

# JUSTICE IN AGING

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FIGHTING SENIOR POVERTY THROUGH LAW

## Business Acumen Webinar: Conflict of Interest in New Medicaid Managed Care Regulation

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on Law and Elder Rights

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FIGHTING SENIOR POVERTY THROUGH LAW

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

# Today

- Interest in Conflict of Interest (COI)
- Brief overview: Medicaid Managed Care Regulation
- Detail: Beneficiary Support System
- Exploration: Potential impact for CBOs
- Questions and Discussion



Intro: Why interest in COI?

# Growing interest in COI requirements

Focus on integration:

Community-based organizations

+

Health care systems

# Growing interest in COI requirements

Community-based organization's role in delivery system:

Gatekeeper

+

Service Provider

# Conflict of Interest in OAA

Currently, lots of discussion about conflict of interest, but Older American's Act has long included protections to limit conflict in Area Agency on Aging services

42 U.S.C. §3026(a)(8)



Happy 50th Anniversary  
Older Americans Act  
Aging Well since 1965

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SOURCE: [www.City.Cleveland.OH.US](http://www.City.Cleveland.OH.US)

# COI Requirements in OAA:

## Under the Older Americans Act:

- AAAs cannot act as promoters for agency.
- AAAs must provide individual with statement specifying individual choice of service.

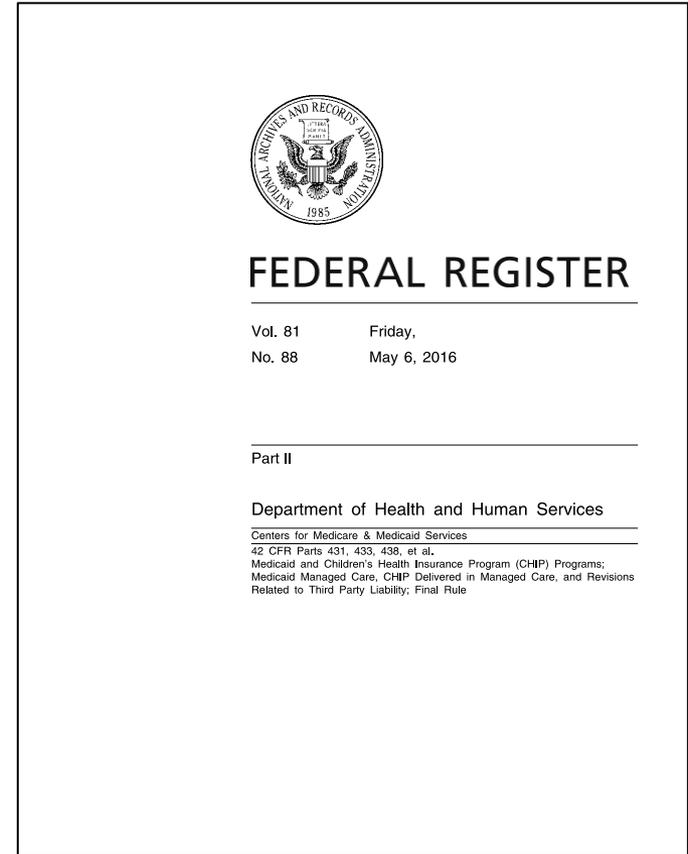
42 U.S.C. §3026(a)(8).



Medicaid Managed Care Reg & Beneficiary Support System

# Final Medicaid Managed Care Rule

- Published: May 6, 2016
- 81 Federal Register 27498 – 27901
- Two sections: Medicaid Managed Care and CHIP requirements



<https://www.gpo.gov/fdsys/pkg/FR-2016-05-06/pdf/2016-09581.pdf>

# BASICS

## CMS Goals:

Strengthen **beneficiary** experience

Advance **delivery system** reform

Strengthen program **integrity** by improving accountability and transparency

**Align** Medicaid and CHIP requirements with other health programs

# Managed Care Regulation Basics

- Phased implementation over 3 years with new provisions starting with contracts on or after July 1, 2017
- Key Regulatory citation changes:
  - Network adequacy: 438.68(b)(2)
  - Quality: 438.334
  - **Beneficiary Support System: 438.71(d)**
  - Stakeholder Engagement: 438.70
  - Language Access: 438.10
  - Crossover claims: 438.3
  - Enrollment: 438.54, 438.56
  - Appeals: 438.402, 438.20
  - Care Coordination: 438.208(a)(1); (438.208)(b)(2)
  - Utilization controls: 438.210(a)(4)(ii)(B)
  - Medical necessity: 438.210(a)(5)
  - MLR: 438.8(e)(3)
  - Rebalancing 438.8(e)(3)

