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TO: OFFICE OF INSPECTOR GENERAL  
FROM: TEXAS ASSOCIATION OF HEALTH PLANS  
DATE: FEBRUARY 1, 2024  
SUBJECT: DEFINITION OF WASTE

## **I. Summary**

As the statewide trade association representing health insurers, HMOs, Medicaid managed care, and other health plans that serve over 20 million Texans, the Texas Association of Health Plans (TAHP) is committed to ensuring that Texas families and employers have access to affordable, comprehensive, and high-quality coverage. We are writing today to express significant concerns raised by our members relating to this agency’s newly expanded definition of “waste,” and specifically its applicability to corrected overpayments. However, we believe there is a straightforward solution to ensure that MCOs are in compliance with federal regulations, while avoiding any unnecessary consequences.

## **II. Analysis**

**A. This report would be duplicative of existing reporting requirements.** The Uniform Managed Care Terms & Conditions (UMCC) requires MCOs to regularly file a “Claims Project Report,” and the Uniform Managed Care Manual (UMCM) has an associated deliverable.<sup>1</sup> This report requires MCOs to report all overpayments and underpayments that are not in response to a claim appeal received from a provider, and includes the provider’s name and NPI, the date the issue was identified, the reason for the underpayment or overpayment, and the number of claims impacted. The report also requires the number of days the project has been underway, as well as a completion date if applicable.

Federal regulations require “each MCO, PIHP, or PAHP must report annually to the State on their recoveries of overpayments.”<sup>2</sup> While we believe the existing Claims Project Report encompasses this requirement, if there are changes to the report that this office believes would be necessary to satisfy the requirements, we recommend building off this report rather than creating a second, duplicative layer of reporting. For example, the federal regulations require annual reporting, but these reports are submitted monthly. When a project is complete, the completion date is entered on the report, but then the following month that report is removed. If this office

<sup>1</sup> UMCC Att. B-1 Section 8.1.18.5.1 (Claims Project); UMCM Section 5.6.3.

<sup>2</sup>42 CFR 438(d)(3).

would like these entries to stay on the report until the end of a calendar year, it would take very little to address that. Likewise, the report currently does not have a column stating whether the project is for an underpayment or overpayment, nor a current data field for the dollars associated with each overpayment recovery claim project, but MCO systems track this information, so including additional columns with that information would not be difficult to implement. MCOs would be happy to work with this office and the Health and Human Services Commission to address any deficiencies in the Claim Project Report, if necessary, to avoid the negative consequences described below and eliminate duplication of deliverable reports.

**B. Treating overpayment recoveries as waste would have unintended consequences for providers and the state.** For example, the UMCC says MCOs must complete all audits of provider claims within two years after receipt of a clean claim, except in the case of fraud, waste, and abuse.<sup>3</sup> If this agency intends for MCOs to consider overpayments waste, then it follows that MCOs are expected to conduct audits beyond the two-year mark. These overpayment audits can cause a significant amount of uncertainty for providers, and if the expectation is that they cannot rely on payments after two years have passed, it would be a radical departure from current state policy.

Similarly, the UMCC requires MCOs, upon discovery of fraud, waste, or abuse, to submit a referral using the fraud referral form through the Waste, Abuse, and Fraud Electronic Reporting System (WAFERS) and proceed with recovery efforts per 1 Tex. Admin. Code § 353.505.<sup>4</sup> That section of the administrative code then requires MCOs, upon the discovery of waste, to notify this agency and the Office of the Attorney General of “each payment made to the provider.”<sup>5</sup> Again, if each individual claim overpayment is considered waste, it would seem that this agency expects MCOs to make a referral for each claim. This is an unreasonable request, and it would result in significant resource costs by both the MCO and the agency to simply account for every referral.

Finally, this new definition of “waste” would apparently encompass overpayments resulting from retroactive fee schedules, member enrollment data updates, and provider enrollment data updates. This data is received periodically from HHSC, and it results in overpayment of claims if fee schedules are reduced, or member eligibility or provider enrollment is retroactively terminated. It appears that this office would consider these overpayments “waste,” yet it is unclear whether MCOs should report such incidents to WAFERS when the overpayment is caused by HHSC. The UMCC provisions discussed above seem to require it, making this yet unintended consequence.

**C. This change would be a significant departure from both the historical interpretation and the codified definition of “waste,” and is therefore voidable without a formal rulemaking.** State rules define “waste” as “practices that a reasonably prudent person

<sup>3</sup> UMCC Att. B-1 Section 8.1.18.5 (Claims Processing Requirements).

<sup>4</sup> UMCC Att. B-1 Section 8.1.19.5(3)

<sup>5</sup>1 Tex. Admin. Code § 353.505.

would deem careless or that would allow inefficient use of resources, items, or services.”<sup>6</sup>If a payment is made, and then corrected, there is no “inefficient use of resources.” To the contrary, the amount ultimately received by the provider is precisely the amount that is due. Likewise, the U.S. Office of Inspector General defines waste as “the thoughtless or careless expenditure, mismanagement, or abuse of resources to the detriment (or potential detriment) of the U.S. government. Waste also includes incurring unnecessary costs resulting from inefficient or ineffective practices, systems, or controls.”<sup>7</sup> Like the state definition of waste, a corrected overpayment would not fall into this definition. After the correction, there is no detriment or potential detriment to the government, nor are there unnecessary costs.

The definition of a rule in the Administrative Procedures Act is any “agency statement of *general applicability* that: (1) implements, interprets, or *prescribes law or policy*; or (2) describes the procedure or practice requirements of a state agency.”<sup>8</sup> The APA requires agencies to engage in a formal rulemaking process to adopt a rule of statewide applicability. Among other requirements, the agency must provide notice of a proposed rule and allow for public comment. A rule is voidable unless a state agency adopts it in substantial compliance with several of the requirements of the APA—primarily those concerning notice and comment.<sup>9</sup>In other words, the declaratory responses to stakeholder comments that adjustments are now considered “waste” were statements of general applicability, and given that they prescribe state policy, state law requires a formal rulemaking.

### **III. Conclusion**

Without going through the required rulemaking process, and providing essentially no advanced notice to other stakeholders, this change will confuse the public, the legislature, and the federal government. System errors that are corrected by MCOs have never been reported as “waste” before. Going forward, stakeholders will be told that there is a significant increase in the amount of waste, despite their ultimately being no “inefficient use of resources.” This will of course make it difficult for policymakers to identify when there is truly waste in the system, and it will lead to a general misunderstanding of how to address underlying causes of actual waste.

To avoid the numerous issues raised in this memo, both legal and practical, we ask that this office consider the alternative solution of either using the Claims Project Report in its current state or amending it to include any additional information that may be required by federal regulations. This would avoid issues created by reclassifying overpayments as waste, and such minor changes to the Claims Project Report template would not require a formal rulemaking. We look forward to opening a dialogue with this office to explore possible solutions to ensure compliance with federal reporting requirements.

<sup>6</sup>1 Tex. Admin. Code § 371.1 (96).

<sup>7</sup> *What is considered fraud, waste, or abuse?* Office of Inspector General. (n.d.). <https://oig.usaid.gov/node/221>.

<sup>8</sup> Tex. Gov’t Code § 2001.003(6) (emphasis added).

<sup>9</sup>Tex. Gov't Code § 2001.035.