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Dated: June 12, 2009.

**Ira W. Leighton,**

*Acting, Regional Administrator, EPA New England.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

#### 42 CFR Part 441

[CMS-2296-ANPRM]

RIN 0938-AP61

### Medicaid Program; Home and Community-Based Services (HCBS) Waivers

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** This advance notice of proposed rulemaking announces the intention of CMS to publish proposed amendments to the regulations implementing Medicaid home and community-based services waivers under section 1915(c) of the Social Security Act and solicits advance public comments on the merits of providing States the option to combine or eliminate the existing three permitted waiver targeting groups, and on the most effective means to define home and community.

**DATES:** To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on August 21, 2009.

**ADDRESSES:** In commenting, please refer to file code CMS-2296-ANPRM. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to <http://www.regulations.gov>. Follow the instructions under the "More Search Options" tab.

2. *By regular mail.* You may mail written comments to the following

address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-2296-ANPRM, P.O. Box 8016, Baltimore, MD 21244-1850.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS-2296-ANPRM, Mail Stop C4-26-05, 7500 Security Boulevard, Baltimore, MD 21244-1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445-G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244-1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786-7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

**FOR FURTHER INFORMATION CONTACT:** Mary Sowers, (410) 786-6814.

#### **SUPPLEMENTARY INFORMATION:**

*Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have

been received: <http://www.regulations.gov>. Follow the search instructions on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1-800-743-3951.

#### **I. Overview**

We are issuing this advance notice of proposed rulemaking (ANPRM) to announce our intention to publish a proposed rule and solicit public comments on the changes necessary to provide States the option to design home and community-based services (HCBS) waiver programs serving more than one target population. We are particularly interested in receiving comments on how removal of the existing regulatory barrier regarding target groups may increase a State's ability to design service packages based on need, rather than diagnosis or condition. Furthermore, we are interested in receiving comments on how this change may affect the State's ability to serve individuals requiring an institutional level of care and may facilitate compliance with the Americans with Disabilities Act of 1990 (ADA). Title II of the ADA prohibits discrimination on the basis of disability and the Supreme Court ruled in *Olmstead v. L.C.*, 527 U.S. 581 (1999), that unnecessary institutionalization may constitute discrimination under the ADA. Many States have used the home and community-based services waiver as a component of their *Olmstead* compliance efforts and we are interested in receiving comments about how this change may affect these efforts. We are intending to propose this change in an effort to remove barriers to person-centered, needs-based service delivery methods. Consequently, we are also hoping to hear from interested parties regarding recommendations to strengthen person-centered principles and practices for the successful operation of any HCBS waiver program, including those that may serve individuals based upon identified needs, rather than diagnosis.

It is also our intention to publish as a part of the proposed rule requirements related to identifying the home and community-based character of the settings in which HCBS participants

reside and/or receive services. During the development of the regulation for the new State plan HCBS benefit under section 1915(i) of the Social Security Act<sup>1</sup> (the Act), we received, as solicited, extensive comments on this issue. In preparation of this ANPRM, we took these comments into consideration and are contemplating publication of a proposed rule that would provide that States must define, and CMS approve, standards for home and community under HCBS waivers. Many commenters asked for a deliberative stakeholder process for developing criteria for home and community standards. This announcement provides advance notice of such a process in regard to HCBS waivers, and provides an opportunity for parties to express interest in participating.

## II. Background

Section 1915(c) of the Social Security Act (the Act) authorizes the Secretary of Health and Human Services to waive certain specific Medicaid statutory requirements so that a State may offer HCBS to State-specified group(s) of Medicaid beneficiaries who meet a level of institutional care that is provided under the Medicaid State plan. This provision was added to the Act by the Omnibus Budget and Reconciliation Act (OBRA) of 1981 (with a number of subsequent amendments). Regulations were published to effectuate this statutory provision, with final regulations issued in the mid-1990s.

### *A. Removing Regulatory Barrier To Designing 1915(c) Waivers Based on Needs Rather Than Diagnosis or Condition*

Section 1915(c) of the Act authorizes the Secretary to waive section 1902(a)(10)(B) of the Act, allowing States to waive comparability and target an HCBS waiver program to a specified Medicaid-eligible group or sub-group who would otherwise require an institutional level of care. A section 1915(c) waiver may currently only serve one of the three target populations identified in regulations at 42 CFR § 441.301. These three target groups are: Aged or disabled, or both; Mentally retarded or developmentally disabled, or both; and Mentally ill. States must develop separate 1915(c) waivers in order to serve more than one of these populations. This regulatory provision has contributed to States offering waivers with service packages tailored to different groups of individuals based

upon diagnosis, rather than the individuals' actual need for support.

