ALABAMA
HOSPITAL
ASSOCIATION

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July 11, 2007

VIA DHL EXPRESS

Leslie V. Norwalk, Esq.
Acting Administrator
Centers for Medicare & Medicaid Services
U.S. Department of Health and Human Services
Attn: CMS–2258–FC
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

2007 JUL 31 PM 2:47

Re: Final Rule With Comment Period CMS–2258–FC

Dear Ms. Norwalk:

The Alabama Hospital Association respectfully submits this comment letter in opposition to the final rule with comment period CMS–2258–FC (the "Final Rule"). The Final Rule was published by the Centers for Medicare & Medicaid Services ("CMS") in the May 29, 2007 edition of the *Federal Register*. We believe that the Final Rule is invalid on its face and that CMS should rescind the Final Rule in its entirety in order to comply with the law.

CMS violated federal law by promulgating the Final Rule. Publication of the Final Rule was an apparent attempt to circumvent Congress's order not to take any further action with respect to the Proposed Rule. CMS hurried to publish the Final Rule despite the fact that both Houses of Congress previously had approved two pieces of legislation instructing CMS not to; and in fact, the latter piece of legislation became law on the same day that CMS first caused the Office of the Federal Register to publicly display the Final Rule. The Final Rule is to no effect because CMS failed to withdraw the Final Rule prior to its publication in the *Federal Register* and because Congress ordered CMS not to take any action.

The revised version of CMS's "unit of government" definition provides evidence that CMS's reliance upon taxing authority is mistaken. CMS revised the definition to eliminate the taxing-authority requirement with respect to certain tribal entities, and stated that it sought to "address concerns raised about the unique governance arrangements of Indian tribes and tribal organizations." "Unique governance arrangements" also exist among state and local government entities in Alabama. CMS's continued insistence that taxing authority is the "end all" for the definition of a "unit of government" outside the tribal context is arbitrary, capricious and beyond the power of CMS to determine.

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On May 24, 2007, both the Senate and House of Representatives approved House Bill 2206. This bill prohibits CMS from taking any further action with respect to the Proposed Rule. House Bill 2206 became Public Law 110-28 on May 25, 2007. Section 7002(a)(1) of Public Law 100-28 reads, in relevant part:

> Notwithstanding any other provision of law, the Secretary of Health and Human Services *shall not*, prior to the date that is 1 year after the date of enactment of this Act, *take any action* (through promulgation of regulation, issuance of regulatory guidance, or other administrative action) to—
>
> (A) finalize or otherwise implement provisions contained in the proposed rule published on January 18, 2007, on pages 2236 through 2248 of volume 72, Federal Register (relating to parts 433, 447, and 457 of title 42, Code of Federal Regulations); [or]
>
> (B) promulgate or implement any rule or provisions similar to the provisions described in subparagraph (A) pertaining to the Medicaid program established under title XIX of the Social Security Act or the State Children's Health Insurance Program established under title XXI of such Act . . . .

CMS has ignored the fact that Congress does not want CMS to take *any* steps to finalize the Proposed Rule. Passage of the one-year moratorium was no surprise to CMS. The moratorium had been the subject of substantial public debate. Congress had included identical language in legislation adopted less than one month before the final bill was passed.

CMS violated the one-year moratorium imposed by Public Law 110-28 by failing to withdraw the Final Rule prior to its publication in the *Federal Register.* The Final Rule did not appear in the *Federal Register* until four days *after* House Bill 2206 became law. CMS did not withdraw the Final Rule prior to its scheduled publication in the *Federal Register*, a procedure that is authorized by federal law. CMS's failure to withdraw the Final Rule prior to its publication in the *Federal Register* constituted agency action to "finalize or otherwise implement" the Proposed Rule, which is an independent violation of the one-year moratorium imposed by Public Law 110-28.

CMS has solicited comments only on issues related to the agency's revised definition of a "unit of government." The revised definition of a "unit of government" reflects CMS's insistence on asserting that the authority to tax is the "end all" definition of being a "unit of government" within the meaning of section 1903(w)(6)(A) of the Social Security Act. CMS's revised definition deviates from this requirement in the context of tribal entities, however. CMS's insistence upon the existence of taxing authority as the defining characteristic of a "unit of government" ignores the structure of government in the U.S.

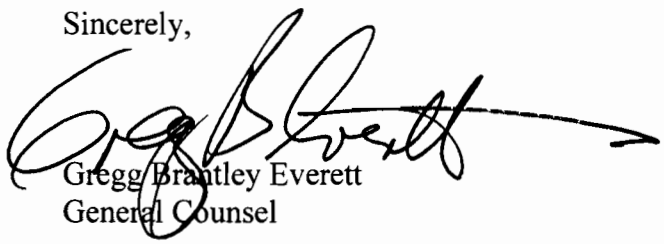
Requiring entities within Alabama to have generally applicable taxing authority in order to be a "unit of government" violates the fundamental structure of our "federal" government. The

federal government cannot mandate what will qualify as a unit of government in Alabama. CMS's revised definition of "unit of government" fails to recognize that Alabama and many other states depend on a wide variety of legitimate governmental entities that (although they do not possess the power to tax) perform essential governmental functions. CMS itself recognized that taxing authority is not a requirement to be a "unit of government" by adopting a revised definition that does not require tribal entities to have taxing authority. The same rule ought to apply to Alabama, which is as independent of the Federal government as the tribal entities for whom the exception was created.

