Department of Health

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Executive Deputy Commissioner

August 12, 2020

Mr. Kenneth Shulman
Assistant Comptroller
Division of State Government Accountability
NYS Office of the State Comptroller
110 State Street, 10th Floor
Albany, New York 12236

Dear Mr. Shulman:

Pursuant to the provisions of Section 170 of New York State Executive Law, I hereby transmit to you a copy of the New York State Department of Health's comments related to the Office of the State Comptroller's final audit report 2018-S-46 entitled, "Medicaid Program: Medicare Part D Clawback Payments."

Please feel free to contact Estibaliz Alonso, Assistant Commissioner, Office of Governmental and External Affairs at (518) 473-1124 with any questions.

Sincerely,

Lisa J. Pino, M.A., J.D.
Executive Deputy Commissioner

Enclosure

cc: Estibaliz Alonso

Department of Health Comments on the Office of the State Comptroller's Final Audit Report 2018-S-46 entitled "Medicaid Program: Medicare Part D Clawback Payments"

The following are the New York State Department of Health's (Department) comments in response to the Office of the State Comptroller's (OSC) Final Audit Report 2018-S-46 entitled, "Medicaid Program: Medicare Part D Clawback Payments."

Recommendation #1:

Coordinate with CMS to confirm the recipients identified by the audit should have been excluded from the State's clawback payments, including:

- the recipients who were receiving Medicaid in another state,
- the recipients with retroactive changes from full to partial or no Medicaid coverage,
- the incarcerated recipients,
- the deceased recipients, and
- the recipients with retroactive changes to Medicare Part D coverage.

Response #1:

The Department continues to disagree with most of Recommendation #1 due to federal noticing requirements. However, the Department reviewed each individual case OSC identified as being deceased since death is the only exception to advance notice requirements. The Department has initiated steps to take the appropriate action for any consumers whose status was not already known and acted on.

The Department has identified a means to data mine the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) file and is in the process of finalizing the methodology to ensure that adjustments to MMA files are made timely and accurately by the Centers for Medicare and Medicaid Services (CMS).

Recommendation #2:

Review the $2.9 million in clawback payments identified by the audit, and take the necessary steps to ensure any appropriate adjustments are made before the 36-month timeframe for refunds expires.

Response #2:

Although the Department does not agree with OSC's methodology and disputes the accuracy of potential cost reductions identified by OSC, the Department continues to take steps to ensure that adjustments to MMA files are made timely and accurately.

Recommendation #3:

Coordinate with CMS to determine whether a recovery process for improper clawback payments exceeding the 36-month limitation of CMS' electronic MMA file process can be implemented.

Response #3:

The Department contacted CMS regarding this issue. As of June 15, 2020, CMS continues to not accept changes greater than 36 months after an eligibility change that results in a dual eligible

status change. If CMS changes its system, policies and procedures to accept changes after the 36-month limit, the Department will adjust its process accordingly.

Recommendation #4:

Develop processes to ensure all appropriate sources of deceased recipient information and incarceration information are reviewed and the weekly MMA file is updated to reflect the information accordingly.

Response #4:

The Department is confident in the results of the sample it reviewed which showed that only 13 percent of the claims had a status code identifying the consumer as deceased. Additionally, those consumers were already identified as deceased through other data sources utilized by the Department. However, the Department has implemented a new procedure to review patient status codes in order to identify consumers whose status may have been otherwise unknown through other data sources currently utilized by the Department.

The Department continues to work with the Office of Temporary and Disability Assistance (OTDA) to enhance the current Death Match with Social Security Administration (SSA). The change will include a match with Vital Statistics for Upstate counties that will systemically end coverage for deceased individuals who are the only individuals on the case. Individuals identified as deceased by Vital Statistics who are on a case with other individuals will be identified on a report and will be closed by Department staff.

As previously stated, the Federal Bureau of Prisons (FBOP) continues to deny the Department's periodic requests to access their data. The Department will consider the feasibility of utilizing SSA Prisoner Updating Processing System (PUPS) data along with other filtering techniques to reduce the risk of using false-positive information.

Recommendation #5:

Develop a process to monitor the accuracy of monthly clawback payments, including reviewing the accuracy of payments made on behalf of the five types of recipient groups listed in Recommendation 1.

