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(i) \* \* \*

(A) \* \* \*

(4) Nevada Revised Statutes (NRS) (2003), chapter 445B, section 445B.310 (“Limitations on enforcement of federal and state regulations concerning indirect sources”).

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[FR Doc. E9–7428 Filed 4–2–09; 8:45 am]

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

#### 42 CFR Part 440

[CMS–2232–F2]

RIN 0938–AP72

#### Medicaid Program; State Flexibility for Medicaid Benefit Packages

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

**ACTION:** Final rule; delay of effective date and reopening of comment period.

**SUMMARY:** This action temporarily delays the effective date of the December 3, 2008 final rule entitled, “Medicaid Program: State Flexibility for Medicaid Benefit Packages” (73 FR 73694) until December 31, 2009. In addition, this action reopens the comment period on the policies set out in the December 3, 2008 final rule, and specifically solicits comments on the effect of certain provisions of the Children’s Health Insurance Program Reauthorization Act of 2009.

**DATES:** *Effective Date:* This action is effective April 2, 2009. The effective date of the rule amending 42 CFR part 440 published in the December 3, 2008, **Federal Register** (73 FR 73694), delayed February 2, 2009 (74 FR 5808), is further delayed until December 31, 2009.

*Comment Period:* To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on May 4, 2009.

**ADDRESSES:** In commenting, please refer to file code CMS–2232–F2. 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 for “Comment or Submission” and enter the file code to find the document accepting comments.

2. *By regular mail.* You may mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2232–F2, P.O. Box 8016, Baltimore, MD 21244–8016.

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 (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–2232–F2, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–8010.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to either of the following addresses: a. Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the HHH 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. 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:** Christine Gerhardt, (410) 786–0693.

#### SUPPLEMENTARY INFORMATION:

#### I. Background

##### A. Regulatory History

On December 3, 2008, we published a final rule in the **Federal Register** entitled “Medicaid Program; State Flexibility for Medicaid Benefit” (73 FR 73694). The December 2008 final rule implements provisions of section 6044 of the Deficit Reduction Act (DRA) of 2005, (Pub. L. 109–171), enacted on February 8, 2006, which amends the

Social Security Act by adding a new section 1937 related to the coverage of medical assistance under approved State plans. The final rule also provides States increased flexibility under an approved State plan to define the scope of covered medical assistance by offering coverage of benchmark or benchmark-equivalent benefit packages to certain Medicaid recipients. In addition, the final rule responds to public comments on the February 22, 2008, proposed rule that pertain to the State Medicaid benefit package provisions.

Subsequent to the publication of the December 3, 2008 final rule, in accordance with the memorandum of January 20, 2009 from the Assistant to the President and the Chief of Staff, entitled “Regulatory Review,” we published an interim final rule with comment period in the **Federal Register** to temporarily delay for 60 days the effective date of the December 3, 2008 final rule entitled, “Medicaid Program; State Flexibility for Medicaid Benefit Packages” (February 2, 2009, 74 FR 5808). The interim final rule also reopened the comment period on the policies set out in the December 3, 2008 final rule. We received nine public comments in response to the February 2, 2009 interim final rule.

#### B. New Legislation

On February 4, 2009, the Children’s Health Insurance Program Reauthorization Act (CHIPRA) of 2009 (Pub. L. 111–3) was enacted. Certain provisions of the CHIPRA affect current regulations regarding State Flexibility for Medicaid Benefit Packages, including the December 3, 2008 final rule. Specifically, section 611(a)(1)(C) and section 611(a)(3) of CHIPRA amends section 1937 of the Act, to require States to assure that children under the age of 21, rather than those under 19 as specified in the DRA of 2005, who are included in benchmark or benchmark-equivalent plans, have access to the Early Periodic Screening, Diagnosis, and Treatment (EPSDT) services. EPSDT services may be provided through a benchmark or benchmark-equivalent plan or as a wrap-around benefit to those plans.

Section 611(a)(1)(A)(i) of CHIPRA amends section 1937 of the Act by changing the language “Notwithstanding any other provision of this title \* \* \*” to read “Notwithstanding section 1902(a)(1) (relating to statewideness), section 1902(a)(10)(B) (relating to comparability), and any other provision of this title which would be directly contrary to the authority \* \* \*”

## II. Provisions of the Final Rule

This action delays the effective date of the December 3, 2008 final rule. The effective date of that rule, which would have been February 2, 2009, was delayed until April 3, 2009 (74 FR 5808) and is now delayed until December 31, 2009. Upon review and consideration of the new provisions of CHIPRA and the public comments we received during the reopened comment period, we believe that it may be necessary to revise a substantial portion of the December 3, 2008 final rule. Therefore, to inform future rulemaking on this issue, we are delaying the effective date a second time to give the public an additional opportunity to submit additional comments on the policy set forth in the December 3, 2008 final rule as well as the provisions of CHIPRA, discussed above. We anticipate that this time period will allow sufficient time for CMS to consider such comments and develop appropriate revisions to the delayed rule.