Because the three target populations outlined above are typically associated with a particular institutional level of care, the necessity to offer multiple separate waivers, is often framed as an inability to combine levels of care. For example, waiver costs for persons with developmental disabilities are most frequently compared to costs of Intermediate Care Facilities for Persons with Mental Retardation or conditions closely related to mental retardation (ICFs/MR), while waiver costs for persons who are aged or with physical disabilities are compared to nursing facility costs. However, the impediment to serving more than one target group through an HCBS waiver relates to the division between the target groups required in the regulation, not the associated institutional settings where those target groups would otherwise receive services but for the provision of HCBS. For example, some individuals with the need for mental health services may be appropriately served in the community at the nursing facility level of care.

Historically, in many cases pre-dating the 1915(c) HCBS waiver program, States have utilized a targeted approach to funding and budgeting for services for various populations. The CMS regulations published in the mid-1990s were modeled after those practices; the regulations reflect the funding approaches common in some State budgets. As the number of HCBS waivers across the country has grown to more than 350 waivers serving more than 1 million individuals, some States, with concurrence from stakeholder groups and individuals, have expressed a desire for the flexibility to combine these target groups in order to provide services based upon needs rather than diagnosis or condition, and for administrative relief from operating and managing multiple 1915(c) waiver programs.

We have considered these issues and intend to propose to change the regulations in 42 CFR subpart G to allow States the flexibility to combine any of the three target groups in one HCBS waiver, or possibly to choose to offer waiver services to groups defined differently from the pre-defined targeting groups. The intended proposed regulatory change would not mandate any change in State criteria for targeting HCBS waivers, it would provide additional State flexibility. We expect that States would continue to appreciate the narrow targeting permitted under section 1915(c) of the Act, particularly for populations with high needs or

receiving unique services. Under the change we are planning to propose, States would still have to determine that without the waiver, participants would require institutional level of care, in accordance with section 1915(c) of the Act. Likewise, the intended proposal to provide additional targeting flexibility for States will not affect the cost-neutrality requirement inherent in section 1915(c) waivers.

In order to assure that individuals served by waivers targeting a broad range of conditions receive individualized care, we further plan to propose to require that: (1) The service planning process be person-centered, and (2) the services specified in the plan of care be based upon the needs of the individual, not an average need among one target group. In addition, we intend to update the language in the regulation related to the target groups to reflect more contemporary, person-first language.

We intend to propose this change to provide States with one additional tool to better serve their citizens, with person-centered delivery systems driven by need, not diagnosis or existing dedicated funding streams. A Federal regulatory change that permits combining targeted groups within one waiver, while optional for States and not an instantaneous change in State structures, would remove one barrier for States wishing to design waivers across various populations. We encourage comments on all aspects of the change we contemplate proposing, including its possible utility in enhancing State flexibility, minimizing administrative burden, facilitating compliance with the ADA, and facilitating a more needs-based service system.

### *B. Home and Community-Based Characteristics*

We are also intending to propose adjusting the regulations at 42 CFR subpart G to describe expectations with regard to waiver participants being served in the home and community. We believe such proposed requirements would increase choice by providing waiver participants with notice of housing alternatives, and would create greater demand and market incentive for person-centered residential settings. Our intended proposed changes would include methods that States may follow to identify appropriate financing mechanisms for reducing the size of existing larger residences, divesting themselves or helping their providers divest themselves of sizable properties, and assisting providers' transition to smaller, more individualized settings. We invite commenters to suggest other

<sup>1</sup> 73 FR 18676, <http://edocket.access.gpo.gov/2008/pdf/08-1084.pdf>.

forms of technical assistance that CMS might provide to assist States in enhancing their efforts for optimal choice, control, and community integration for persons with disabilities and individuals who are aging.

Since the inception of the 1915(c) HCBS waiver program in the 1981, the Centers for Medicare & Medicaid Services (CMS) (formerly known as Health Care Finance Administration (HCFA)) has supported State efforts to serve individuals in the least restrictive setting possible. However, home and community have not been explicitly defined, and as a consequence, some individuals who receive HCBS in a residential setting managed or operated by a service provider have experienced a provider-centered and institution-like living arrangement, instead of a person-centered and home-like environment with the freedoms that should be characteristic of any home and community-based setting. For some years, we have attempted to address this problem indirectly through our review of State service definitions for HCBS, with limited success. Through this ANPRM, we are announcing our intention to propose to affirmatively identify expectations for characteristics of home and community-based settings.

