Tribal Technical Advisory Group
To the Centers for Medicare & Medicaid Services
c/o National Indian Health Board 1940 Duke Street, Ste. 200 Alexandria, VA 22314 (703)486-4706 (703)486-5717fax

March 24, 2008

Kerry Weems, Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2244-P
P.O. Box 8016
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Subject: Proposed Rule: CMS-2244-P

Dear Mr. Weems:

As Chair and on behalf of the Centers for Medicare & Medicaid Services (CMS) Tribal Technical Advisory Group (TTAG), I write to express serious concerns regarding proposed rule implementing sections 6041, 6042, and 6043 of the Deficit Reduction Act of 2005 (DRA) and section 405(a)(1) of the Tax Relief and Health Care Act of 2006 (TRHCA). These sections amend the Social Security Act (SSA) by adding a new section 1916A to provide State Medicaid agencies with increased flexibility to impose premium and cost sharing requirements on certain Medicaid recipients. These regulations were proposed by CMS without first seeking input from the CMS TTAG as to the effect the proposal would have on the accessibility of Medicaid services to American Indians and Alaska Natives (AI/AN), one of the most fundamental purposes for which the TTAG was created.

The CMS TTAG was established in October 2004 to provide advice and input to the CMS on policy and program issues affecting delivery of health services to AI/ANs served by CMS-funded programs, including Medicaid. For the last four years the TTAG has carried out its responsibilities as an advisory group by holding monthly conference calls and three face to face meetings each year. The TTAG has full participation of its fifteen members, one representative from each of the twelve geographic areas of the Indian Health Service (IHS) and one representative from three national Indian organizations, National Indian Health Board, National Congress of American Indians, and Tribal Self-Governance Advisory Group. But the TTAG cannot fulfill its purpose of providing advice to CMS where, as here, the agency failed to bring the proposed regulations to the TTAG for input and evaluation of the likely impact they would have on AI/AN Medicaid-eligible individuals.

The CMS TTAG is very concerned with the lack of Tribal consultation in the development of the proposed rule, CMS -2244-P. The lack of Tribal consultation is in contradiction to the Department's Tribal Consultation Policy and the CMS TTAG requests that these regulations not be made effective until such Tribal consultation consistent with Department policy is conducted.

Background:

As explained above, the CMS TTAG was established to provide advice and input to CMS in the development of policy guidance and regulations that could impact AI/AN access to Medicaid services and the IHS and tribal programs that participate as providers of Medicaid services pursuant to section 1911 of the SSA. In 1976, Congress amended the SSA to provide Medicaid participation and reimbursement authority for Medicaid services provided in IHS and tribal facilities so that Indian people could access Medicaid services entitled to them as citizens of the State where they reside. The IHS estimates that nationwide approximately 35% of the 1.5 million IHS active users are eligible for or are Medicaid beneficiaries - in some locations, for instance with 70% unemployment, this percentage is higher. Over 500 health care facilities operated by the IHS and tribes and tribal organizations, pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), are Medicaid participating providers.

In 2007, the CMS TTAG established a Policy Subcommittee to specifically provide a forum for tribal input in the development of policy guidance and regulations for having potential impact on AI/AN Medicaid beneficiaries and IHS and tribal provider of Medicaid services. The CMS TTAG Policy Subcommittee is not a substitute for tribal consultation but consists of tribal representatives with particular knowledge and expertise in Medicaid.

Department Tribal Consultation Policy:

The Department's Tribal Consultation Policy, revised on February 1, 2008, requires each HHS Operating and Staff Division (Division), including CMS, to establish a process to ensure meaningful and timely input by Tribal officials in the development of policies that have Tribal implications. The consultation policy, at Section 4 (B), also requires that HHS Divisions, such as CMS, not promulgate regulations that have tribal implications or impose substantial direct compliance costs on Indian Tribes unless:

1. Funds necessary to pay the direct costs incurred by the Indian Tribe in complying with the regulations are provided by the Federal Government; or

2. The Division, prior to the formal promulgation of the regulation,

    a. Consulted with Tribal officials early and throughout the process of developing the proposed regulation;

    b. Provided a Tribal summary impact statement in a separately identified portion of the preamble to the regulation as it is to be issued in the *Federal Register* (FR), which consists of a description of the extent of the Division's prior consultation with Tribal officials, a summary of the nature of their concerns and the Division's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of Tribal officials have been met; and

    c. Made available to the Secretary any written communications submitted to the Division by Tribal officials.

