# Recommendation 90-8

## Rulemaking and Policymaking in the Medicaid Program

(Adopted December 18, 1990)

The Medicaid program is a joint federal/state health and long term care insurance program for eligible poor persons in the United States.[1] The Health Care Financing Administration (HCFA), in the Department of Health and Human Services (HHS), administers the Medicaid program at the federal level. The states have primary responsibility for implementing the Medicaid program. To participate in the Medicaid program and receive federal financial participation in state Medicaid expenditures, states must submit a plan to HCFA detailing how the state will comply with federal statutory and regulatory requirements in the design and implementation of its Medicaid program. The relationship between HCFA and the states in the administration of Medicaid has been complicated in recent years by the volume and complexity of congressionally mandated program changes and HCFA's reluctance or inability to promulgate implementing regulations, policies, or other guidance in a timely manner. This recommendation addresses the relationship between Congress, HCFA and the states in the administration of the Medicaid program and, in particular, suggests changes to promote a more effective rulemaking and policymaking process and more efficient implementation of rules and policies.

Since 1981, Congress has almost annually made a large number of changes in the Medicaid program. Of primary concern is that Congress, in annual budget legislation (often in the last days of a session), has either made the expansion of benefits effective regardless of whether or not HCFA promulgates implementing regulations or other guidance by a certain date or has made the expansion effective immediately.[2] These provisions place a great burden on HCFA to issue rules, policies, or other guidance at an accelerated pace and, due to this time pressure, as well as HCFA's reluctance or inability to promulgate implementing regulations and policies, states are often forced to implement program changes without federal guidance. If Congress has directed states to proceed without HCFA guidance, HCFA may still want states to proceed according to its interpretation of the statutory policy. HCFA may issue rules or, more likely,

[1] Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended as 42 U.S.C. 1396-1396s (1982 & Supp. V 1987)).

[2] See, e.g., Deficit Reduction Act of 1984, § 2361(d)(1), Pub. L. No. 98-369, 98 Stat. 494, 1104 (1982 & Supp. V 1987); Consolidated Omnibus Budget Reconciliation Act of 1985, § 9501. 100 Stat. 201, 42 U.S.C. 1396a (Supp. V 1987); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1984 (1986); Medicare Catastrophic Coverage Act of 1988, § 301, Pub. L. No. 100-360, 102 Stat. 748-64; Omnibus Budget Reconciliation Act of 1989, § 6401 et seq., Pub. L. No. 101-239, 103 Stat. 2106, 2258 (1989); and Omnibus Budget Reconciliation Act of 1990, Pub. IL No. 101-508, November 5, 1990.

policy guidance on the matter. While HCFA does promulgate legislative rules pursuant to section 553 of the APA,[3] it more often issues interpretative or procedural rules in its manuals for states, such as the *State Medicaid Manual*. HCFA also issues policy guidance through serially numbered program memoranda or letters, often from its regional offices to states.

To implement congressionally mandated program changes or HCFA rules and policies, states must take specific steps. At the very least, they must submit a plan amendment to HCFA that outlines how the state agency will implement the federal policy change. HCFA must approve or disapprove the state plan amendment within 90 days or request additional information—a step which starts another 90-day period on HCFA action on the plan amendment from the time HCPA receives the information from the state. A state may obtain reconsideration of HCFA's disapproval of a plan amendment by HHS within 60 days and then judicial review in the United States Court of Appeals for the circuit in which the state is located. A plan amendment which expands eligibility, services, or payment is effective no earlier than the first day of the quarter in which the proposed plan amendment is submitted and states may receive federal financial participation back to that date. To protect their rights to the federal payment under congressional appropriations legislation for the Medicaid program, states sometimes expend funds for expanded benefits and other program changes requiring additional funds, upon submitting a proposed plan amendment to HCFA. However, states are subject to HCFA-imposed penalties in certain circumstances. One such action is a "disallowance action" in which HCFA retrospectively disallows the federal payment for state Medicaid expenditures on grounds that a particular expenditure did not meet federal requirements. In addition, under the Medicaid quality control system, claims paid on the basis of determinations regarding eligibility of beneficiaries that are later found to be contrary to federal policy can be viewed as errors for purposes of calculating the error rate penalty which reduces federal payment to the states.

In recent years, HCFA has, as a general matter, had difficulty promulgating its rules and policies in a timely manner. These delays have imposed hardships on states that are required by Congress to implement statutory changes regardless of whether HCFA promulgates regulations. Where HCFA has failed to issue rules or policy, does not act expeditiously on a state's plan amendment to implement a congressionally mandated change, or promulgates new rules or policies strictly interpreting a legislative program change, states are at risk of having to return

[3] In 1971, HHS announced that it would observe notice-and-comment rulemaking procedures under § 553 of the Administrative Procedure Act (APA), notwithstanding the exemption in § 553(a)(2) for rules concerning government benefits.

the federal payment if HCFA determines that a state's proposed plan amendment inaccurately implements the statutory change.