The Deficit Reduction Act of 2005 created a new section 1915(i) of the Social Security Act. Section 1915(i) permits States to offer the HCBS specifically identified in section 1915(c)(4)(b) of the Act as a State plan option without requiring States to submit a waiver application. In addition to making HCBS available under the State plan, Congress expressed interest in assuring small, community-based home-like environments through statutory requirements in section 6071 of the DRA of 2005 for the Money Follows the Person Demonstration Program. This program authorized grants to States to increase the use of HCBS, rather than institutional services, and required that community-based residential settings include no more than a specific limited number of residents.

A regulatory change articulating CMS requirements for the nature of home and community-based residence under section 1915(c) HCBS waivers is necessary to ensure that the expectations for home and community characteristics are consistent across section 1915(c) of the Act and section 1915(i) authorities, and to ensure, most importantly, that individuals receiving HCBS have meaningful alternatives to institutional care, regardless of the section of the statute authorizing their services. Therefore, we are planning to

propose adding to 42 CFR subpart G a requirement that individuals receiving HCBS waiver services must reside in the home or community, in accordance with either of two criteria enumerated below:

- Resides in a home or apartment not owned, leased or controlled by a provider of any health-related treatment or support services; or
- Resides in a home or apartment that is owned, leased or controlled by a provider of one or more health-related treatment or support services, and that meets standards for community living, as defined by the State and approved by the Secretary.

We believe that this wording takes into account the variety of living situations that should be exempt from evaluation, and avoids indirect indicators such as number of residents. Only living situations in which a paid provider of services has opportunity to affect the degree of independence and choice will trigger application of additional State-defined and CMS-approved standards for community living. Standards for community living are to optimize participant independence and community integration, promote initiative and choice in daily living, and facilitate full access to community services. To ensure that these goals are met, standards must be developed through strong stakeholder input. We would be interested in receiving comments regarding strategies that States could employ to solicit and incorporate strong stakeholder input in their efforts to define standards for community living.

We do not contemplate specifying criteria for home and community standards in the proposed regulation. We do solicit stakeholder interest in working with CMS to develop policy guidelines for State definitions.

The intent of these guidelines is to create the necessary conditions so that individuals are able to reside in person-centered, home-like environments where they can enjoy all of the liberties of community living. We recognize that it is difficult for a State to develop and monitor standards related to the individual's standing in a landlord/tenant relationship or in homeownership without inadvertently omitting an arrangement that could be ideal for a particular individual. Furthermore, we recognize that the criteria listed above may not address the possibility that some providers may undertake efforts to avert state-established standards. In light of the complexity of this matter, the long-standing HCBS waivers operating in the country currently, and the many existing efforts to ensure that

individuals are provided services in the setting where they have maximum choice, control and individual liberties, CMS solicits public input on strategies to address this issue of maximum individual choice and control for the 1915(c) waiver participants. We solicit comments on pathways that States may take to improve their systems to ensure that the settings where services are rendered are truly home and community-based in nature, and that individuals are offered meaningful opportunities for community living. In addition, we solicit input on the potential impact of this issue on federally recognized tribes. We recognize that States will require assistance and technical guidance as they make changes, and also solicit comments on the nature of guidance and assistance that may be needed.

### III. Intentions of This Notice

We encourage comments that assist us in determining all implications of our contemplated proposed regulatory changes, and to assist us in constructing the regulations in a manner that provides appropriate guidance and incentives to result in meaningful, positive change for the nearly one million individuals currently served through 1915(c) HCBS waivers.

### IV. Response to Comments

Because of the large number of comments we normally receive on a proposed rule, we are not able to acknowledge or respond to them individually. However, we will consider all comments we receive by the date and time specified in the **DATES** section of this advance notice of proposed rulemaking, and will address these comments in any proposed regulation that results from this advance notice.

### V. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

**Authority:** Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Dated: May 29, 2009.

**Charlene Frizzera,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: June 16, 2009.

**Kathleen Sebelius,**

*Secretary.*

[FR Doc. E9-14559 Filed 6-19-09; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

#### 49 CFR Part 107

[Docket No. PHMSA-2008-0010 (HM-208G)]

RIN 2137-AE35

#### Hazardous Materials Transportation; Miscellaneous Revisions to Registration and Fee Assessment Program

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Withdrawal of notice of proposed rulemaking.