## IV. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a notice such as this take effect, in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). We also ordinarily provide a 30-day delay in the effective date of the provisions of a notice in accordance with section 553(d) of the APA (5 U.S.C. 553(d)). However, we can waive both the notice and comment procedure and the 30-day delay in effective date if the Secretary finds, for good cause, that it is impracticable, unnecessary or contrary to the public interest to follow the notice and comment procedure or to comply with the 30-day delay in the effective date, and incorporates a statement of the finding and the reasons in the notice.

This final rule delays the effective date of the December 3, 2008 final rule that was promulgated through notice and comment rulemaking, and does not make substantive changes to that final rule. Delay in the effective date and reopening of the comment period is necessary to ensure that the final rule, when effective, fully takes into account public comments, and conforms to recently enacted legislation. We do not believe that there will be any adverse impact or effect on the public from this delay in the effective date. Moreover, it would not be in the public interest for the underlying rule to go into effect, or to have uncertainty about whether it is

in effect, when the underlying rule does not conform to statutory requirements. In addition, it is not in the public interest to put into effect a rule that we intend to revise in a reasonable time frame after fully taking into account public comment and statutory changes. For the reasons stated above, we find that both notice and comment procedures and the 30-day delay in effective date for this final rule are unnecessary and contrary to the public interest. Therefore, we find there is good cause to waive notice and comment procedures and the 30-day delay in effective date for this final rule.

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: March 25, 2009.

**Charlene Frizzera,**

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

Approved: March 30, 2009.

**Charles E. Johnson,**

*Acting Secretary.*

[FR Doc. E9-7505 Filed 4-2-09; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Office of the Secretary

### 49 CFR Parts 23 and 26

[Docket No. DOT-OST-2009-0074]

RIN 2105-AD79

### Disadvantaged Business Enterprise Program; Inflationary Adjustment

**AGENCY:** Office of the Secretary, DOT.

**ACTION:** Final rule.

**SUMMARY:** Under the statutes governing the Department's Disadvantaged Business Enterprise (DBE) Program, firms are not considered small business concerns and are therefore ineligible as DBEs once their average annual receipts over the preceding three fiscal years reach specified dollar limits. The Department of Transportation is amending the size limits or gross receipts caps to ensure that the opportunity of small businesses to participate in the Department's DBE programs remains unchanged after taking inflation into account. This final rule provides 2009 inflation adjustment of size limits on small businesses participating in the DOT's Disadvantaged Business Enterprise programs.

**DATES:** This rule is effective April 3, 2009.

## FOR FURTHER INFORMATION CONTACT:

Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 1200 New Jersey Avenue, SE., W94-302, Washington, DC 20590, phone numbers (202) 366-9310 (voice), (202) 366-9313 (fax), (202) 755-7687 (TTY), [bob.ashby@dot.gov](mailto:bob.ashby@dot.gov) (e-mail).

## SUPPLEMENTARY INFORMATION:

### Background

On April 2, 2007, the Department published a final rule revising 49 CFR part 23, the regulation governing the airport concessions disadvantaged business enterprise (ACDBE) program, to require that the Department adjust the general ACDBE gross receipts cap for inflation. That rule also adjusted the gross receipts cap for the Department's financial assistance programs in 49 CFR part 26. This final rule updates the gross receipts cap for the ACDBE program and the Department's financial assistance program for 2009.

### The DBE Airport Concession and Contracting Programs

The DOT-assisted contracts DBE rule and airport concessions DBE rule are based on different statutes. Each statute applies to a distinct type of business that may seek DOT financial assistance. The ACDBE program is designed to give business opportunities to certain small business concerns that operate at airports and that are owned and controlled by socially and economically disadvantaged individuals. The ACDBE program is mandated by 49 U.S.C. 47107(e), originally enacted in 1987 and amended in 1992.

The DBE program for DOT-assisted contracts is a statutory program intended to ensure nondiscriminatory contracting opportunities for small business concerns owned and controlled by socially and economically disadvantaged individuals in the Department's highway, mass transit and airport financial assistance programs. The statutory provision governing the DBE program in the highway and mass transit financial assistance programs is 1101(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, August 10, 2005. The statutory provision governing the DBE program as it relates to the airport financial assistance programs is 49 U.S.C. 47113.

### ACDBE Gross Receipts Size Standards

Under the current DOT rule, if the airport concessions firm's annual gross receipts average over the preceding three fiscal years exceed \$47,780,000,