# Beneficiary Support System (438.71)

- States develop a *Beneficiary Support System* (BSS).
- BSS provides support to beneficiaries before and after enrollment.

# Beneficiary Support System (438.71)

- At a minimum, BSS provides:

- **Choice counseling for all beneficiaries**

- Assistance understanding managed care, including LTSS

- Outreach to beneficiaries

# Beneficiary Support System, LTSS (438.71)

- For individuals receiving LTSS, the BSS provides:
  - Access point for complaints
  - Education on grievance and appeals
  - Assistance navigating grievance and appeals process
  - Review and oversight of LTSS program data to identify systemic problems

# Beneficiary Support System- Choice Counseling

Direct language on the choice counseling provision:

438.71 (c)(2): If an individual or entity provides choice counseling on the State's behalf under a memorandum of agreement or contract, it is considered an enrollment broker as defined in § 438.810(a) and must meet the independence and freedom from conflict of interest standards in § 438.810(b)(1) and (2).



# Exploration: Potential Impact on CBOs

# Beneficiary Support System: Opportunity

- CMS does not expect states to develop entirely new consumer network for BSS.
- CMS expects states will draw on existing organizations and resources.
- Potential for many existing CBOs to be a part of BSS.

# Implications of Choice Counseling Requirement

BSS choice counselors: considered an enrollment broker... must meet the independence and freedom from conflict of interest standards.

# Why the concern about COI in choice counseling?

## Potential for steering:

CBO provides advice and referral

CBO has a financial relationship in that entity

CBO could financially benefit from referral

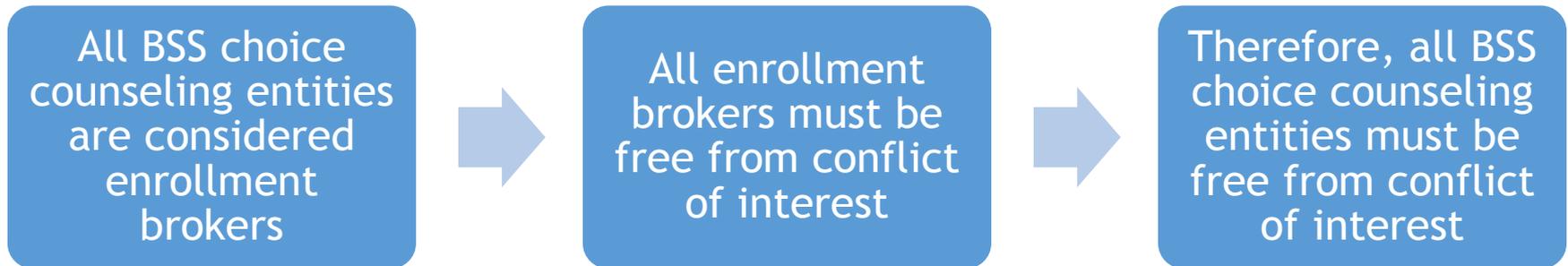
Potential for steering; potential for COI

# Potential further conflict with MCO

- CBOs are contracting with MCOs.
- Distinction between advice, care plans, referrals and service providers can blur.

# Enrollment brokers must be free from conflict

According to regulation:



# Enrollment broker or choice counselor?

- Under BSS, choice counseling considered enrollment broker
- In reg comments, CMS rejects request to separate choice counseling from enrollment broker

# Potential Impact on CBOs

**DISCLAIMER**: Discussion based on interpretation from reading regulation and preamble. CMS has not issued any sub-regulatory guidance or further explanation on the Beneficiary Support System at this time.

# Potential Impact 1: No Impact

- Very likely it will not impact CBOs.
- CBOs are committed to providing conflict-free, person-centered care.