**SUMMARY:** The Pipeline and Hazardous Materials Safety Administration (PHMSA) is withdrawing the notice of proposed rulemaking published under this docket on May 5, 2008 (73 FR 24519). Our revised estimates of unexpended balances from previous years and revenues expected to be generated at current registration fee levels indicate that an increase in registration fees is not necessary to fund the national Hazardous Materials Emergency Preparedness (HMEP) grants program at its authorized level of \$28,318,000 for Fiscal Year 2009.

**FOR FURTHER INFORMATION CONTACT:** Deborah Boothe, Office of Hazardous Materials Standards, (202) 366-8553, or David Donaldson, Office of Hazardous Materials Planning and Analysis, (202) 366-4484, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Hazardous Materials Emergency Preparedness (HMEP) grants program, as mandated by 49 U.S.C. 5116, provides Federal financial and technical assistance to States and Indian tribes to “develop, improve, and carry out emergency plans” within the National Response System and the Emergency Planning and Community Right-To-Know Act of 1986 (Title III), 42 U.S.C.

11001 *et seq.* The grants are used to develop, improve, and implement emergency plans; to train public sector hazardous materials emergency response employees to respond to accidents and incidents involving hazardous materials; to determine flow patterns of hazardous materials within a State and between States; and to determine the need within a State for regional hazardous materials emergency response teams. The HMEP grants program is funded by registration fees collected from persons who offer for transportation or transport certain hazardous materials in intrastate, interstate, or foreign commerce.

Congress reauthorized the Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*) in 2005. The Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users, Pub. L. 109-59, 119 Stat. 1144, Aug. 10, 2005) authorizes \$28.3 million per year for the HMEP grants program and lowered the maximum registration fee from \$5,000 to \$3,000. The Consolidated Appropriations Act of 2008 (Pub. L. 110-161, 121 Stat. 2404, Dec. 26, 2007) set an obligation limitation of \$28,318,000 for expenses from the HMEP fund, and the Administration’s Fiscal Year 2009 budget requests \$28,300,000 in support of HMEP activity.

##### II. Current Rulemaking

To ensure full funding of the HMEP grants program for FY 2009, PHMSA proposed an increase in registration fees to fund the program at the \$28.3 million level (73 FR 24519, May 5, 2008). For those registrants not qualifying as a small business or not-for-profit organization, we proposed to increase the registration fee from \$975 (plus a \$25 administrative fee) to \$2,475 (plus a \$25 administrative fee) for registration year 2009–2010 and following years. As explained in the NPRM, an existing surplus enabled us to delay an increase in registration fees, but we concluded that we would not be able to fund the HMEP grants program at the \$28.3 million level in Fiscal Year 2009 without an increase.

We received 13 written comments in response to the NPRM from shippers and carriers and from the emergency response community, including the American Trucking Association (ATA), Council on the Safe Transportation of Hazardous Articles (COSTHA), Institute of Makers of Explosives (IME), International Association of Fire Chiefs

(IAFC), National Association of SARA Title III Program Officials (NASTTPO), and Vessel Operators Hazardous Materials Association, Inc. (VOHMA).

We have recently re-examined our estimates for funding the HMEP grants program based on updated information from the Department of Treasury on the HMEP account carry-over balance, de-obligations of unused grant and administrative funds, increased enforcement of the registration requirements, and current registrant data, and we have further refined our estimates of revenues we anticipate collecting for registration years 2008–2009 (covering July 1, 2008 to June 30, 2009) and 2009–2010 (covering July 1, 2009 to June 30, 2010) at current registration fee levels. Based on this analysis, we have concluded that we will be able to fund the HMEP grants program at the \$28.3 million level in Fiscal Year 2009 without an increase in registration fees. Accordingly, PHMSA is withdrawing the May 5, 2008, NPRM and terminating this rulemaking proceeding. Depending on appropriated and available funding for Fiscal Year 2010, we may initiate a future rulemaking to adjust registration fees for future registration years.

Issued in Washington, DC, on June 9, 2009 under authority delegated in 49 CFR part 106.

**Theodore L. Willke,**

*Associate Administrator for Hazardous Materials Safety.*

[FR Doc. E9-14569 Filed 6-19-09; 8:45 am]

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[FWS-R6-ES-2009-0037; 92210-1117-0000-B4]

#### Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Revise Critical Habitat for *Eriogonum pelinophilum* (Clay-Loving Wild Buckwheat)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding and initiation of critical habitat review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (USFWS), announce a 90-day finding on a petition to revise critical habitat for *Eriogonum pelinophilum* (clay-loving wild buckwheat) under the Endangered