Problems in HCFA rulemaking are further complicated by the persisting dilemma of whether agency rules and policies are legislative rules requiring section 553 notice-and-comment rulemaking procedures. In this regard, Recommendation 76-5 of the Administrative Conference could be a useful approach to HCFA rule and policymaking [4] This recommendation urges agencies to publish and seek comment on all significant interpretative rules of general applicability before promulgation or, at least, seek comment on such rules and policy statements after promulgation. The use of negotiated rulemaking, based on recommendations of the Conference, might also be useful for program changes amenable to negotiation between HCFA and the states as well as providers and beneficiaries.[5]

This recommendation seeks to resolve the difficulties in the HCFA rulemaking and policymaking process which have complicated the administration of the Medicaid program by urging HCFA to issue rules and policy statements promptly, to complete interim-final rulemakings without delay, to make rules and those policies readily accessible to the public, and to refrain from penalizing states that must implement congressionally mandated changes and have properly submitted a proposed plan amendment.

This recommendation also urges Congress to consider the consequences of imposing statutory deadlines on implementing statutory changes, to console with HCFA and the states before enacting program changes, and to allow states sufficient time to engage in appropriate rulemaking procedures. The Conference especially urges Congress to examine the Medicaid program's daunting complexity with a view toward making eligibility, scope of benefits, and payment requirements more comprehensible for beneficiaries and providers and easier for states to administer. At present, the Medicaid statute had become unduly complex because of the annual overlay of new statutory amendments in these areas. A recodification of title 19 of the Social Security Act, the Medicaid statute, is urgently needed to make the statute and the numerous amendments enacted in the last decade more comprehensible.

In view of the complexity of the Medicaid program and the lack of understanding among Congress, HCFA, and states, as well as provider and beneficiary representatives, of one another's respective positions regarding the need for statutory changes in the Medicaid

[4] ACUS Recommendation 76-5, Interpretative Rules of General Applicability and Statements of General Policy, 1 CFR § 305.76-5.
[5] ACUS Recommendations 82-4 and 85-5, Procedures for Negotiating proposed Regulations, 1 CFR 305.82-4, 85-5.

program and the difficulties in the implementation of these changes, it would be advisable to convene a conference on rulemaking and policymaking in the Medicaid program.

**Recommendation**

*A. Recommendations to HCFA*

1. When Congress makes any changes to the Medicaid program, HCFA should act promptly to issue rules, policies, and other guidance implementing such changes. Insofar as resource constraints necessitate making choices about the priority in issuing rules and policies, priority should be given to program changes which Congress has identified for prompt implementation or where agency guidance is particularly necessary for their implementation.[6]

2. Where HCFA finds it necessary to promulgate an interim final rule to implement Medicaid program changes, HCFA should permit a subsequent comment period and should avoid delays in publishing its response to the comments and any modification of the rule.[7]

3. HCFA should ensure that all rules and policies affecting the administration of the Medicaid program—whether promulgated pursuant to section 553 of the APA or issued in the form of manuals, program memoranda, or letters to states—are readily available to the public at convenient locations.[8] HCFA should also publish an updated list of such materials in the Federal Register quarterly.[9]

4. (a) When Congress requires states to implement Medicaid program changes, HCFA should not penalize states in a disallowance action or impose an error rate penalty if the state has incurred greater Medicaid expenditures than a subsequently issued HCFA rule or policy would otherwise allow. This recommendation applies only where Congress mandates that states change their Medicaid programs with or without HCFA guidance, and where, in the absence of such guidance, a state has submitted a state plan amendment reflecting a reasonable interpretation of the statute to implement the change.

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[6] ACUS Recommendation 87-1, Priority Setting and Management of Rulemaking by the Occupational Safety and Health Administration, 1 CFR 305.87-1, offers several suggestions as to priority setting and management of the rulemaking process that may be useful to HCFA.

[7] The Administrative Conference is currently undertaking a study of agency use of interim final rules.

[8] HCFA should devote greater attention to implementing its own salutary regulation in this regard, 42 CFR 431.18.

[9] See ACUS Recommendation 87-8, National Coverage Determinations Under the Medicare Program, 1 CFR 305.87-8 and Recommendation 89-1, Peer Review and Sanctions in the Medicare Program, 1 CFR 305.89-1.

(b) Where HCFA issues rules, policies, or other guidance resulting in a program change, it should provide a reasonable grace period (in which penalties are not imposed for noncompliance) to enable states to comply with the new HCFA requirements. This recommendation does not apply where such guidance, in essence, only tracks the statutory language. As a general matter, HCFA should avoid retroactive program changes.

*B. Recommendations to Congress*

1. In view of the Medicaid program's daunting complexity with regard to eligibility, scope of benefits, and payments to states and providers, Congress should seek to simplify and clarify these program areas in the Medicaid statute, so far as practicable, to make the program more comprehensible for beneficiaries and providers and easier for states to administer. Before enacting changes in the Medicaid program, Congress should consult with all parties (particularly HCFA and the states) knowledgeable about the complexities of implementing proposed program changes. Congress should avoid reliance on last-minute budget reconciliation negotiations to make major Medicaid program changes without having first obtained a clear understanding of how HCFA and the states can implement these changes.

2. Before establishing statutory deadlines for implementing legislative changes in the Medicaid program, Congress should consider whether such deadlines allow HCFA and the states adequate time to promulgate the requisite rules or policies and to take other necessary steps for their proper implementation. Where Congress mandates a complex program change to be implemented at the state level, it should allow states reasonable time to make necessary adjustments (e.g. state legislative action or state rulemaking procedures) before the changes become effective.

**Citations:**

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