

[Federal Register: October 30, 2009 (Volume 74, Number 209)]  
[Proposed Rules]  
[Page 56151-56153]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr30oc09-25]

---

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 440, 447 and 457

[CMS-2232-P2; CMS-2244-P2]  
RIN 0938-AP72 and 0938-AP73

Medicaid Program: State Flexibility for Medicaid Benefit Packages  
and Premiums and Cost Sharing

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed Rule.

---

SUMMARY: This document proposes to temporarily delay the effective date of the November 25, 2008 final rule entitled, ``Medicaid Program; Premiums and Cost Sharing'' and the December 3, 2008 final rule entitled, ``Medicaid Program; State Flexibility for Medicaid Benefit Packages.'' Upon the review and consideration of the new provisions of the American Recovery and Reinvestment Act of 2009, the Children's Health Insurance Program Reauthorization Act of 2009, and the public comments received during the reopened comment period, we believe that it is necessary to revise a substantial portion of the November 25, 2008 and the December 3, 2008 final rules. To allow time to make these revisions, the Department has determined that it needs several more months to revise the rule. Accordingly, we are asking for public comment on this proposal for delaying the effective date of the final rules until July 1, 2010.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on November 19, 2009.

ADDRESSES: In commenting, please refer to file code CMS-2244-P2 or CMS-2232-P2. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. Electronically. You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the instructions under the ``More Search Options'' tab.

2. By regular mail. You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-2244-P2 or CMS-2232-P2, P.O. Box 8010, Baltimore, MD 21244-8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. By express or overnight mail. You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-2244-P2 or CMS-2232-P2, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

4. By hand or courier. If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC--Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445-G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD--Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244-1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786-9994 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

FOR FURTHER INFORMATION CONTACT: Frances Crystal, (410) 786-1195 for State Flexibility for Medicaid Benefit Packages. Christine Gerhardt, (410) 786-0693 for Premiums and Cost Sharing.

#### SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: <http://www.regulations.gov>. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1-800-743-3951.

#### I. Background

##### A. State Flexibility for Medicaid Benefit Packages

On December 3, 2008, we published a final rule in the Federal Register (73 FR 73694) entitled ``Medicaid Program; State Flexibility for Medicaid Benefit Packages.'' The December 2008 final rule

implements provisions of section 6044 of the Deficit Reduction Act (DRA) of 2005, (Pub. L. 109-171), enacted on February 8, 2006, which amends the Social Security Act (the Act) by adding a new section 1937 related to the coverage of medical assistance under approved State plans. Section 1937 provides States increased flexibility under an approved State plan to provide covered medical assistance through enrollment of certain Medicaid recipients in benchmark or benchmark-equivalent benefit packages. The final rule set forth the requirements and limitations for this flexibility, after consideration of public comments on the February 22, 2008 proposed rule.

Subsequent to the publication of the December 3, 2008 final rule, we published an interim final rule with comment period in the Federal Register on February 2, 2009 (74 FR 5808) to temporarily delay for 60 days the effective date of the December 3, 2008

[[Page 56152]]

final rule entitled, ``Medicaid Program; State Flexibility for Medicaid Benefit Packages.'' The interim final rule also reopened the comment period on the policies set out in the December 3, 2008 final rule. We received 9 public comments in response to the February 2, 2009 interim final rule.

On February 4, 2009, the Children's Health Insurance Program Reauthorization Act (CHIPRA) of 2009 (Pub. L. 111-3) was enacted. Certain provisions of the CHIPRA affect current regulations regarding State Flexibility for Medicaid Benefit Packages, including the December 3, 2008 final rule. Specifically, section 611(a)(1)(C) and section 611(a)(3) of CHIPRA amends section 1937 of the Act, to require States to assure that children under the age of 21, rather than those under 19 as specified in the DRA of 2005, who are included in benchmark or benchmark-equivalent plans, have access to the Early Periodic Screening, Diagnosis, and Treatment (EPSDT) services. EPSDT services may be provided through a benchmark or benchmark-equivalent plan or as an additional benefit to those plans.

