TO: Medical Care Advisory Committee

DATE: August 13, 2020

FROM: Jordan Nichols, Director of Electronic Visit Verification Operations

SUBJECT: Electronic Visit Verification (EVV)

Agenda Item No.: 7

Amendments to: The repeal of Texas Administrative Code (TAC) Title 40, Part 1, Chapter 68; the repeal of §354.1177 in Title 1, Part 15, Chapter 354, and new Subchapter O in 1 TAC Chapter 354, relating to Electronic Visit Verification (EVV).

BACKGROUND: ☒ Federal Requirement ☐ Legislative Requirement ☐ Other: (e.g., Program Initiative)

In 2011, the Texas legislature recommended the use of electronic visit verification (EVV) for various long-term services and support and as a result, the Texas Health and Human Services Commission (HHSC) formerly known as the Department of Aging and Disability Services initiated an EVV pilot program in certain regions across the state. In 2013, the legislature expanded their direction for HHSC to implement a statewide EVV program to include personal assistance services in the managed care programs, and personal care services in acute care fee-for-service and community first choice. The HHSC EVV program became operational statewide on June 1, 2015.

On December 13, 2016, the 21st Century Cures Act was signed into law which, Section 12006 requires all states to use EVV for Medicaid-funded personal care services beginning January 1, 2019. On July 30, 2018, Federal legislation changed the original 2019 deadline for EVV to be required for all personal care services to begin January 1, 2020. The state's federal medical assistance percentage (FMAP) will be reduced by .25 percentage points each year, up to a maximum of one percentage point, if HHSC does not require the use of EVV for all Medicaid-funded personal care services provided in a calendar quarter, beginning on or after January 1, 2020.

However, on September 5, 2019, the Centers for Medicare & Medicaid Services granted HHSC a good faith effort exemption to delay the FMAP reductions in calendar year 2020 because the state encountered unavoidable delays when implementing its EVV system for new program, services, and service delivery options affected by the 21st Century Cures Act. The delays were a result of developing an open model for selecting and using an EVV system, implementation of EVV vendors, and complexities in allocating consumer directed services (CDS) employer funding for EVV devices, among other timeline challenges.

HHSC currently has rules concerning EVV in Titles 1 and 40 of the Texas Administrative Code (TAC). This proposal consolidates the EVV rules into one location, implements federal and state requirements for the Texas EVV system, and removes unnecessary or duplicative rules from TAC. The proposed new rules in 1 TAC Chapter 354, Subchapter O also implement the requirements for the Texas EVV system to electronically verify that Medicaid-funded personal care services are provided to a member in accordance with a prior authorization or plan of care, as applicable to the program in which the member receives the service.

The proposed new rules are based on federal and state laws that require HHSC to implement EVV, specifically, Title XIX, Section 1903(l) of the Social Security Act [42 United States Code Section 1396b], as amended by Section 12006 of the 21st Century Cures Act; Texas Government Code Section 531.024172, as amended by Senate Bill 894, 85th Legislature, Regular Session, 2017; and Texas Human Resources Code Section 161.086.

ISSUES AND ALTERNATIVES:

HHSC has received concerns from stakeholders regarding opposition to the federal statute to require EVV for all Medicaid-funded personal care services; EVV requiring a member to follow a service delivery schedule; HHSC or a managed care organization (MCO) having direct on-site access to the EVV system a contracted provider, consumer directed services (CDS) employer, or financial management services agency (FMSA) uses; and how EVV may change the way an employer pays an employee in regards to overtime pay, mileage reimbursement, and reimbursement for wear and tear on a vehicle.

To address concerns about the requirement that a member must follow a service delivery schedule, language was added to the proposed rules clarifying that program providers, CDS employers, and FMSAs must follow the specific policies of each Medicaid program in which services are being delivered. If program policy requires a member to follow a schedule, then a schedule must be entered into the EVV system. If program policy does not require a schedule, then entering a schedule into the EVV system is optional.

No alternatives were considered for concerns regarding:

- The requirement for all Medicaid-funded personal care services to begin using EVV because the federal 21st Century Cures Act requires it.
- The requirement for HHSC or an MCO to have direct on-site access to an EVV system a contracted program provider, CDS employer, and FMSA uses because §531.024172 of the Texas Government Code requires it.
- How EVV may change the way an employer pays an employee regarding overtime pay, mileage reimbursement, and reimbursement for wear and tear on a vehicle because EVV does not impact these business functions. The purpose of EVV is to verify the delivery of Medicaid-funded services the member is authorized to receive and for which the state is being billed. EVV does not change practices related to overtime pay, mileage reimbursement, and reimbursement for wear and tear on a vehicle.

STAKEHOLDER INVOLVEMENT:

Stakeholders affected by the proposed rules include provider agencies, CDS employers, FMSAs, service providers, Medicaid recipients, and managed care organizations (MCOs).

HHSC established multiple workgroups consisting of these stakeholders. By attending ongoing meetings, stakeholders learn about future changes to EVV and are encouraged to provide feedback about these changes to help inform rule, policy, and system requirements necessary to apply the state's EVV system for all Medicaid-funded personal care services programs.