Response #5:

The audit found a 99.88 percent accuracy rate of the $2.4 billion in phase-down payments reviewed. Even though the Department does not entirely agree with the audit methodology, scope and cost reduction findings, the Department has:

1. Continued to review sample cases on MMA files to ensure phase-down payments maintain a high-level of accuracy and that adjustments occur appropriately. As previously stated, the Department has identified a means to data mine the MMA file and is in the process of verifying the data is accurate and complete. Once data is fully verified, the Department will begin to data mine the MMA file on a regular basis to ensure adjustments to the MMA file are made timely and accurately; and

2. Reviewed reports from eMedNY that indicate a consumer has no Part D coverage to verify if the absence of Part D is appropriate. However, the phase-down adjustments made if a

plan disenrolls or CMS retroactively disenrolls or voids coverage of Part D, would be automatic based on the ongoing process.

State Comptroller's Comment #1:

During the course of the audit, we met with Department officials who stated the Department is able to "contest" clawback payments if it believes the State was charged incorrectly. It is clear and logical that if clawback payments were not refunded by CMS for individuals who, for example, were known to be deceased or without Part D that a state would have justification to contact CMS to seek a resolution if it could not resolve it on its own.

Response to State Comptroller's Comment #1:

As previously stated, the Department is unable to contest phasedown payments since CMS does not allow retroactive adjustments except in the instance of death. The current process of including consumers who have a change in their eligibility and/or coverage status on subsequent MMA files in order to trigger the appropriate adjustments (debit/credit) obviates the need to contest phase down payments.

State Comptroller's Comment #2:

Per the Medicare Advantage Prescription Drug State User Guide, retroactive adjustments to the MMA file are allowed for recipients: not previously reported, having a change in dual status code, deceased, or found to be ineligible for another reason.

Response to State Comptroller's Comment #2:

While the Medicare Advantage Prescription Drug State User Guide may indicate retroactive adjustments are allowed, the Department must still comply with Federal Medicaid regulatory notice requirements (42 CFR 431.210-214) which do not allow states to reduce or terminate Medicaid benefits retroactively, except when the beneficiary's situation includes an exception to advance notice requirements such as death. For consumers whose eligibility status can be retroactively changed, for instance a deceased consumer or a consumer whose status increases from partial to fully dual-eligible, the change in their eligibility will trigger the appropriate adjustment (debit/credit) to be made by CMS on the subsequent MMA files. The Department has reached out to CMS for guidance on whether retroactive changes to the MMA files can be made despite the aforementioned Federal advance notice requirements. CMS has advised as recently as May 7, 2020 they continue to conduct in-depth analysis in order to provide an answer.

State Comptroller's Comment #3:

The report presents a fair representation of the situation by acknowledging that it is possible findings could be impacted by subsequent MMA file transactions (we note, the Department was only willing to give our auditors MMA response files for the period January 1, 2017 through December 1, 2018 and stated CMS approval would be required for additional time frames). The report also acknowledges when Medicaid coverage cannot be closed retroactively, while also recommending specific follow-up actions, including coordinating with CMS to confirm the appropriateness of the clawback payments identified.

Furthermore, at the closing conference, Department officials stated that due to the large size of the MMA files, they were not able to confirm that adjustments (i.e., refunds of clawback payments) were made regarding our audit findings. Therefore, the Department has no assurances that all

necessary adjustments were made to the MMA files after our audit period ended. We are pleased that the Department has requested additional resources, such as appropriate hardware, to data mine the MMA file going forward (see Department Response #2 on page 23).

Response to State Comptroller's Comment #3:

The Department has identified a means to data mine the MMA file and is in the process of finalizing the methodology to ensure that adjustments to MMA files are made timely and accurately by CMS.

State Comptroller's Comment #4:

See State Comptroller's Comment 1.

Response to State Comptroller's Comment #4:

As previously stated, CMS does not allow retroactive adjustments except in the instance of death. Therefore, the Department is not able to contest phasedown payments. Instead, the current process of including consumers who have a change in their eligibility and/or coverage status on subsequent MMA files will trigger the appropriate adjustments (debit/credit).

