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***CMCS Informational Bulletin***

**DATE:** April 5, 2018

**FROM:** Timothy B. Hill, Acting Director  
Center for Medicaid and CHIP Services

**SUBJECT: Compliance with Medicaid Home Health Final Regulation**

The Centers for Medicare & Medicaid Services' (CMS) Medicaid Home Health final rule<sup>1</sup> was published on February 2, 2016 with an effective date of July 1, 2016. States are required to comply with these provisions, however, as indicated in the final rule, CMS recognizes that states may experience operational and budgetary implications that states need to consider as they plan to implement certain provisions of the final rule. Therefore, CMS delayed compliance with the final rule for up to two years from the effective date, based on state legislative cycles.

CMS Administrator Seema Verma issued a letter to the nation's Governors on March 14, 2017<sup>2</sup>, affirming the continued CMS commitment to partnership with states in the administration of the Medicaid program. Through our discussions with states following the issuance of this letter, we recognize that there may continue to be state-specific administrative challenges associated with implementing certain provisions of the Medicaid Home Health final rule and that there is confusion surrounding state compliance deadlines. As any modifications or changes to the Medicaid Home Health Final Rule will generally necessitate rulemaking as required by the Administrative Procedure Act (APA), CMS intends to use our enforcement discretion to focus on working with states to achieve compliance with provisions of the Medicaid Home Health final rule if states are unable to meet compliance deadlines. This use of enforcement discretion will be applied based on state-specific facts and circumstances and focused on states' specific needs.

To implement this targeted enforcement discretion, states will need to identify for CMS the provisions of the final rule that they are unable to implement by the required date based on their legislative timeframes. States should work through their normal regional office processes to identify the specific provisions. CMS will work with states on assessing compliance with the specific provisions, including (1) the specific goals and intent for the provision; (2) compliance with home health regulatory standards that were in effect prior to the Medicaid face-

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<sup>1</sup> Medicaid Program; Face-to-Face Requirements for Home Health Services; Policy Changes and Clarifications Related to Home Health; Final Rule, 81 FR 5529 (February 2, 2016); available at: <https://www.federalregister.gov/documents/2016/02/02/2016-01585/medicaid-program-face-to-face-requirements-for-home-health-services-policy-changes-and>

<sup>2</sup> Letter to the nation's Governors on March 14, 2017

to-face rule publication in 2016; (3) alternatives the state could consider in moving toward compliance and strategies for how states can best mitigate specific risks and concerns with non-compliance; and (4) developing a timeline for future compliance with the regulatory requirements.

Notwithstanding this guidance, CMS is unable to permit flexibility for all provisions of the final rule for which compliance is required on or after July 1, 2016. Specifically, we will not permit flexibility for certain provisions which codify longstanding Medicaid home health policy. These include:

1. The prohibition on requiring that the availability of all home health service is contingent upon the individual needing nursing or therapy services found in § 440.70(b);
2. The requirements found at § 440.70(b)(3)(v) codifying CMS long standing policy implementing the ruling of the United States Court of Appeals for the Second Circuit in *DeSario v. Thomas*, 139 F. 3d 80 (1998). Specifically, a state may develop a list of pre-approved items of medical equipment as an administrative convenience, but must provide individuals with a reasonable and meaningful procedure for requesting items that do not appear on such a list; and
3. The homebound prohibition on Medicaid home health services and settings in which individuals can receive Medicaid home health services found in §440.70(c)(1).

As articulated in the final home health regulation, the regulation sets forth a framework for coverage, and does not remove state flexibility to define the scope of the home health benefit. States continue to have flexibility to establish a reasonable service definition as long as that definition is consistent with the federal regulatory framework.

### **Technical Assistance**

CMS will work with states on assessing compliance with the specific provisions on a case-by- case basis. Please contact CMS by May 31, 2018 to request assistance so that compliance can be assessed and any necessary flexibility can be granted prior to July 1, 2018.

CMS remains committed to providing technical assistance to states and other stakeholders in understanding the Medicaid Home Health final rule and developing implementation approaches that maximize the provision of Medicaid services in a manner compliant with program requirements. If you have questions or would like to request technical assistance related to the guidance in this informational bulletin, please send an email to [MedicaidHomeHealthRule@cms.hhs.gov](mailto:MedicaidHomeHealthRule@cms.hhs.gov).

We look forward to continuing our partnership to deliver on our shared goals of providing high quality, sustainable healthcare to those who need it.