The draft rules were posted for informal comments on the HHS Rulemaking webpage from November 8 - 22, 2019.

Comments received from stakeholders were reviewed by staff and taken into consideration. External stakeholders included 1 CDS employer, 1 HHSC employee, and 2 provider agencies.

A variety of feedback was received by stakeholders such as opposition to the federal requirement to begin using EVV; how EVV may change established business functions relating to an employer paying their employee overtime pay; the inability of EVV to reimburse mileage and wear and tear on a vehicle; EVV requiring a schedule that a member must follow; HHSC or an MCO having direct on-site access to the EVV system a contracted provider, CDS employer, or FMSA uses; a burden on the service provider for having to clock in and clock out of the EVV system when delivering differing types of authorized services to a member during a single visit; and adding definitions to the rules to assist with recoupment appeals.

FISCAL IMPACT:

☒ Yes

	SFY21	**SFY22**	**SFY23**	**SFY24**	**SFY25**
State	$708,840.35	$715,831.84	$722,900.44	$730,020.45	$737,217.57
Federal	$2,106,521.06	$2,127,495.52	$2,148,701.32	$2,170,061.34	$2,191,652.70
Total	$2,815,361.41	$2,843,327.36	$2,871,601.76	$2,900,081.79	$2,928,870.27

RULE DEVELOPMENT SCHEDULE:

July 2020	Publish proposed rules in *Texas Register*
August 13, 2020	Present to the Medical Care Advisory Committee
August 20, 2020	Present to HHSC Executive Council
November 2020	Publish adopted rules in *Texas Register*
November 2020	Effective date

REQUESTED ACTION: (Check appropriate box)

☒ The MCAC recommends approval of the proposed rules for publication.

☐ Information Only

TITLE 40 SOCIAL SERVICES AND ASSISTANCE
PART 1 DEPARTMENT OF AGING AND DISABILITY SERVICES
CHAPTER 68 ELECTRONIC VISIT VERIFICATION (EVV) SYSTEM

PROPOSED PREAMBLE

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation of and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC proposes the repeal of §68.101, concerning Application; §68.102, concerning Definitions; and §68.103, concerning Use and Availability of EVV System, in Texas Administrative Code (TAC), Title 40, Part 1, Chapter 68, Electronic Visit Verification (EVV) System.

BACKGROUND AND PURPOSE

HHSC currently has rules concerning EVV in Titles 1 and 40 of the TAC. The purpose of this proposal is to remove unnecessary or duplicative rules from TAC. The repeal of EVV-related rules in 1 TAC, Chapter 354, Subchapter A and new rules in 1 TAC, Chapter 354, Subchapter O are proposed elsewhere in this issue of the *Texas Register*.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §§68.101 - 68.103 deletes rules that are no longer necessary, because the rules for EVV will be addressed in proposed new Subchapter O in 1 TAC Chapter 354.

FISCAL NOTE

Trey Wood, HHSC Chief Financial Officer, has determined that for each year of the first five years that the rule repeals will be in effect, enforcing or administering the repeals does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rule repeals will be in effect:

(1) the proposed repeals will not create or eliminate a government program;
(2) implementation of the proposed repeals will not affect the number of HHSC employee positions;

(3) implementation of the proposed repeals will result in no assumed change in future legislative appropriations;
(4) the proposed repeals will not affect fees paid to HHSC;
(5) the proposed repeals will not create new rules;
(6) the proposed repeals will repeal existing rules;
(7) the proposed repeals will not change the number of individuals subject to the rules; and
(8) the proposed repeals will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rule repeals do not impose any additional costs on small businesses, micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed rule repeals will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to the rule repeals because the repeals do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Stephanie Stephens, State Medicaid Director, has determined that for each year of the first five years the rules are in effect, the public will benefit from having a consolidated rule base that contains the requirements for EVV.

Trey Wood has also determined that for the first five years the rule repeals are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed repeals because the repeals do not impose any additional costs.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to E. Frechette, Program Specialist, Mail Code W-465, 701 W. 51st Street, Austin, Texas 78751; or by email to Electronic_Visit_Verification@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or

shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 19R025" in the subject line.

STATUTORY AUTHORITY

The rule repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The rule repeals are issued in accordance with §1903(l) of the Social Security Act [42 United States Code §1396b] and implement Texas Government Code §531.024172 and Texas Human Resources Code §161.086.

This agency hereby certifies that this proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

ADDITIONAL INFORMATION

For further information, please call: (512) 438-4809.