# Potential Impact 2: CBOs make a choice

BSS appears to present CBOs with a choice:

- 1) Continue to provide choice counseling services and maintain contracts with MCOs or
- 2) Participate in BSS as choice counselor and eliminate financial relationship with MCOs

# Why either-or? MCO contract *or* BSS?

- Regulations clarify that choice counseling entities cannot have a financial relationship with MCOs.

42 C.F.R. §438.810

# Limitation on CBOs in BSS

- CBO cannot provide choice counseling in BSS when CBO has or has been:

A direct or indirect financial interest in any entity or health care provider

Excluded from participation

Debarred by any Federal Agency

Past or currently subject to civil monetary penalties

# Are MCOs entities or health providers?

- Unclear.
- Regulation does not define what organizations fall under “entity or health provider.”
- Preamble does interpret MCOs as falling under that umbrella.

80 Fed. Reg. 88 at 27628 (May 6, 2016).

# Pulling it together

- Medicaid managed care reg requires states to create a Beneficiary Support System.
- BSS must provide choice counseling to all MCO enrollees.
- Choice counseling entities considered enrollment brokers.
- Enrollment brokers held to conflict of interest standards.
- In addition, CBOs cannot provide choice counseling services if they have a financial relationship in a health care entity.
- MCOs are most likely considered health care entities.

# Conclusion

- CBOs *may* face a choice: to contract or not to contract with MCOs, to participate in BSS, not to participate.
- What's needed: More information from CMS, additional subregulatory guidance.

# Additional Resources

- **Conflict Free Case Management Paper (2014):**  
<http://nslcarchives.org/wp-content/uploads/2014/10/Conflict-Free-Case-Management-Issue-Brief.pdf>.
- **CMS presentation on Conflict of Interest rules:**  
<http://www.n4a.org/files/2016%20APB%20Mon%20Session%20%20Kayala.pdf>.
- **Medicaid managed care reg:**  
<https://www.federalregister.gov/documents/2016/05/06/2016-09581/medicaid-and-childrens-health-insurance-program-chip-programs-medicare-managed-care-chip-delivered>.

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# Conflict of Interest Policies In Medicaid Home- and Community-Based Services

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*ACL Business Acumen Learning Collaborative Webinar*

October 7, 2016

Julie Hamos, Principal, Health Management Associates  
on behalf of the National Association of Area Agencies on Aging

## Goals of Webinar

- Review background of new federal conflict of interest (COI) rules
- Review Medicaid services provided by aging and disability networks
- Review federal guidance on COI rules
- Propose strategies for mitigating conflicts of interest

# Background

- Delivery of Medicaid-funded long-term supports and services (LTSS) has shifted from nursing home care to Home- and Community-Based Services (HCBS)
- Most states have used HCBS “waivers” to provide services to older and disabled persons at home to prevent institutionalization
- Aging and disability networks provide the types of services funded by Medicaid HCBS

# Activities Associated with Medicaid HCBS

- Information & referral
- Medicaid eligibility determination/redetermination
- Clinical eligibility determination/redetermination (aka “level of care” determination)
- Needs assessment/re-assessment
- Service planning (aka “care plan”)
- Service coordination
- Service authorization
- Service delivery
- Quality oversight/quality monitoring

# Concerns About Potential Conflicts

- ➔ Steering individuals to own organization
- ➔ Pressure to retain client instead of promoting choice
- ➔ Incentives for over- or under-utilization of services
- ➔ Undue influence over goals of care
- ➔ Lack of consumer choice in selecting services or providers
- ➔ Focus on convenience of service provider

## Conflict of Interest Defined

- “A real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.” Black’s Law Dictionary, Eighth Ed., Thomson West, St Paul, MN (2004)
- Conflict may occur when CBO serves as both the agency assessing the need for services and delivering the services

# Key Components of Conflict-Free System

- Eligibility decisions separated from direct service provision
- Not related by blood or marriage; not financially responsible for person
- Clear paths and tracking for grievances and appeals
- State engaged in oversight
- Engage stakeholders and track individual experience

