medicare enrollment of their providers. However, the policy must be reflected in their state plan, and it should be evaluated to ensure that it complies with 42 CFR 431.51(c)(2) which allows states to set “reasonable standards relating to the qualifications of providers.” Additionally, this requirement should only be applied to provider types eligible to enroll in Medicare. Please note that this requirement would have to apply to all providers (and not just THOs).*

*One additional note to clarify is regarding the state’s understanding of TFQHCs and Medicare enrollment from previous guidance. Please note that Q8 from the Jan 18, 2017 FAQs, which says that a Tribal facility that wishes to change its provider enrollment designation to FQHC does not need to enroll in Medicare as a FQHC, only means that T-FQHCs can be enrolled in Medicare as a different provider type than the provider type in which they have enrolled in Medicaid. It does not speak to the question of whether the state may require T-FQHCs to enroll in Medicare for TPL purposes.*

#### [Tribal Comment #5 – Transportation and Accommodation Services](#)

In our in-person consultation, you confirmed that transportation and accommodation services, with one exception, are not covered by payers other than Medicaid, and will thus be included on the initial list of “Never Covered Codes.” We appreciate the confirmation, especially given how vital these services are to Medicaid beneficiaries who live or work in rural or remote communities, most of whom are Alaska Natives and American Indians. However, we also encourage the Department to increase Medicaid payment rates for these providers, especially for hotels and particularly during the tourist season. These providers are in scarce supply, and we believe that rates must be substantially increased to ensure all Alaska Medicaid beneficiaries have adequate access to services.

[State Response](#) – Reimbursement for transportation and accommodation services is outside the scope of this consultation. However, as always, the state appreciates receiving tribal perspectives on Medicaid issues and considers them at the appropriate time.

#### [Tribal Comment #6 – CHA/P, BHA/P, and DHA/T Services](#)

Thank you for confirming in our in-person consultation that, because other payers do not cover them, services furnished by certified Community Health Aides and Practitioners and by Behavioral Health Aides and Practitioners will not be subject to the TPL requirements (nor have they ever been), and tribal health programs may bill Medicaid for their services without waiting or first (fruitlessly) billing Medicare or other payers. We would appreciate receiving this assurance in writing.

Please also confirm that the same is true for services furnished by Dental Health Aides and Therapists.

We understand that some other state’s Medicaid programs cover, or will soon cover, services furnished by other provider types that are unique to the Indian health system, such as Traditional Healers and Community Health Representatives. Assuming no other changes to applicable law or the Medicaid State Plan, are we correct that, if Alaska Medicaid extends coverage to services furnished by additional tribal provider types, the TPL requirements would not apply to those services, provided no other payers cover them?

[State Response](#) – To the extent services provided by Dental Health Aides and Therapists (or other tribal provider types) are not reimbursed by Medicare or private insurance carriers in Alaska, the TPL process requirements do not apply.

#### [Tribal Comment #7 – Our Thanks](#)

Finally, some words of thanks.

First, we would like to thank and acknowledge the Department for the work it has done to try to minimize the adverse impact the changes will have on Medicaid providers that will be subject to the TPL requirements. We especially appreciate the decision to publish a list of “Never Covered Codes,” and to update the list for each calendar year.

Second, thank you for extending the deadline for these written comments several days, to accommodate our busy schedules last week.

Last, but by no means least, thank you for what has again been a very positive consultative experience – for listening carefully to our concerns, and for being open to our suggestions and requests. By continuing to work together in this constructive and respectful fashion, we can best serve the individuals and communities that depend upon the Alaska Medicaid Program and the Alaska Tribal Health System.

[State Response](#) – Thank you for these comments; the state team also appreciates the collaborative and productive tenor of this consultation.

#### [Additional Information](#)

The state does not believe it necessary to change the language in the draft SPA as it currently includes the following language covering any TPL exceptions discussed above.

*Unless excluded by federal law, claims for medical services are cost-avoided when a third-party liability policy exists within the claims payment system.*