Legend:
Single Underline = Proposed new language
[~~Strikethrough and brackets~~] = Current language proposed for deletion
Regular print = Current language
(No change.) = No changes are being considered for the designated subdivision

TITLE 40 SOCIAL SERVICES AND ASSISTANCE
PART 1 DEPARTMENT OF AGING AND DISABILITY SERVICES
~~CHAPTER 68 ELECTRONIC VISIT VERIFICATION (EVV) SYSTEM~~

~~§68.101. Application.~~

~~This chapter applies to the following services:~~

~~(1) in the Community Based Alternatives (CBA) Program: personal assistance services and in-home respite, as described in Appendix C of the CBA Program waiver application (found on the CBA Program page of the Department of Aging and Disability Services (DADS) website);~~

~~(2) in the Community Living Assistance and Support Services (CLASS) Program: skilled nursing services, residential habilitation and in-home respite, as described in Appendix C of the CLASS Program waiver application (found on the CLASS Program page of the DADS website);~~

~~(3) in the Deaf Blind with Multiple Disabilities (DBMD) Program: nursing services, residential habilitation, and in-home respite, as described in Appendix C of the DBMD Program waiver application (found on the DBMD Program page of the DADS website);~~

~~(4) in the Medically Dependent Children Program (MDCP): in-home respite and flexible family support services, as described in Appendix C of the MDCP waiver application (found on the MDCP page of the DADS website); and~~

~~(5) in the Primary Home Care (PHC) Program:~~

~~(A) a community attendant service (CAS), as described in §47.3(3) of this title (relating to Definitions);~~

~~(B) a family care (FC) service, as described in §47.3(11) of this title; and~~

~~(C) a primary home care (PHC) service, as described in §47.3(20) of this title.~~

~~§68.102. Definitions.~~

~~The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:~~

~~(1) CDS option--Consumer directed services option. As defined in §41.103(8) of this title (relating to Definitions), a service delivery option in which a CDS option participant or legally authorized representative employs and retains a service provider and directs the delivery of a program service, including a service described in §68.101 of this chapter (relating to Application).~~

~~(2) CDS option participant--A person who receives a service described in §68.101 of this chapter using the CDS option.~~

~~(3) Contractor--An entity that contracts with DADS to provide a service described in §68.101 of this chapter.~~

~~(4) DADS--The Department of Aging and Disability Services.~~

~~(5) DADS website--The website at www.dads.state.tx.us.~~

~~(6) EVV system--Electronic visit verification system. An electronic visit verification system that:~~

~~(A) allows a service provider to electronically document:~~

~~(i) the service recipient's identity;~~

~~(ii) the service provider's identity;~~

~~(iii) the date and time the service provider begins and ends the delivery of services;~~

~~(iv) the location of service delivery; and~~

~~(v) tasks performed by the service provider; and~~

~~(B) meets other guidelines described on the DADS website.~~

~~(7) FMSA--Financial management services agency. As defined in §41.103(19) of this title, an entity that contracts with DADS to provide financial management services.~~

~~(8) Service provider--A person who provides a service described in §68.101 of this chapter and who is employed or contracted by:~~

~~(A) a contractor; or~~

~~(B) a CDS option participant.~~

~~§68.103. Use and Availability of EVV System.~~

~~(a) DADS may require a contractor, FMSA, or CDS option participant to use an EVV system.~~

~~*(b) A contractor, FMSA, or CDS option participant required to use EVV:*~~

~~*(1) must use an EVV system approved by DADS or certified by the Texas Health and Human Services Commission to document the provision of a service described in §68.101 of this chapter (relating to Application), except under circumstances described in guidelines on the DADS website;*~~

~~*(2) must comply with DADS requirements for documentation of information not documented by an EVV system in the provision of a service described in §68.101 of this chapter; and*~~

~~*(3) must comply with applicable federal and state laws regarding confidentiality of information regarding a person receiving a service described in §68.101 of this chapter.*~~

~~*(c) A contractor or FMSA required to use EVV:*~~

~~*(1) must ensure that documentation that may be generated by an EVV system is available for review in accordance with the contract; and*~~

~~*(2) must provide, upon request and at no charge, a copy of documentation that may be generated by an EVV system to DADS and any other federal or state agency authorized to have access to such documentation.*~~

~~*(d) An FMSA must make an EVV system approved by DADS available to a CDS option participant.*~~

~~*(e) A contractor may use confidential information, including the name and contact information of a person receiving a service described in §68.101 of this chapter from another contractor, only for the authorized purpose for which the confidential information was legally obtained.*~~

~~*(f) A contractor, FMSA, or CDS option participant must, at any time, allow DADS to access an EVV system used by the contractor, FMSA, or CDS option participant.*~~

TITLE	ADMINISTRATION
PART 15	TEXAS HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 354	MEDICAID HEALTH SERVICES
SUBCHAPTER A	PURCHASED HEALTH SERVICES
SUBCHAPTER 0	ELECTRONIC VISIT VERIFICATION

PROPOSED PREAMBLE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes the repeal of §354.1177, concerning Electronic Visit Verification (EVV) System, in Subchapter A, Division 11; and new §354.4001, concerning Purpose and Authority; §354.4003, concerning Definitions; §354.4005, concerning Applicability; §354.4007, concerning EVV System; §354.4009, concerning Requirements for Claims Submission and Approval; §354.4011, concerning Member Rights and Responsibilities; and §354.4013, concerning Additional Requirements, in new Subchapter O, Electronic Visit Verification.