## When Conflict of Interest is Present, State Needs To:

- Demonstrate to CMS that the entity is the only “willing and qualified” provider
- Provide full disclosure to participants and assurances that participants may exercise right of free choice in providers
- Describe individual dispute resolution process
- Assure that entities separate case management and service provision (different staff)
- Assure that state has given express approval
- Provide direct oversight and periodic evaluation of safeguards

# Federal Guidance on Conflict of Interest in HCBS

- States offer HCBS in different programs, waivers and state plan amendments
  - Balancing Incentive Program
  - 1915(c) Waivers
  - 1915(i) State Plan Option
  - 1915(k) Community First Choice State Plan Option
  - 1115 Waivers
- Programs have different COI rules

# Balancing Incentive Program

- States offered enhanced federal match if they agreed to rebalance LTSS toward HCBS and away from institutionalization
- States had to make structural reforms including “conflict free case management” (CFCM)
- BIP guidance included 9 design elements on CRCM
- Time limited program; 18 states

## 1915(c) Waivers

- Most frequently used; in most states
- HCBS services offered to various populations with LTSS needs
- Individuals must meet state-defined institutional level of care to be eligible
- States can limit HCBS to specific geographic areas
- COI provisions apply, but will take effect only when states apply for waiver extension or for new 1915(c) waiver

## 1915(i) State Plan Option

- Allows states to extend same benefits as 1915(c) but for those who do not meet institutional level of care
- As state plan, cannot limit benefits by geographical area
- As of 12/2015, in 17 states
- COI guidance is most strict: requires that needs assessment and service planning must be separated from direct service

## 1915(k) Community First Choice State Plan Option

- Provides 6% increase in federal match to offer personal care services to those who meet institutional level of care
- As state plan, cannot limit benefits by geographical area
- As of 9/2016, in 5 states
- Has COI standards for persons and entities conducting assessment of functional need and person-centered service plan

# 1115 Waivers

- Experimental, pilot or demonstration projects
- Give states flexibility to design and improve their programs to evaluate innovative policy approaches
- 1115 waivers used by some states to provide HCBS
- CMS has indicated that HCBS conflict of interest rules will apply

# Conflict of Interest and Managed Care Organizations (MCOs)

- MCOs can provide case management and perform functional assessments
- BUT: If MCOs do operate direct LTSS services and provide case management, state must demonstrate to CMS that MCO is only willing and qualified case manager
- MCOs cannot determine eligibility for programs; if MCO performs assessments for level of care (LOC), state must perform representative sampling to ensure accuracy of LOC
- Appeals process must be in place to address decreases in care with state

# CBO Strategies for Mitigating Conflict

## STEP 1: Assess your state Medicaid Program

- Under which state plan amendments or waivers does your CBO provide HCBS?
- What is timetable for HCBS to be renewed?
- Are new HCBS waivers, SPAs or 1115 waivers being considered?
- Are HCBS being provided in fee for service or in managed care?

## CBO Strategies for Mitigating Conflict, cont'd

### STEP 2: Assess your own CBO

- Are you a Medicaid provider?
- Which HCBS services do you provide, or would like to provide?
- If there is potential conflict now, which services are most important?
- Are you the only “willing and qualified” provider in your area?

## CBO Strategies for Mitigating Conflict, cont'd

STEP 3: Develop strategies to mitigate any potential conflicts

- Develop “firewalls” between organizations
- Develop “firewalls” within your CBO – distinct budgets, staffing and management
- Contract out some services you now provide

## CBO Strategies for Mitigating Conflict, cont'd

### STEP 4: Borrow models from other states

- *Ohio*: 3-way contract between CMS, Ohio and MCOs for dual eligible; AAA conducts LOC; MCO must contract with AAA to perform service coordination
- *Pennsylvania*: AAAs are allowed to perform LOC; MCOs contract with AAAs for service coordination

## CBO Strategies for Mitigating Conflict, cont'd

### STEP 5: Help design the new state systems

- Stay engaged in state-level implementation of new policies and protocols
  - State monitoring and oversight
  - Consumer pathways to filing grievances and appeals
  - Tracking of grievances and appeals
  - Tracking of individual consumer experience
- You deserve a seat at the table!

# QUESTIONS?

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