

PN-ACU-507



MANAGEMENT SCIENCES FOR HEALTH, INC.

Health Sector Reform Technical Assistance Project (HSRTAP)

United States Agency for
International Development



*This report was made possible through support provided by the U.S. Agency for International Development,
under the terms of Contract No. HRN-I-00-98-00033-00, Delivery Order No. 804*

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**A REPORT ON ANALYSIS OF FEDERAL
LAW GOVERNING THE OWNERSHIP OF
MEDICAID CLAIMS PROCESSING SYSTEM
AND ITS IMPLICATIONS FOR PHILHEALTH**

This report was made possible through support provided by the U. S. Agency for International Development, under the terms of Contract No. HRN-I-00-98-00033-00. The opinions expressed herein are those of the author(s) and do not necessarily reflect the views of the U. S. Agency for International Development.

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October 29, 2002

Analysis of Federal Laws Governing the Ownership of Medicaid Claims Processing Systems and the Implications for Philhealth

Summary

Federal laws in the United States provide that a state government must own the software used in a Medicaid claims processing system that is developed with Federal funding for design, programming and installation. The Federal government also obtains a license to such systems, and can grant to others a license to use the system for valid "Federal purposes." The Federal government (Department of Health and Human Services) has made an administrative determination that use of a system by the national health insurance program of another country is not a "Federal purpose" within the meaning of the licensing law. However, a state government would still own the license to such a claims processing system, and nothing in the Federal statute limits the state's ability to grant to other parties a license for use of the system. Thus, it may be possible for Philhealth to negotiate a license to use an MMIS—such as that in the state of Utah--- at little or no cost, IF the state owning the system is so inclined.

Applicable Federal Law and Regulation

To improve the fiscal management of the state-run Medicaid program, the US Federal government created a special incentive for states to upgrade automated claims processing systems. Under Section 1903(a)(3) of the laws governing the Medicaid program, the Congress provided for enhanced Federal Financial Participation (FFP) for these improved Medicaid Management Information Systems (MMIS). If it approves a plan for a new MMIS in advance, the Federal Government pays 90% of the cost of "design, development, installation or enhancement of a mechanical claims processing and information retrieval system" for a state Medicaid program. As a condition of obtaining this 90% funding, the contract with the developer must provide that "the State owns any software that is designed, developed, installed or improved" with 90% Federal funding (42CFR433.112a(5)). In addition, the regulation provides that the Federal Government (HHS) must receive a "royalty free, non-exclusive and irrevocable license to reproduce, publish or otherwise use and authorize others to use, for Federal government purposes, software, modifications to software and documentation that is designed, developed, installed or enhanced" with 90% Federal funding, (42CFR433.112a(6)). The clear intent of this language is to enable the Federal Government to transfer successful claims processing systems to other State Medicaid programs without paying the developer twice.

These provisions are a specific extension of the principle that information systems developed with Federal funding should be available to other public users. 45CFR95.617 governs a variety of Federal/State programs run through the Department of Health and Human Services (HHS), including public assistance and Medicaid. It provides that "the State or local government must include a clause in all procurement instruments providing that the State or local government will have all ownership rights in software or modifications thereof and associated documentation designed, developed or installed with Federal financial participation" under these programs. In addition, HHS reserves a "royalty free, non exclusive license to reproduce, publish, or otherwise use and to authorize others to use for Federal Government purposes," such software, modification, and documentation.

This section of the regulations, 45CFR95.617c, specifically recognizes that not all data processing systems used by Federal/state health and welfare programs are developed with Federal funds; "Proprietary operating/vendor software packages (e.g., ADABAS or TOTAL) which are provided at established catalog or market prices and sold or leased to the general public shall not be subject to the ownership provisions ...of this section. FFP is not available for proprietary applications software developed specifically for the public assistance programs covered under this subpart."

The language which governs FFP in the operation of MMIS systems clearly recognizes the possibility that States will install qualified claims processing systems which are NOT developed with Federal funds. The regulations provide for 75% FFP in all claims processing systems which meet the requirements set by the Federal Government for MMIS performance. (Only 50% FFP is available for routine Medicaid administrative expenses and non-compliant MMIS) The regulations providing for 75% FFP in MMIS operation echo the requirements set for 90% Federal funding of MMIS design and development---with two significant exceptions. Specifically omitted are the clauses requiring that the State own the software and grant a non-exclusive license to the Federal Government to use the system or license it to others for Federal purposes. States may choose to install an approved MMIS which is developed by the vendor with its own funds, and the Federal (or State) governments do not therefore acquire a license to the software so used. In such arrangements, the contractor (fiscal agent) that processes Medicaid claims would be paid on a per claim or other basis solely for system operation, and would not be compensated by the state for development expenses.

In these situations, where the fiscal agent or claims processor has an operational contract with a state, regulations (see 48FR54013) require that a fiscal agent being terminated must turn over "data, computer programs, system documentation and user manuals" for the continued operation of the system. If the contractor has a "proprietary right to the material" it must allow the State agency to purchase the material (e.g.; a computer program) or to purchase the use of the material through license or other means. Thus, by purchasing a license to the software, a State government may take over an MMIS previously developed without Federal funding and run by a contractor. The license arrangement need not (and probably would not) allow the State to transfer the license to a third party such as another State Medicaid program or Philhealth.