BACKGROUND AND PURPOSE

HHSC currently has rules concerning EVV in Titles 1 and 40 of the Texas Administrative Code (TAC). The purpose of this proposal is to consolidate the EVV rules into one location, implement federal and state requirements for the Texas EVV system, and remove unnecessary or duplicative rules from TAC. The repeals for the EVV-related rules in 40 TAC, Chapter 68, are proposed elsewhere in this issue of the *Texas Register*.

The Texas EVV System began as a state-mandated system and is in the process of changing in compliance with current state law and newly enacted federal law. An EVV system electronically verifies information relating to the delivery of services, such as the type of service provided; the name of the member who received the service; the name of the provider who provided the service; the date the service was provided; and the time the service began and ended. HHSC requires the use of an EVV system to help ensure that members receive services authorized for their care, to ensure accurate Medicaid payments, and to prevent fraud, waste and abuse.

The proposed new rules apply to program providers, Consumer Directed Services (CDS) employers, Financial Management Services Agencies (FMSAs), service providers, members, and managed care organizations (MCOs). The proposed new rules list the services subject to the use of EVV.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §354.1177, Electronic Visit Verification (EVV) System, deletes the rule that is no longer necessary, because the rules for EVV will be addressed in the proposed new Chapter 354, Subchapter O.

Proposed new §354.4001 describes the purpose of the rules in Subchapter O and references the federal and state laws that authorize HHSC to implement the requirements of the rules.

Proposed new §354.4003 provides definitions for terminology used in the subchapter.

Proposed new §354.4005 states that the rules in Subchapter O apply to a program provider, a CDS employer, an FMSA, a service provider, a member, and an MCO unless otherwise specified in the rules. The proposed new rule also lists the services subject to the use of EVV.

Proposed new §354.4007 (1) requires the use of an EVV system by program providers, CDS employers, and FMSAs to electronically document delivery of the services listed in §354.4005; (2) lists data elements that must be included to verify service delivery in order to receive payment for an EVV-relevant claim; and (3) provides mandates related to the accuracy of the data. The rule also addresses mandatory HHSC and MCO access to the EVV system and documentation.

Proposed new §354.4009 outlines the requirements for accurately submitting an EVV-relevant claim for reimbursement and the consequences for non-compliance with the rule. The proposed rule also addresses program provider requirements and requirements for CDS employers and FMSAs.

Proposed new §354.4011 addresses the notices that HHSC and the MCOs must provide relating to compliance with EVV and requires HHSC or the MCO to provide members with notice of their rights and responsibilities regarding EVV.

Proposed new §354.4013 requires that program providers, CDS employers, FMSAs, service providers, members, and MCOs must administer the EVV requirements in an effective, accurate, and efficient manner, in compliance with all state and federal laws, rules, regulations, policies, and guidelines. The proposed rule also addresses compliance with the EVV Policy Handbook, obligations under contract or law regarding documentation requirements, and compliance with applicable federal and state laws regarding confidentiality of a member's information.

FISCAL NOTE

Trey Wood, HHSC Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, there will be an estimated additional cost to state government as a result of enforcing and administering the rules as proposed. The effect on state government for each year of the first five years the proposed rules are in effect is an estimated cost of $2,106,521.06 in Federal Funds (FF) ($2,815,361.41 All Funds (AF)) in state fiscal year (SFY) 2021, $2,127,495.52 FF ($2,843,327.36 AF) in SFY 2022, $2,148,701.32 FF ($2,871,601.76 AF) in SFY 2023, $2,170,061.34 FF ($2,900,081.79 AF) in SFY 2024, and $2,191,652.70 FF ($2,928,870.27 AF) in SFY 2025.

Enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of local government.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

(1) the proposed rules will not create or eliminate a government program;
(2) implementation of the proposed rules will not affect the number of HHSC employee positions;
(3) implementation of the proposed rules will require an increase in future legislative appropriations;
(4) the proposed rules will not affect fees paid to HHSC;
(5) the proposed rules will create new rules;
(6) the proposed rules will repeal an existing rule;
(7) the proposed rules will increase the number of individuals subject to the rules; and
(8) the proposed rules will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be an adverse economic effect on small businesses or micro-businesses. No rural communities are EVV program providers.

The adverse economic effect on small businesses or micro-businesses is the cost to comply with the proposed rules for provider agencies, CDS employers, and FMSAs not currently required to use EVV. The cost to comply may include implementing the use of an EVV system; purchase or management of EVV equipment such as alternative device delivery; the purchase of a mobile device for a service provider; usage of the mobile application on a mobile device; training and educating new members about EVV; compliance monitoring by service providers in all processes required to verify service delivery through the use of EVV; and to ensure all data elements required by HHSC are uploaded or entered completely and accurately into the EVV system before billing for service delivery.

HHSC lacks sufficient data to estimate the number of and economic impact to small businesses or micro-businesses subject to the proposed rules.

HHSC determined that there are no alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities because the proposed rules are required by state and federal law.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the proposed rules are necessary to receive a source of federal funds or comply with federal law.