State Comptroller's Comment #5:

Audit recommendation #1 is to "Coordinate with CMS to confirm the recipients identified by the audit should have been excluded from the State's clawback payments, including: the recipients who were receiving Medicaid in another state …" We do not consider this recommendation to be implemented based on a CMS manual stating that two states are not charged for Part D at the same time. The Department should follow up with CMS on the individual cases we identified to confirm whether New York and another state paid clawback payments concurrently on behalf of the same Medicaid recipient.

Response to State Comptroller's Comment #5:

As a result of communications between CMS and the Department regarding this issue, CMS re-asserted it has measures in place to ensure that two states will not be charged for Part D at the same time. As OSC correctly stated in the body of the final report, CMS makes the final determination on phase-down payments.

State Comptroller's Comment #6:

The Department's statement is misleading. There was no such confirmation with CMS regarding the appropriate corresponding changes to the MMA file when the Department retroactively changes an individual's coverage in eMedNY from full to partial dual-eligibility. Per the Medicare Advantage Prescription Drug State User Guide, retroactive adjustments to the MMA file are allowed for recipients having a change in dual status code.

Response to State Comptroller's Comment #6:

The Department was not referring to "…confirmation with CMS regarding the appropriate corresponding changes to the MMA file when the Department retroactively changes an individual's coverage in eMedNY from full to partial dual-eligibility". The Department was referring to a July 2, 2019 email communication in which CMS advised OSC "…the state could only terminate coverage

moving forward. Advance notice (42 CFR 431.211) would apply, unless the specific beneficiary's situation includes an exception to advance notice (42 CFR 431.213)".

The Department agrees changes in eligibility can be made retroactively for consumers whose status changes from partially dual-eligible to fully dual-eligible since this is not a downgrade in coverage and therefore, advance notice is not required. However, changes from fully dual-eligible to partially dual-eligible would require advance notice since this is a downgrade in coverage.

State Comptroller's Comment #7:

At the closing conference, Department officials stated that due to the large size of the MMA files, they weren't able to confirm that adjustments (i.e., refunds of clawback payments) were made regarding our audit findings. Therefore, it is unclear how the Department verified that the above corrections were made to the MMA files.

Response to State Comptroller's Comment #7:

The Department verified the consumers' Medicaid eligibility was retroactively changed to accurately reflect their dual eligible status. After their change to non-dually eligible, the Department verified that consumers were included on subsequent MMA files in order to adjust the months in which the consumers were incorrectly identified as being dually eligible. Per the standard MMA file process, once the changes are accepted by CMS, an adjustment to the previous phase down payment is automatically triggered.

State Comptroller's Comment #8:

We indeed acknowledged the Department's concerns on page 10 of the report. However, we also encouraged the Department to utilize this information, followed by independent verification by contacting the corrections facility.

Response to State Comptroller's Comment #8:

The Department followed up with the FBOP to re-request access to admission and release files. FBOP's position remains unchanged. It only communicates with law enforcement agencies; therefore, it will not release the files to the Department.

The Department is investigating the feasibility of utilizing SSA PUPS data along with other filtering techniques to reduce the risk of using false-positive information.

State Comptroller's Comment #9:

We note that §50.2.1.2 and §50.2.1.3 (June 2017 revision) of the Medicare Prescription Drug Benefit Manual make no mention of the phase-down payment; therefore, the Department should follow up on the appropriateness of these clawback payments.

Response to State Comptroller's Comment #9:

Chapter 3 of the Medicare Prescription Drug Benefit Manual requires Part D Plans to involuntarily disenroll individuals for a change in residence, which includes incarceration (§50.2.1). Plans must investigate after they are notified of an individual's possible incarceration by a source other than CMS and, if appropriate, involuntarily disenroll the member (§50.2.1.2). These incarcerated individuals will continue to remain enrolled until plans complete their investigation, confirm the

individual’s out of area status (which includes incarceration), and complete the disenrollment (§50.2.1.2 and §50.2.1.3).

While the above cited sections do not specifically mention phase-down payments, as stated elsewhere in the manual, the phase-down payment is required if an individual is identified as a full benefit dual-eligible and enrolled in a Part D plan. Until the plan disenrolls an incarcerated individual, they will be identified as enrolled in a Part D plan and will be charged a phase-down payment.