CMS has an obligation to rectify violations of Public Law 110-28 by immediately rescinding the Final Rule. Moreover, the fact that CMS recognized the unique characteristics of tribal governments and removed the taxing-authority requirement for such entities, confirms that CMS's strategy lacks a rational basis upon which to make such a distinction.

For these reasons, and for those reasons set forth in the Alabama Hospital Association's previous comment letter opposing the Proposed Rule, we respectfully submit that CMS should recognize that it has overstepped the bounds of its authority and rescind the Final Rule as soon as possible. Thank you for your attention and action.

Sincerely,



Gregg Brantley Everett
General Counsel

GBE/pc

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CAPE FEAR VALLEY
TRANSFORMING HEALTHCARE

Joyce P. Korzen, RN, MS, ANCC, Interim Chief Executive Officer
Rueben N. Rivers, MD, Chief of Staff

BEHAVIORAL HEALTH CARE
CAPE FEAR VALLEY MEDICAL CENTER
CAPE FEAR VALLEY REHABILITATION CENTER
HEALTH PAVILION NORTH
HIGHSMITH-RAINEY SPECIALTY HOSPITAL

BLOOD DONOR CENTER
CANCER CENTER
CARELINK
CAPE FEAR VALLEY HOME HEALTH & HOSPICE
CUMBERLAND COUNTY EMS
FAMILY BIRTH CENTER
HEART & VASCULAR CENTER
HEALTHPLEX
LIFELINK CRITICAL CARE TRANSPORT
PRIMARY CARE PRACTICES
SLEEP CENTER

July 12, 2007

Leslie Norwalk
Acting Administrator
Centers for Medicare & Medicaid Services
200 Independence Avenue, S.W., Room 445-G
Washington, DC 20201

Re: (CMS-2258-FC) Medicaid Program; Cost Limit for Providers Operated by Units of Government and Provisions to Ensure the Integrity of Federal-State Financial Partnership, (Vo. 72, N0. 102), May 29, 2007

Dear Ms. Norwalk:

Cape Fear Valley Health System, located in Fayetteville, North Carolina, strongly opposes the revised proposed definition of Unit of Government that was published in the Federal Register on May 29, 2007.

The proposed definition of Unit of Government will have serious adverse consequences on the medical care that is provided to North Carolina's indigent and Medicaid populations and on the many safety net hospitals that provide that care. It is estimated that the impact of the application of this definition on the North Carolina Medicaid program is that at least $340 Million in annual federal expenditures presently used to provide hospital care for these populations will disappear overnight creating immense problems with healthcare delivery and the financial viability of the safety net hospitals.

Presently, North Carolina's 43 public hospitals certify their public expenditures to draw down matching federal funds to make enhanced Medicaid payments and DSH payments to the public and non-public hospitals that provide hospital care to Medicaid and uninsured patients. Our understanding is that all of these 43 public hospitals are in fact public hospitals under applicable State law. Substantially all of them have been participating in Medicaid programs as public hospitals for over a decade with the full knowledge and approval of CMS. Each public hospital certifies annually that it is owned or operated by the State or by an instrumentality or a unit of government within the State, and is required either by statute, ordinance, by-law, or other controlling instrument to serve a public purpose.

Under the proposed new definition North Carolina's public hospitals will have to meet the new definition Unit of Government in order to continue to certify their public expenditures to draw down matching federal funds. Because the new definition imposes the requirement that a Unit of Government have generally applicable taxing authority or to be an integral part of an entity that has generally applicable taxing authority, virtually none of these truly public hospitals will be able to certify their expenditures. Imposing a definition that is so radically different and which has the effect of wiping out entire valuable programs that are otherwise fully consistent with all of the Medicaid statutes is unreasonable and objectionable. Cape Fear Valley Health System respectfully requests that CMS reconsider its position on the definition of Unit of Government and defer to applicable State law.

If CMS elects to go forward with the proposed new definition of Unit of Government, it is absolutely critical that the effective date be extended significantly to allow for a reasonable organized response by the State and participating hospitals. This hospital believes that the consequences of implementing new regulations before October 1, 2009 will be catastrophic. North Carolina's indigent patients, the hospitals that provide care for these patients, the State Legislature and the State Agency responsible for the Medicaid program need time to adequately prepare, because the new regulations totally eliminate what has always been considered to be a legal and legitimate means for providing the non-federal share of certain enhanced Medicaid payments and DSH payments to the State's safety net hospitals. A date no earlier than October 1, 2009 is necessary for the affected stakeholders to try to mitigate the detrimental impact of the changes.

Cape Fear Valley Health System urges CMS to withdraw its proposed definition of Unit of Government, or in the alternative revise it substantially by among other things adopting applicable State law to define the public hospitals (or units of government). If the regulation is not withdrawn or adequately revised, Cape Fear Valley Health System urges CMS to adopt a more reasonable implementation schedule that allows until October 1, 2009 before the new definition takes effect. Thank you for your consideration.

Respectfully submitted,

Joyce P. Korzen

Joyce P. Korzen
Interim CEO