PUBLIC BENEFIT AND COSTS

Stephanie Stephens, State Medicaid Director, has determined that for each year of the first five years the rules are in effect, the public will benefit from having a consolidated rule base that contains the requirements for EVV. The public will also

benefit from rules intended to ensure (1) members receive authorized services, (2) prevention of fraud, waste, and abuse, and (3) compliance with federal law.

Trey Wood has also determined that for the first five years the rules are in effect, persons who are required to comply with the proposed rules may incur economic costs by implementing the use of an EVV system; delivering EVV equipment to a Medicaid recipient's home such as an alternative device; choosing to purchase a mobile device for a service provider; using the mobile application on a mobile device; training and educating new members about EVV; monitoring compliance of service providers to verify service delivery through the use of EVV; and ensuring all data elements required by HHSC are uploaded or entered completely and accurately into the EVV system before billing for service delivery. HHSC does not have sufficient data to estimate these costs to comply.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to E. Frechette, Program Specialist, Mail Code W-465, 701 W. 51st Street, Austin, Texas 78751; or by email to Electronic_Visit_Verification@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 19R025" in the subject line.

STATUTORY AUTHORITY

The repeal and new sections are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resource Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The repeal and new sections are issued in accordance with §1903(l) of the Social Security Act [42 United States Code §1396b] and implement Texas Government Code §531.024172 and Texas Human Resources Code §161.086.

This agency hereby certifies that this proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

ADDITIONAL INFORMATION

For further information, please call: (512) 438-4809.

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Single Underline = Proposed new language
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TITLE 1 ADMINISTRATION
PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 354 MEDICAID HEALTH SERVICES
SUBCHAPTER A PURCHASED HEALTH SERVICES
DIVISION 11 GENERAL ADMINISTRATION

~~*§354.1177. Electronic Visit Verification (EVV) System.*~~

~~*(a) Definitions. For purposes of this section, the following terms have the following meanings:*~~

~~*(1) DADS--Department of Aging and Disability Services.*~~

~~*(2) Electronic visit verification (EVV) system--A telephone or computer-based system that allows confirmation that services were provided to an eligible recipient according to an approved HHSC prior authorization or DADS Plan of Care.*~~

~~*(3) HHSC--The Texas Health and Human Services Commission or its designee.*~~

~~*(b) EVV system requirements. An EVV system must:*~~

~~*(1) allow for verification and documentation of the delivery of services in the home or in the community and data associated with those services and must require the confirmation of, among other things:*~~

~~*(A) the service recipient's identity;*~~

~~*(B) the health care service provider's identity;*~~

~~*(C) the date and time the health care service provider begins and ends each service delivery visit;*~~

~~*(D) location at which the service is provided; and*~~

~~*(E) any additional requirements as established by HHSC;*~~

~~*(2) support the services requested in the approved HHSC prior authorization or DADS Plan of Care and claims filed for reimbursement;*~~

~~*(3) be certified by HHSC in accordance with subsection (c) of this section; and*~~

~~*(4) satisfy the policy guidelines specified by HHSC.*~~

~~*(c) Certification. HHSC will certify an entity providing EVV services to health care service providers to provide EVV services based on demonstrated ability to comply with minimum standard requirements approved by HHSC.*~~

~~*(d) Services requiring EVV system use. An EVV system must be used for the following attendant and nursing services:*~~

~~*(1) Home Health Skilled Nursing as provided under §354.1039(a)(1) and (2) of this chapter (relating to Home Health Services Benefits and Limitations);*~~

~~*(2) Private Duty Nursing (PDN) as provided under Chapter 363, Subchapter C of this title (relating to Private Duty Nursing Services); and*~~

~~*(3) Personal Care Services (PCS) as provided under Chapter 363, Subchapter F of this title (relating to Personal Care Services).*~~

~~*(e) Provider requirements. A health care service provider that provides the services listed in subsection (d) of this section must:*~~

~~*(1) use an EVV system to document the provision of health care services;*~~

~~*(2) comply with all documentation requirements as defined by HHSC;*~~

~~*(3) comply with applicable federal and state laws regarding confidentiality of information about a person who is receiving services described in this chapter;*~~

~~*(4) ensure that HHSC may review documentation generated by an EVV system or obtain a copy of that documentation at no charge to HHSC; and*~~

~~*(5) at any time, allow HHSC direct access to the EVV system.*~~

~~*(f) Use of provider-based EVV systems. HHSC at its discretion may grandfather a health care service provider's proprietary EVV system into the HHSC EVV program for a specified certification period provided the system meets the following requirements:*~~

~~*(1) demonstrates the ability to meet all standards and requirements set forth in this rule and HHSC policy;*~~

~~*(2) can comply with all necessary data submission, exchange and reporting requirements as outlined in HHSC policy; and*~~

~~*(3) was in place for use prior to June 1, 2014.*~~

~~*(g) Use of EVV data for claims reimbursement.*~~

~~*(1) HHSC will not pay a claim for reimbursement unless the data from the EVV system corresponds with the health care services for which reimbursement is claimed and is consistent with an approved HHSC prior authorization or DADS Plan of Care.*~~

~~*(2) Paid claims may be subject to retrospective review and recoupment, if appropriate.*~~

TITLE 1 ADMINISTRATION
PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 354 MEDICAID HEALTH SERVICES
SUBCHAPTER O ELECTRONIC VISIT VERIFICATION

§354.4001. Purpose and Authority.

