



Responding to HHSC's most recent waiver communication, CMS replied that:

- It will not provide federal match for programs that use non-state funds with hold harmless arrangements, including privately managed arrangements;
- It is open to DSRIP extension approval but is pending approval until it receives the state's DSRIP submission and can assess the proposed non-federal match;
- Its November 15th letter "fully reflects CMS' current position and suggests potential paths forward;" and
- The paths forward rely on the state's demonstration that no hold harmless exists.

CMS: "If those [private hold harmless] business arrangements exist in Texas, FFP is not available for Medicaid programs that derive the non-federal share of those Medicaid payments from those LPPFs that include hold harmless arrangements... We will not require Texas to prohibit providers from making private business arrangements, but we cannot provide FFP where those arrangements are inconsistent with federal requirements and constitute the source of the non-federal share of Medicaid payments... But unless Texas can demonstrate that CHIRP, TIPPS, and RAPPs will be financed using permissible sources of the non-federal share, CMS will not approve those requests." pp 121-122

THOT's draft summary is below, based on the CMS responses dated 12/3 and included in the document found at the link in footnote 1.

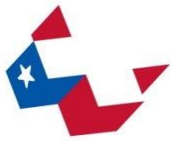
CMS will not approve DPPs using LPPFs until CMS determines no hold harmless exists in Texas or until Texas has taken steps to ensure they are no longer in place. CMS notes that Louisiana provided attestations from providers and that Louisiana asked for technical assistance prior to submitting DPPs.

CMS cites Missouri as a state that had hold harmless managed by the hospital association, and CMS expressed its concerns. CMS notes that when it has concerns it works with states to resolve those concerns and that it is still in discussions with Louisiana and Missouri. (pp. 104-105).

CMS notes that although it may have approved LPPFs in the past, it has not done so with information that CMS now has regarding how LPPFs operate; i.e., written mitigation agreements or agreements among private providers to hold harmless for the cost of the tax through pooling and redistribution. Given information that these arrangements likely exist and given the size of the payments, CMS believes it would be inappropriate to approve the requested SDPs and then seek disallowances as that would be disruptive. LPPFs' historical use is irrelevant to the current situation since CMS had no information suggesting impermissible arrangements until 2019. (p. 108)

CMS argues against TX' stance that TX lacks the legal authority to become involved in private parties related to this issue noting that the state cannot receive federal funds based on impermissible non-federal

¹ HHSC received correspondence from CMS last Friday and shared with stakeholders on 12/6: [Correspondence from CMS \(Dec. 3, 2021\)\(PDF\)](#).



fund sources. CMS again states that it has not approved programs where they reasonably believed mitigation agreements were in place. (p. 109)

CMS says that since providers receive at least 100% of their tax payments back either in Medicaid payments or indirectly through redistributed payments; that constitutes a hold harmless. A hold harmless criterion is whether there is a reasonable expectation that the taxpayer will be held harmless.

CMS cites the case of an Orlando FL city tax in which CMS concluded that 100% of the tax would be returned and notified the program that CMS would be unlikely to approve the program. The proposal was then withdrawn. (p.111)

CMS notes that while states are not legally prohibited from having a hold harmless tax, CMS is prohibited from providing matching funds for such programs. (p. 111).

CMS notes that in states in which it believes an impermissible hold harmless is in place, CMS may withhold approval until the state demonstrates that the method of finance is permissible. (p. 112).

CMS notes that even if it approved proposed DPP programs, it would be required to disapprove the federal financial participation for those funds. (p. 113)

CMS argues that LPPFs involving pools that redistribute funds to ensure no provider is financially harmed by the tax is an impermissible hold harmless. The Medicaid payment passes directly to some providers but indirectly to other providers through the pooling and redistribution. CMS argues that if a taxpayer reasonable expects to be held harmless, directly or indirectly through Medicaid payments, a hold harmless exists.

CMS writes that insofar as Texas heard these arrangements exist, Texas policy “likely provides for payment through the redistribution...” of Medicaid for purposes of a hold harmless. (p. 118)

CMS notes that it is neither regulating private entities nor prohibiting hold harmless; however if the MOF has a hold harmless the non-federal funds are impermissible and CMS is required to reduce federal payments based on the impermissible funding. CMS says that both the state and CMS are required to prohibit funding using hold harmless agreements. (p. 118)

CMS notes that its Nov 15 letter reflects CMS’ current position and suggests paths forward (p 120). CMS approved two DPP programs but as the other three proposed programs rely on funding using hold harmless payments, CMS says approval would be improper (p. 120), and that approval of those three programs is contingent on Texas’ demonstration that a hold harmless is not used in those programs (p. 121).

Regarding DSRIP, CMS indicated that until it has the application for an extension, it is unable to assess the nature of the funding. (p. 120-121)