The laws and regulations governing enhanced FFP in the development of MMIS systems have been on the books for about twenty years. The regulations do not limit 90% FFP to the initial MMIS, but also permit HHS to provide 90% funding for design, development and installation of system enhancements or replacements. Thus, second or third generation MMIS may have been developed with 90% Federal funding under Section 1903(a)(3). In this case, the State will own the software and the Federal government will have a license permitting it to use the system, or permit the system to be used, for Federal purposes. After 1989, eligibility systems (potentially a subset of an MMIS) no longer qualified for 90% Federal funding under this section. Therefore, a recently developed eligibility module would not automatically be available without a license fee for Federal purposes under 42CFR433.112. However, eligibility systems are usually developed for welfare (public assistance) programs, and might therefore be available for license from the Federal Government under the provisions of 45CFR95.617 which governs FFP for automated data processing equipment and services in all joint state/Federal welfare and health programs.

Applying the Laws and Regulations

I could find no court case directly on point in interpreting the clauses on ownership and licensing for "Federal purpose" discussed above. There are several cases which give HHS substantial latitude in determining which costs qualify for 90% and 75% Federal Financial Participation under the MMIS enhancement provisions. There are no reported cases which address the legality of issuing a license for a Medicaid claims processing system to any entity (even another state).

The official at HHS responsible for oversight of State MMIS systems reported that the Federal government's ability to grant licenses for MMIS systems has been little used. Each state argues that its circumstances are sufficiently unusual that it cannot use an MMIS developed for another state. States generally do not seek to license existing MMIS systems. The Federal government has deferred to the states in these matters, and has permitted the Federal funded development of additional MMIS systems.

HHS confirms that the Utah Medicaid system is highly regarded, and might be a good system to copy. However, an internal memorandum at HHS (perhaps stimulated by our inquiry) determined that use of an MMIS by the national health insurance program of another country does not constitute a "Federal purpose" for which the Federal government could grant a license. I was unable to obtain a copy of the memorandum which reached this conclusion.

With the Federal government unwilling to license an MMIS to Philhealth, the approach must be made directly to the state government, which should own the software for its Medicaid processing systems---PROVIDED THAT THE MMIS WAS DEVELOPED WITH STATE/FEDERAL FUNDS and does not fit under the exception

for "proprietary application software that has an applicability to the medical environment /community at large, and is marketed/sold within the medical environment/community at large." (State Medicaid Manual; 11276.3).

Next Steps

If Philhealth wishes to attempt to license the Utah MMIS, the following steps are indicated;

1. Confirm that the Utah MMIS will meet Philhealth needs with affordable modifications. As described below, licensing the system will have costs for Philhealth, even if the state of Utah does not charge a license fee per se.
2. Determine that the system (or desired modules thereof) was developed with Federal funding and that Utah owns the license to this software. Given statements that the Utah system is "in the public domain," it seems likely that the MMIS was developed with Federal Financial Participation and that the State owns the license. But the State could be paying an information technology company to process claims using software developed with the company's own funds---in which case the state does not own the license.
3. Determine the extent to which the system relies on underlying programs which are not in the public domain. Use of a commercial computer program of wide application (such as a data base manager) in an MMIS does not result in the state owning a license to the specific program which it can transfer to others. Federal law permits a software company to retain ownership of the license of such software of general application. Philhealth should determine if the Utah MMIS depends on "general application" programs, and should ascertain the cost in the Philippines of a license for these underlying program(s).
4. With these questions answered, Philhealth could approach Utah to ascertain the state's willingness to license the MMIS for Philhealth use. In making this approach, Philhealth should be clear that it is prepared to pay any incremental costs incurred by the Government of Utah in granting such a license. With state governments under great fiscal stress in the current economic environment, no Medicaid administrator would be prepared to incur costs solely to benefit a foreign country. Philhealth should make clear that it is prepared to pay for such activities as copying the programs and documentation, consultations on program operations between Philhealth and knowledgeable state officials, and perhaps the state's cost of drawing up the license agreement. State officials will likely then be better disposed to cooperate. Characterizing any payment by Philhealth as reimbursement of incremental costs incurred by the state of Utah will be advantageous to the State, since such an arrangement is less likely to trigger an

attempt by the Federal Government to recover FFP in the costs of developing the system.

Glossary

CMM Center for Medicare and Medicaid. Part of HHS currently responsible for administration of Medicare and Medicaid.

FFP Federal Financial Participation Federal contribution to the costs incurred by states in running various joint Federal/State programs such as Medicaid.

HCFA Health Care Financing Administration. Formerly the element of HHS responsible for administration of Medicare and Medicaid

HHS Department of Health and Human Services. Cabinet Department of the US Government responsible for public assistance, Medicare and Medicaid programs

Medicaid. US health insurance program for the poor; administered by state Government under rules set by the Federal government, which provides 50% or more of the cost of benefits and program administration.

MMIS Medicaid Management Information System. Enhanced systems for claims processing and management reporting in the Medicaid program.

Philhealth Social health insurance system of the Philippines. Would presumably be the licensee of any claims processing system transferred from the U.S. Medicaid program.