(a) The purpose of this subchapter is to implement requirements for the Texas electronic visit verification (EVV) system to electronically verify that services identified in this subchapter, or any other services identified by HHSC, are provided to a member in accordance with a prior authorization or plan of care as applicable to the appropriate program.

(b) The provisions of this subchapter are issued in accordance with the following federal and state laws:

(1) Title XIX, Section 1903(l) of the Social Security Act (42 U.S.C. §1396b);

(2) Texas Government Code §531.024172; and

(3) Texas Human Resource Code §161.086.

§354.4003. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Centers for Medicare & Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services that administers the Medicare and Medicaid programs.
(2) Claims administrator--The entity HHSC has designated to perform functions such as processing certain Medicaid program provider claims, managing the EVV aggregator, and performing EVV vendor management functions.
(3) Community Attendant Services Program--A Medicaid state plan program operating under Title XIX of the Social Security Act, as described in 40 TAC Chapter 47 (relating to Primary Home Care, Community Attendant Services, and Family Care Programs).
(4) Community First Choice (CFC)--A Medicaid state plan option governed by Code of Federal Regulations, Title 42, Part 441, Subpart K, Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice). This includes STAR members who receive these services through the traditional Medicaid service model also referred to as fee-for-service. CFC services include:
(A) Community First Choice Habilitation (CFC HAB), a Medicaid state plan service that provides habilitation through CFC;
(B) Community First Choice Personal Assistance Services (CFC PAS), a Medicaid state plan service that provides personal assistance services through CFC; and

(C) Community First Choice Personal Assistance Services/Habilitation (CFC PAS/HAB), a Medicaid state plan service provided through CFC that provides both personal assistance services and habilitation combined into one service.

(5) Community Living Assistance and Support Services (CLASS) Program--The Medicaid waiver program approved by CMS under Title XIX, Section 1915(c) of the Social Security Act, as described in 40 TAC Chapter 45 (relating to Community Living Assistance and Support Services and Community First Choice (CFC) Services).

(6) Consumer Directed Services (CDS) employer--A member or legally authorized representative (LAR) who chooses to participate in the CDS option. A CDS employer, the member or LAR, is responsible for hiring and retaining a service provider who delivers a service described in §354.4005 of this subchapter (relating to Applicability).

(7) Consumer Directed Services option (CDS option)--A service delivery option in which a member or LAR employs and retains a service provider and directs the delivery of a service described in §354.4005 of this subchapter.

(8) Deaf Blind with Multiple Disabilities (DBMD) Program--The Medicaid waiver program approved by CMS under Title XIX, Section 1915(c) of the Social Security Act, as described in 40 TAC Chapter 42 (relating to Deaf Blind with Multiple Disabilities (DBMD) Program and Community First Choice (CFC) Services).

(9) Electronic visit verification (EVV)--The documentation and verification of service delivery through an EVV system.

(10) EVV aggregator--A centralized database that collects, validates, and stores statewide EVV visit data transmitted by an EVV system.

(11) EVV Policy Handbook--The HHSC handbook that provides EVV standards and policy requirements.

(12) EVV proprietary system--An HHSC-approved EVV system that a program provider or financial management services agency (FMSA) may opt to use instead of an EVV vendor system that:

(A) is purchased or developed by a program provider or an FMSA;

(B) is used to exchange EVV information with HHSC or a managed care organization (MCO); and

(C) complies with the requirements of Texas Government Code §531.024172 or its successors.

(13) EVV system--An EVV vendor system or an EVV proprietary system used to electronically document and verify the data elements described in §354.4007 of this subchapter (relating to EVV System) for a visit conducted to provide a service described in §354.4005 of this subchapter.

(14) EVV vendor system--An EVV system provided by an EVV vendor selected by the claims administrator, on behalf of HHSC that a program provider or FMSA may opt to use instead of an EVV proprietary system.

(15) EVV visit transaction--A data record generated by an EVV system that contains the data elements described in §354.4007 of this subchapter for a visit conducted to provide a service described in §354.4005 of this subchapter.

(16) Family Care (FC) Program--A program funded under Title XX, Subtitle A of the Social Security Act, as described in 40 TAC Chapter 47.

(17) Financial Management Services Agency (FMSA)--An entity that contracts with HHSC or an MCO to provide financial management services to a CDS employer as described in 40, TAC Chapter 41 (relating to Consumer Directed Services Option).

(18) HHSC--Texas Health and Human Services Commission.