Tribal consultation required per the HHS consultation policy:

1. **Proposed rules have tribal implications:**

The proposed regulations have tribal implications because a substantial number of AI/AN Medicaid beneficiaries will be subject to new cost sharing requirements. Like other low-income groups, cost sharing requirements serve as a substantial barrier to AI/AN enrollment in the Medicaid program. Imposition of cost sharing requirements on AI/ANs undermines Congressional intent of ensuring AI/AN access to Medicaid services in IHS and tribal health care facilities located in some of the most poor, remote and isolated areas of this country. Because of the Federal government's trust responsibility to provide health care to AI/ANs, cost sharing requirements have specific tribal implications that have not been addressed in the proposed rules. Because the impact of these proposed rules on AI/AN participation in State Medicaid programs will vary depending on locality, tribal consultation with all 561 Indian Tribes is needed to address specific tribal concerns.

2. **Proposed rules could result in compliance costs on Indian Tribes:**

The imposition by States of cost sharing requirements on Medicaid beneficiaries will have adverse consequences on IHS and tribally-operated health programs in at least three ways: (1) an Indian beneficiary who is eligible to enroll in Medicaid may be dissuaded from doing so where a cost is imposed on him/her for such enrollment; and (2) the IHS or tribal program who services such an Indian patient will lose access to Medicaid reimbursements for that patient; and (3) even if the eligible Indian does enroll in Medicaid, the IHS/tribal program would have to use scarce IHS-appropriated funds to pay the cost-share amount. Imposing such barriers to Medicaid participation on Indian beneficiaries and Indian health programs violates the Federal government's trust responsibility to provide health care to AI/ANs.

While CMS estimates that the proposed rules will result in cost savings to the Medicaid program, the proposed rules will shift costs to the IHS - an agency that is currently woefully under funded. It is irresponsible for CMS to propose such regulations without providing a mechanism to protect access for Indian beneficiaries for whose health care needs the United States has full and exclusive responsibility.

Lack of Tribal consultation in development and promulgation of proposed rule;

Contrary to the HHS Tribal Consultation Policy, the CMS did not consult with Tribes in the development of these regulations before they were promulgated. The CMS did not obtain advice and input from the CMS TTAG even though the TTAG meets on a monthly basis via conference calls and holds quarterly face to face meetings in Washington, D.C. The CMS did not utilize the CMS TTAG Policy Subcommittee which was specifically established by CMS for the very purpose of obtaining advice and input in the development of policy guidance and regulations.

Contrary to the Department's consultation policy, the proposed rule does not contain a Tribal summary impact statement describing the extent of the tribal consultation or lack thereof, nor an explanation of how the concerns of Tribal officials have been met.

Regulations should not be effective until Tribal consultation is held:

Because CMS failed to comply with the HHS Tribal Consultation requirements in the promulgations of proposed rule, CMS-2244-P, the CMS TTAG requests that the proposed rule not be made applicable to AI/AN Medicaid beneficiaries until such time as CMS consults with Indian Tribes regarding the impact of these proposed rules on their tribal members.

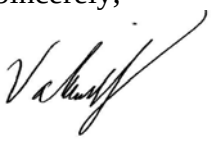
In the event, CMS proceeds to make these regulations effective on Indian tribes, the CMS TTAG strongly urges that the proposed rules be modified to require State Medicaid programs to consult with Indian Tribes prior to the development of any policy which would impose any premium or cost sharing requirements on AI/ANs served by IHS or tribal health programs.

Conclusion:

The CMS TTAG remains concerned about the lack of Tribal consultation in the development of other and future proposed regulations. The CMS did not consult with Tribes regarding proposed rule CMS-2232-P, [State Flexibility for Medicaid Benefit Packages], and the TTAG will be submitting comments to these rules as well. A 30 day comment period for Tribes to comment on Medicaid regulations, that are comprehensive and have a potentially significant impact on Tribal communities, is not sufficient. Per the HHS policy, the CMS is required to consult with Tribes in the early stages and throughout the development of any regulations with Tribal implications.

Thank you for consideration of our request to delay implementation of the proposed rules, CMS-2244-P, until Tribal consultation is held. The TTAG is available to assist with the Tribal consultation process. The TTAG will continue to work with CMS staff to provide timely and substantive advice and input regarding these proposed rules, as well as proposed rules currently under development and rules developed in the future.

Sincerely,



Valerie Davidson
Chair

cc: Secretary Michael Leavitt
Laura Caliquiri, Director, Office of Intergovernmental Affairs
Dennis Smith, Director, Center for Medicaid Services
Dorothy Dupree, Director, Tribal Affairs Group
Robert McSwain, Acting Director, IHS
CMS TTAG members