

COMMENTS OF KAISER FOUNDATION HEALTH PLAN, INC.

On Proposed Rule CMS-4130-P

July 24, 2007

Kaiser Foundation Health Plan, Inc. and its subsidiary Health Plans ("Kaiser"), all of which are either Medicare Advantage organizations or Medicare Cost contractors pursuant to Section 1876 of the Social Security Act, appreciate the opportunity to comment upon the proposed rule (CMS-4130-P) published in the May 25, 2007 Federal Register. Kaiser's comments are set forth below. If readers of these comments have any questions or seek further information, they may contact any of the following Kaiser attorneys: Judith Mears (Judith.Mears@kp.org, 510 271-5964), Paula Ohliger (Paula.Ohliger@kp.org, 510 271-2325), Amy Hafey (Amy.B.Hafey@kp.org, 626 405-5494), or Anthony Barraeta (Anthony.Barraeta@kp.org, 510 271-6835).

p.29407 - Section 423.104 Requirements Related to Qualified Prescription Drug Coverage - Waiver or Reduction of Part D Cost-Sharing by Pharmacies

Although the proposed rule does not set out any revision to Section 423.104, in the preamble CMS refers to this section when it says that although its current regulations explicitly permit pharmacies to waive Part D cost-sharing and have such waived amounts count against Troop as "incurred costs", CMS did not intend that outcome when the pharmacy is "affiliated with entities whose wraparound coverage does not count as an incurred cost. This includes pharmacies operated by entities that are group health plans..." This proposed "clarification" by CMS affects Kaiser disproportionately because Kaiser is one of perhaps three or four MAOs/Medicare Cost contractors in the United States which owns and operates outpatient pharmacies to serve its members. It appears, therefore, from CMS' proposed clarification, that any waivers of Part D cost-sharing granted by Kaiser's pharmacies, even unadvertised waivers based solely on the member's financial need, would not count toward the member's "incurred costs." Such a member would therefore never move any closer to the catastrophic coverage phase entitling him/her to nominal Part D cost-sharing.

We understand that CMS is wary of Part D sponsors that might incent their affiliated pharmacies to manipulate waivers so that Part D enrollees are pushed through the coverage gap ("donut hole") and into the catastrophic coverage phase where the sponsors could then maximize their reinsurance payments from CMS. We believe, however, that CMS could and should protect the Medicare fisc against such potential abuse without penalizing financially needy Part D enrollees (especially those whose assets disqualify them from LIS eligibility) who face high Part D cost-sharing, perhaps for very expensive biotech drugs.

Kaiser has long had a program of medical financial assistance that assists financially needy Kaiser members who cannot afford the Kaiser cost-sharing for covered services. Kaiser pharmacy waivers of Part D cost-sharing are a part of this program. Such assistance/waivers are not advertised, and are available only after a Kaiser member with Part D benefits requests financial assistance, completes an application therefor, and is approved, based on conservative, consistently applied, financial criteria. Kaiser believes that such assistance is essential to preserving continuity of care for members, especially members who would stop taking their prescribed medications because they could not afford the cost-sharing (especially in the coverage gap period). When this happens, the costs in human suffering as well as the cost of additional medical complications and increased hospital utilization are very significant. Providing the assistance promotes good compliance with medication therapy. That's why Kaiser's ability to provide financial assistance/pharmacy waivers for its needy members' Part D cost-sharing is so important.

We believe that CMS' proposed clarification penalizes Part D sponsors that have historically and responsibly provided financial assistance (and now pharmacy waivers) to financially needy members well before the advent of Part D (and therefore well before any financial incentive to maximize reinsurance payments from CMS). We believe that CMS should either (a) maintain its current interpretation that the value of pharmacy-waived Part D cost-sharing should count against TrOOP regardless of the affiliation of the pharmacy, or (b) adopt a regulation that no pharmacy-waived Part D cost-sharing counts against TrOOP. Every Part D pharmacy is affiliated with one or more Part D sponsors and any pharmacy waiver can serve the economic interests of both the pharmacy and the sponsor, depending on the contract between them. We believe that CMS' clarification inappropriately discriminates against non-profit organizations that typically have (as Kaiser does) the provision of charitable assistance as part of their mission. CMS' proposed position makes it much more difficult for such organizations to serve the most vulnerable of their Part D enrollees (those who don't qualify for LIS or employer group drug benefits, but whose serious medical conditions require expensive drugs).

We think it would be far preferable for CMS to develop standards under which Part D sponsors, through cost-sharing waivers granted by their affiliated network pharmacies, could assist enrollees who are not eligible for LIS and have a demonstrated financial need, and have the waived cost sharing counted toward TrOOP. Such standards could, for example, impose limits on the permissible amount of pharmacy-waived cost-sharing or the number of enrollees granted waivers. The standards could also require regular, transparent, reporting to CMS. Such an approach would require more effort to develop and implement, but an ironclad "clarification" constraining pharmacies that have historically been most likely to assist their members will, without a doubt, cause some Part D enrollees to forgo filling their prescriptions and result in poorer outcomes and higher Medicare costs.