(19) Home and Community-Based Services (HCBS) Adult Mental Health Program--A Medicaid state plan option approved by CMS under Title XIX, Section 1915(i) of the Social Security Act, as described in 26 TAC Chapter 307, Subchapter B (relating to Home and Community-Based Services--Adult Mental Health Program).

(20) Home and Community-based Services (HCS) Program--A Medicaid waiver program approved by CMS under Title XIX, Section 1915(c) of the Social Security Act, as described in 40 TAC Chapter 9, Subchapter D (relating to Home and Community-based Services (HCS) Program and Community First Choice (CFC)).

(21) Managed care organization (MCO)--Has the meaning set forth in Texas Government Code §536.001.

(22) Medically Dependent Children Program (MDCP)--A Medicaid waiver program approved by CMS under Title XIX, Section 1915(c) of the Social Security Act, as described in Chapter 353, Subchapter M of this title (relating to Home and Community Based Services in Managed Care).

(23) Medically Dependent Children Program STAR Health (MDCP STAR Health) covered service--A service provided to a member eligible to receive MDCP benefits under the STAR Health Program.

(24) Medically Dependent Children Program STAR Kids (MDCP STAR Kids) covered service --A service provided to a member eligible to receive MDCP benefits under the STAR Kids Program.

(25) Member--A person eligible to receive a service described in §354.4005 of this subchapter.

(26) Primary Home Care Program--A Medicaid state plan program operating under Title XIX of the Social Security Act, as described in 40 TAC Chapter 47.

(27) Program provider--An entity that contracts with HHSC or an MCO to provide a service described in §354.4005 of this subchapter.

(28) Reason code--A standardized HHSC-approved code entered into an EVV system to explain the specific reason a change was made to an EVV visit transaction.

(29) Service provider--A person who provides a service described in §354.4005 of this subchapter and who is employed or contracted by:

(A) a program provider;

(B) a CDS employer; or

(C) a member who has selected the service responsibility option (SRO).

(30) Service responsibility option (SRO)--A service delivery option in which a member or LAR selects, trains, and provides daily management of a service provider, while the fiscal, personnel, and service back-up plan responsibilities remain with the program provider.

(31) STAR--State of Texas Access Reform.

(32) STAR Program--A Medicaid program operating under Title XIX, Section 1115 of the Social Security Act. The program provides services through a managed care delivery model to a member enrolled in STAR as described in Chapter 353, Subchapter I of this title (relating to STAR).

(33) STAR Health Program--The Medicaid program operating under Title XIX, Section 1915(a) of the Social Security Act and Texas Family Code, Chapter 266. The program provides services through a managed care delivery model to a member enrolled in STAR Health as described in Chapter 353, Subchapter H of this title (relating to STAR Health).

(34) STAR Kids Program--The Medicaid program operating under Title XIX, Section 1115 of the Social Security Act and Texas Government Code, Chapter 533.

The program provides services through a managed care delivery model to a member enrolled in STAR Kids as described in Chapter 353, Subchapter N of this title (relating to STAR Kids).

(35) STAR+PLUS Home and Community-Based Services Program (STAR+PLUS HCBS Program)--A Medicaid program operating through a federal waiver under Title XIX, Section 1115 of the Social Security Act. The program provides services to a member eligible to receive HCBS benefits under the STAR+PLUS Program, as described in Chapter 353, Subchapter M of this title (relating to Home and Community Based Services in Managed Care).

(36) STAR+PLUS Medicare-Medicaid Plan (STAR+PLUS MMP)--A managed care program operating under Title XIX, Section 1115A of the Social Security Act that provides the authority to test and evaluate a fully integrated care model for clients who are dual eligible. The STAR+PLUS MMPs are contracted with CMS and HHSC to participate in the Dual Demonstration Program described in Chapter 353, Subchapter L of this title (relating to Texas Dual Eligibles Integrated Care Demonstration Project).

(37) STAR+PLUS Program--A Medicaid program operating under Title XIX, Section 1115 of the Social Security Act, and Texas Government Code, Chapter 533. The program provides services through a managed care delivery model to a member enrolled in STAR+PLUS as described in Chapter 353, Subchapter G of this title (relating to STAR+PLUS).

(38) TAC--Texas Administrative Code.

(39) Texas Health Steps Comprehensive Care Program--A Medicaid comprehensive program approved by CMS under Title XIX, Section 1905 of the Social Security Act, as described in Chapter 363, Subchapter F of this title (relating to Personal Care Services). This includes STAR members who receive these services through the traditional Medicaid service model also referred to as fee-for-service.

(40) Texas Home Living (TxHmL) Program--A Medicaid waiver program approved by CMS under Title XIX, Section 1915(c) of the Social Security Act, as described in 40 TAC Chapter 9, Subchapter N (relating to Texas Home Living (TxHmL) Program and Community First Choice (CFC)).

(41) Youth Empowerment Services Program--A Medicaid waiver approved by CMS under Title XIX, Section 1915(c) of the Social Security Act as described in 26 TAC Chapter 307, Subchapter A (relating to Youth Empowerment Services (YES)).

§354.4005. Applicability.