State Comptroller’s Comment #10:

The Department has not yet indicated that it has coordinated with CMS regarding this matter. It appears the Department has not obtained information from CMS regarding why clawbacks are charged at the same time as CMS is indicating a recipient cannot be auto-enrolled in a Medicare Part D plan due to incarceration, nor has the Department indicated it has coordinated with CMS to determine the appropriateness of charging states for clawback payments when individuals are clearly no longer eligible for Part D due to incarcerations. Rather, the Department continues to take a passive approach in these matters, which impacts the State. We acknowledged several times in the report that the Department must provide a recipient with timely and adequate notice prior to suspending or closing the individual’s Medicaid coverage.

Response to State Comptroller’s Comment #10:

As previously stated, the Department has requested CMS guidance on whether retroactive changes to the MMA files can be made despite Federal advance notice requirements for consumer’s whose coverage is reduced or terminated, such as an individual who is truly incarcerated. Per Chapter 3 of the Medicare Prescription Drug Benefit Manual, Part D plans cannot disenroll a consumer unless they are able to independently verify the consumer is incarcerated. In an email communication dated August 22, 2019 to state program staff, CMS indicated there could be situations when the consumer ”…has proof of release but SSA system hasn’t been updated yet. We are aware that incarceration data is notoriously troublesome, especially when it comes to release, mostly due to the limited reporting requirements by prison”. CMS’ statement is supported by the SSA’s Program Operating Manual System (POMS) for processing Social Security benefits which indicates the FBOP does not provide SSA with release dates (POMS section SI 02310.092 Processing Title XVI FBOP PUPS Alerts). The POMS further states “…the PUPS record or alert may contain missing or questionable confinement data or unreliable identity information that associates an inmate with the incorrect Social Security number” (POMS section GN 02607.600 Developing PUPS Records and Alerts).

State Comptroller’s Comment #11:

The Department appears to be referring to three individuals from a sample given to the Department for review early in the audit. The three individuals were not included in our findings. On pages 11 and 12 of the report, we stated the Department does not use VERIS and, in response to our audit, the Department stated VERIS data is not always reliable as its justification for not using it. We note, however, that the Department was also provided with instances where VERIS was accurate and if used by the Department to flag potentially deceased individuals for review, it could have resulted in cost reductions to clawback payments. We are pleased the Department is taking necessary steps to enhance death matches with SSA going forward (see Department Response #4 on page 24).

Response to State Comptroller's Comment #11:

It is the Department's understanding the source of deceased information used by VERIS is the SSA which is the same source of death information the Department already utilizes. The Department does not believe paying a privately-owned service for information it already utilizes would result in any additional cost reductions.

State Comptroller's Comment #12:

The Department's statement is misleading. Although the billing details do not provide enough specificity to identify consumers, the MMA files do have this level of specificity. We reviewed the MMA files and determined a credit was not given for the consumers in our findings population. We are pleased that the Department has also requested additional resources, such as appropriate hardware, to data mine the MMA file on a regular basis (see Department Response #2 on page 23).

Response to State Comptroller's Comment #12:

OSC reviewed MMA files for a determinate period from January 1, 2017 through December 1, 2018 and OSC acknowledged the findings "….could be impacted by any corrective action taken by CMS or the Department (i.e., retroactive adjustments to the MMA files)". In many cases, the needed adjustments cited would have been made after December 1, 2018 according to an already established process. As previously stated, the Department has identified a means to data mine the MMA file and is in the process of finalizing the methodology to ensure that adjustments to MMA files are made timely and accurately by CMS.

State Comptroller's Comment #13:

We are pleased the Department is taking steps to implement our recommendations.

Response to State Comptroller's Comment #13:

As indicated in its previous response, the Department sought guidance from CMS to better understand the processing by CMS for when a consumer no longer has Part D coverage, either voided or termed retroactively. Specifically, the Department sought clarification on the expected timeframes for the posting of credits for these consumers.

On May 28, 2020, CMS confirmed any retroactive changes to a prior month's Part D enrollment counts will be adjusted on the following month's billing file. This confirmation supports the Department's previous statements that changes in a consumer's eligibility status will trigger the appropriate adjustments (debit/credit) on prospective MMA files.

State Comptroller's Comment #14:

It does not appear that a review of individual cases has occurred; therefore, the Department has not actually confirmed with CMS that no overpayments exist.