Section 611(a)(1)(A)(i) of CHIPRA amends section 1937 of the Act by changing the language ``Notwithstanding any other provision of this title \* \* \*'' to read ``Notwithstanding section 1902(a)(1) (relating to statewideness), section 1902(a)(10)(B) (relating to comparability), and any other provision of this title which would be directly contrary to the authority \* \* \*''

On April 3, 2009, we published a second final rule (74 FR 15221) in the Federal Register further delaying implementation of the December 3, 2008 rule until December 31, 2009 and reopening the comment period to permit additional comments on the policies set forth in the December 3, 2008 final rule and the statutory changes contained in CHIPRA. This second delay specifically requested comments on the provisions of the CHIPRA enacted on February 4, 2009, which corrected language in the DRA as if these amendments were included in the DRA, and subsequently amended section 1937 of the Act, ``State Flexibility for Medicaid Benefit Packages.'' We received 7 timely items of correspondence in response to the April 3, 2009 interim final rule.

#### B. Premiums and Cost Sharing

On November 25, 2008, we published a final rule entitled, ``Medicaid Program; Premiums and Cost Sharing'' in the Federal Register (73 FR 71828) to implement and interpret the provisions of the DRA and the Tax Relief and Health Care Act of 2006 (TRHCA). The DRA was amended by TRHCA to include limitations on cost sharing for individuals with family incomes at or below 100 percent of the Federal poverty line. The

DRA also provided State Medicaid agencies with increased flexibility to impose premium and cost sharing requirements on certain Medicaid recipients. The DRA provisions also specifically addressed cost sharing for non-preferred drugs and non-emergency care furnished in a hospital emergency department. The November 25, 2008 final rule integrated into CMS regulations the statutory flexibility to impose premiums and cost sharing that was added by the DRA. In addition, in the November 25, 2008 final rule, we responded to public comments on the February 22, 2008 proposed rule.

Subsequent to the publication of the November 25, 2008 final rule, we published a final rule in the Federal Register on January 27, 2009 (74 FR 4888) that temporarily delayed for 60 days the effective date of the November 25, 2008 final rule. The final rule also reopened the comment period on the policies set out in the November 25, 2008 final rule.

On February 17, 2009, the American Recovery and Reinvestment Act of 2009 (the Recovery Act) was enacted subsequent to the publication of the January 27, 2009 delay of effective date. Certain provisions of the Recovery Act affect current regulations regarding premiums and cost sharing. Specifically, under the Recovery Act, effective July 1, 2009, Medicaid and CHIP programs are prohibited from imposing premiums or other cost sharing payments on Indians who are provided services or items covered under the Medicaid State plan by Indian Health providers or through referral under contract health services. Similarly, payments to Indian Health providers or to a health care provider through referral under contract health services for Medicaid services or items furnished to Indians cannot be reduced by the amount of any enrollment fee, premium, or cost sharing that otherwise would be due from the Indians.

On March 27, 2009, we published a second final rule in the Federal Register (74 FR 13346) that further delayed the effective date of the November 25, 2008 final rule until December 31, 2009. The final rule reopened the comment period to give the public an additional opportunity to submit comments on the policy set forth in the final rule as well as the provisions of the Recovery Act. Comments were specifically solicited on the effect of certain provisions of the Recovery Act related to the exclusion of Indians from payments of premiums and cost sharing.

## II. Provisions of the Proposed Regulation

We are proposing to delay the effective date of the November 25, 2008 and December 3, 2008 final rules (collectively, ``the 2008 final rules'') until July 1, 2010. Upon review and consideration of the new provisions of CHIPRA, the Recovery Act, and the public comments received during the reopened comment periods, we believe that it is necessary to revise a substantial portion of these final rules. To allow time to make these revisions, the Department has determined that it needs several more months to revise the rule. Accordingly, we are asking for public comment on this proposal for delaying the effective date of the final rules until July 1, 2010.

The comments received during the reopened comment period were complex and presented numerous policy issues, which require extensive consultation, review, and analysis. Additionally, because both CHIPRA and the Recovery Act contain provisions that impact the American Indian and Alaska Native community, the development of the final rules requires collaboration with other HHS agencies and the Tribal governments.

Therefore, we are proposing to further delay the effective date of the 2008 final rules until July 1, 2010. We anticipate that this time

period would allow sufficient time for CMS to further consider public comments, analyze the impact of the revisions on affected stakeholders, and develop appropriate revisions to the regulations. We note that, although we are proposing to delay the effective date of the 2008 final rules jointly because it is more efficient to do so, revisions to the 2008 final rules will be published as two separate revised final rules.

### III. Response to Comments

Because of the large number of public comments we normally receive on Federal Register documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the DATES section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program.)

[[Page 56153]]

Dated: October 22, 2009.

Charlene Frizzera,  
Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: October 27, 2009.

Kathleen Sebelius,  
Secretary.

[FR Doc. E9-26297 Filed 10-29-09; 8:45 am]

BILLING CODE 4120-01-P