



Ms. Elyse Greenwald
Executive Office of the President
Office of Management and Budget, OIRA
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Draft Proposed Rule, Medicare Secondary Payer and Future Medicals (CMS-6047),
RIN 0938-AT85

Dear Ms. Greenwald:

The MARC Coalition thanks you and your colleagues for speaking with us and other stakeholders on March 9, 2022 about the draft Proposed Rule entitled Medicare Secondary Payer (MSP) and Future Medicals (CMS-6047), RIN 0938-AT85, under review by your office. We are writing to bring to your attention some recent events following our meeting that bear on the ability of the Center for Medicare and Medicaid Services (CMS) to regulate “future medicals” issues in the MSP program.

As we believe your office is aware, for over 20 years CMS has administered a *voluntary* “Medicare Set Aside” program to address future medical issues in workers’ compensation cases. Over the years, CMS applied a future medicals policy to the voluntary program which damaged the timely resolution of workers’ compensation claims and settlements (including CMS applying unreasonable cost assumptions and approval delays in some years), and reflected a fundamental misunderstanding of workers’ compensation claims. As a result, in the last several years stakeholders have created their own solutions, known as “non-submit” MSAs, as a substitute to the MSA program given that in many cases the CMS WCMSA program was unworkable.

On January 10, CMS announced an addition of Section 4.3 to the WCMSA User Guide “clarifying” the Agency’s position on “non-submit” MSAs, and on February 17, 2022, the Agency held a webinar addressing the changes. The changes met with significant protest from a broad range of stakeholders from both the claimant and payer communities, including MARC, regarding inaccuracies and ambiguities in the January update, compounded by the statements made during the February webinar. Unfortunately, the January announcement immediately damages workers’ compensation cases involving Medicare beneficiaries (and soon-to-be beneficiaries), and a number of disputed’ workers compensation cases were unable to settle (thereby continuing to burden Medicare with primary payer responsibility that would be terminated by a settlement).

On March 21, 2022, CMS corrected some of the errors, and revised the policy.¹ The updated policy change, however, creates as many questions as it resolves, and leaves thousands of Medicare beneficiaries with workers compensation' settlements under \$25,000 (the CMS WCMSA review threshold) in limbo.

We highlight this recent series of events to emphasize the difficulty that CMS has encountered in understanding and implementing a coherent future medicals *voluntary* program in comparatively straightforward circumstances involving no-fault workers' compensation cases. Respectfully, the Agency understandably lacks the expertise in the workers' compensation arena, as reflected in the January 2022 statement, the February webinar, and the March changes. This will be all the more true if the Agency tries to expand a MSP future medicals policy to liability and no fault cases, which are far more numerous and complex, involve apportionment of fault and liability limit considerations not present in workers' compensation, and will touch every settlement, judgment and award in every cases across the country. The Agency's overreach risks damaging the ability of millions of Medicare beneficiaries to resolve claims, just as its voluntary policy has already done in the workers' compensation program. Given that CMS is unable to appropriately implement its WCMSA "future medicals" policy in a significantly narrower and far less complex environment, OIRA should closely examine the significant unintended consequences of the proposed CMS future medicals policy before allowing CMS to propose a new (and, in our view, *ultra vires*) rulemaking that will negatively impact a far broader universe of claims and beneficiaries.

We appreciate your consideration of these recent events, and welcome any further questions you may have.

Sincerely,



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cc: Sarah Rooney, American Association for Justice
Casey Schwarz, Medicare Rights Center

¹ The March 21 update is available at <https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/Whats-New/Whats-New>. The January 10 version is no longer on the website, but should be available from CMS. Although CMS committed to do so, it has failed to post the February 17 webinar transcript on the website.