Response to State Comptroller's Comment #14:

The Department continues to disagree with most of Recommendation #1 due to federal noticing requirements. However, the Department reviewed each individual case OSC identified as being deceased since death is the only exception to advance notice requirements. The Department has

initiated steps to take the appropriate action for any consumers whose status was not already known and acted on.

The Department has identified a means to data mine the MMA file and is in the process of finalizing the methodology to ensure that adjustments to MMA files are made timely and accurately by CMS.

State Comptroller's Comment #15:

The Department has not coordinated with CMS to confirm this; see State Comptroller's Comment 6.

Response to State Comptroller's Comment #15:

See response to Comment #14.

State Comptroller's Comment #16:

The Department has no assurances that adjustments are always occurring automatically; see State Comptroller's Comment 3.

Response to State Comptroller's Comment #16:

See response to Comment #14.

State Comptroller's Comment #17:

We are pleased the Department is taking steps to implement our recommendation.

Response to State Comptroller's Comment #17:

Although the Department does not agree with OSC's methodology and disputes the accuracy of potential cost reductions identified by OSC, the Department continues to take steps to ensure that adjustments to MMA files are made timely and accurately.

State Comptroller's Comment #18:

We note that CMS officials said there was not currently a process for recoveries beyond 36 months, but also said they were not aware of anything that would prevent setting up a process beyond the 36-month time frame of the automated system. We also note that CMS did not agree to do this, rather the comments represent the opinions of those CMS officials at that time.

Response to State Comptroller's Comment #18:

The Department contacted CMS regarding this issue. As of June 15, 2020, CMS continues to not accept changes greater than 36 months after an eligibility change that results in a dual eligible status change. If CMS changes its system, policies and procedures to accept changes after the 36-month limit, the Department will adjust its process accordingly.

State Comptroller's Comment #19:

We are pleased the Department indicates it will take steps to implement our recommendation. However, we note the Department is referring to a review that included four recipients who had a claim with a patient status code of deceased. We have not verified the accuracy of the Department's statement, as the sample was reviewed by the Department after the audit ended.

Response to State Comptroller's Comment #19:

The Department is confident in the results of the sample it reviewed which showed that only 13 percent of the claims had a status code identifying the consumer as deceased. Additionally, those consumers were already identified as deceased through other data sources utilized by the Department. However, the Department has implemented a new procedure to review patient status codes in order to identify consumers whose status may have been otherwise unknown through other data sources currently utilized by the Department.

The Department continues to work with the OTDA to enhance the current Death Match with SSA. The change will include a match with Vital Statistics for Upstate counties that will systemically end coverage for deceased individuals who are the only individuals on the case. Individuals identified as deceased by Vital Statistics who are on a case with other individuals will be identified on a report and will be closed by Department staff.

As previously stated, the FBOP continues to deny the Department's periodic requests to access their data. The Department will consider the feasibility of utilizing SSA PUPS data along with other filtering techniques to reduce the risk of using false-positive information.

State Comptroller's Comment #20:

We are pleased the Department is taking steps to implement our recommendation.

Response to State Comptroller's Comment #20:

See response to Comment #19.

State Comptroller's Comment #21:

The audit identified instances where clawback payments were not refunded automatically despite the retroactive disenrollment or void of Part D coverage. At the closing conference, Department officials stated that due to the large size of the MMA files, they weren't able to confirm that adjustments (i.e., refunds of clawback payments) were made regarding our audit findings. Therefore, the Department has no assurances that adjustments are always occurring automatically. We are pleased the Department is taking steps to implement our recommendation.

Response to State Comptroller's Comment #21:

The audit found a 99.88 percent accuracy rate of the $2.4 billion in phase-down payments reviewed. Even though the Department does not entirely agree with the audit methodology, scope and cost reduction findings, the Department has:

1. Continued to review sample cases on MMA files to ensure phase-down payments maintain a high-level of accuracy and that adjustments occur appropriately. As previously stated, the Department has identified a means to data mine the MMA file and is in the

process of verifying the data is accurate and complete. Once data is fully verified, the Department will begin to data mine the MMA file on a regular basis to ensure adjustments to the MMA file are made timely and accurately; and

2. Reviewed reports from eMedNY that indicate a consumer has no Part D coverage to verify if the absence of Part D is appropriate. However, the phase-down adjustments made if a plan disenrolls or CMS retroactively disenrolls or voids coverage of Part D, would be automatic based on the ongoing process.