

#### § 411.114

#### 42 CFR Ch. IV (10–1–24 Edition)

persons entitled to Medicare on the basis of ESRD, age, or disability as compared to the provisions applicable to other enrollees and potential enrollees.

(2) An explanation of the plan's allegation that it does not owe CMS any amount CMS claims the plan owes as repayment for conditional or mistaken Medicare primary payments.

(b) *Lack of acceptable documentation.* If a GHP or LGHP fails to provide acceptable evidence or documentation that it has complied with the MSP prohibitions and requirements set forth in § 411.110, CMS may make a determination of nonconformance for both the year in which the services were furnished and the year in which the request for information was made.

#### § 411.114 Determination of nonconformance.

(a) *Starting dates for determination of nonconformance.* CMS's authority to determine nonconformance of GHPs begins on the following dates:

(1) On January 1, 1987 for MSP provisions that affect the disabled.

(2) On December 20, 1989 for MSP provisions that affect ESRD beneficiaries and the working aged.

(3) On August 10, 1993 for failure to refund mistaken Medicare primary payments.

(b) *Special rule for failure to repay.* A GHP that fails to comply with § 411.110 (a)(1), (a)(2), or (a)(3) in a particular year is nonconforming for that year. If, in a subsequent year, that plan fails to repay the resulting mistaken primary payments (in accordance with § 411.110(a)(4)), the plan is also nonconforming for the subsequent year. For example, if a plan paid secondary for the working aged in 1991, that plan was nonconforming for 1991. If in 1994 CMS identifies mistaken primary payments attributable to the 1991 violation, and the plan refuses to repay, it is also nonconforming for 1994.

#### § 411.115 Notice of determination of nonconformance.

(a) *Notice to the GHP or LGHP.* (1) If CMS determines that a GHP or an LGHP is nonconforming with respect to a particular calendar year, CMS

mails to the plan written notice of the following:

(i) The determination.

(ii) The basis for the determination.

(iii) The right of the parties to request a hearing.

(iv) An explanation of the procedure for requesting a hearing.

(v) The tax that may be assessed by the IRS in accordance with section 5000 of the IRC.

(vi) The fact that if none of the parties requests a hearing within 65 days from the date of its notice, the determination is binding on all parties unless it is reopened in accordance with § 411.126.

(2) The notice also states that the plan must, within 30 days from the date on its notice, submit to CMS the names and addresses of all employers and employee organizations that contributed to the plan during the calendar year for which CMS has determined nonconformance.

(b) *Notice to contributing employers and employee organizations.* CMS mails written notice of the determination, including all the information specified in paragraph (a)(1) of this section, to all contributing employers and employee organizations already known to CMS or identified by the plan in accordance with paragraph (a)(2) of this section. Employers and employee organizations have 65 days from the date of their notice to request a hearing.

#### § 411.120 Appeals.

(a) *Parties to the determination.* The parties to the determination are CMS, the GHP or LGHP for which CMS determined nonconformance, and any employers or employee organizations that contributed to the plan during the calendar year for which CMS determined nonconformance.

(b) *Request for hearing.* (1) A party's request for hearing must be in writing (not in facsimile or other electronic medium) and in the manner stipulated in the notice of nonconformance; it must be filed within 65 days from the date on the notice.

(2) The request may include rationale showing why the parties believe that CMS's determination is incorrect and supporting documentation.