(a) Entities subject to this subchapter. The requirements in this subchapter apply to a program provider, a consumer directed services (CDS) employer, a financial management services agency (FMSA), a service provider, a member, and a managed care organization (MCO) unless otherwise specified in the text.

(b) Services subject to this subchapter. The use of electronic visit verification (EVV) is required for all service delivery options for the following services:

(1) personal attendant services provided in the Community Attendant Services Program;

(2) personal attendant services provided in the Family Care Program;

(3) personal attendant services provided in the Primary Home Care Program;

(4) Community First Choice (CFC) services delivered through the traditional Medicaid service model also referred to as fee-for-service:

(A) Community First Choice Personal Assistance Services (CFC PAS); and

(B) Community First Choice Habilitation (CFC HAB);

(5) personal care services (PCS) provided under the Texas Health Steps Comprehensive Care Program;
(6) Community Living Assistance and Support Services Program services:
(A) CFC PAS/HAB; and
(B) in-home respite;
(7) Deaf Blind with Multiple Disabilities Program services:
(A) CFC PAS/HAB; and
(B) in-home respite;
(8) Home and Community-Based Services (HCBS) Adult Mental Health Program services:
(A) supported home living - habilitative support; and
(B) in-home respite;
(9) Home and Community-based Services Program services:
(A) CFC PAS/HAB;
(B) respite provided in a member's residence; and
(C) day habilitation provided in a member's residence;
(10) State of Texas Access Reform (STAR) Health Program services:
(A) CFC PAS;
(B) CFC HAB;
(C) PCS; and
(D) Medically Dependent Children Program (MDCP) STAR Health covered service:
(i) in-home respite; and
(ii) flexible family support;
(11) STAR Kids Program services:
(A) CFC PAS;
(B) CFC HAB;
(C) PCS; and
(D) MDCP STAR Kids covered service:
(i) in-home respite care; and
(ii) flexible family support;
(12) STAR+PLUS Program services:
(A) personal assistance services;
(B) CFC PAS; and
(C) CFC HAB;
(13) STAR+PLUS HCBS Program services:
(A) in-home respite care;
(B) protective supervision;
(C) personal assistance services;
(D) CFC PAS; and
(E) CFC HAB;
(14) STAR+PLUS Medicare-Medicaid Plan services:
(A) in-home respite care;
(B) protective supervision;
(C) personal assistance services;
(D) CFC PAS; and
(E) CFC HAB;
(15) Texas Home Living Program services:
(A) CFC PAS/HAB;
(B) respite provided in a member's residence; and
(C) day habilitation provided in a member's residence;

(16) in-home respite provided in the Youth Empowerment Services Program; and

(17) any other service required by federal or state mandates.

§354.4007. EVV System.

(a) Use of an EVV System.

(1) A program provider, consumer directed services (CDS) employer, and financial management services agency (FMSA) must ensure an electronic visit verification (EVV) vendor system or an HHSC-approved EVV proprietary system is used to electronically document the delivery of a service described in §354.4005 of this subchapter (relating to Applicability).

(2) A program provider, CDS employer, and FMSA must:

(A) ensure that each EVV visit transaction contains the following data elements, including identifying information, as required by HHSC, for:

(i) the type of service provided;

(ii) the name of the member who received the service;

(iii) the name of the service provider who provided the service;
(iv) the date of the service;

(v) the time the service began and ended;

(vi) the location, including the address, at which the service was provided; and

(vii) other information HHSC determines necessary to ensure the accurate payment of a claim for services, as described in the EVV Policy Handbook;

(B) ensure the accuracy of the data elements on each EVV visit transaction; and

(C) comply with all HHSC requirements for correcting or noting an inaccurate data element.

(b) Access to an EVV System.

(1) A program provider must allow HHSC or a managed care organization (MCO), with which they contract, immediate, direct, on-site access to the EVV system the program provider uses.

(2) An FMSA must allow HHSC or an MCO with whom the member is enrolled and with whom the FMSA contracts, immediate, direct, on-site access to the EVV system the FMSA uses.

(c) Access to Documentation.

(1) A program provider and an FMSA must ensure that HHSC can review EVV system documentation or obtain a copy of that documentation at no charge to HHSC.

(2) A program provider and an FMSA must ensure an MCO, with which a claim for payment for a service is filed, can review EVV system documentation related to the claim or obtain a copy of that documentation at no charge to the MCO.

§354.4009. Requirements for Claims Submission and Approval.

(a) For a service described in §354.4005 of this subchapter (relating to Applicability), a program provider must:

(1) ensure a service provider accurately documents the service using an electronic visit verification (EVV) system;

(2) ensure that the EVV visit transaction is transmitted and accepted into the EVV aggregator;

(3) submit claims in accordance with:

(A) HHSC's rules;

(B) the EVV Policy Handbook;

(C) managed care organization (MCO) billing requirements, as applicable; and

(D) all other applicable HHSC billing requirements; and

(4) ensure the EVV visit transaction matches the claim submitted to HHSC or the MCO, as described in the EVV Policy Handbook.

(b) For a service described in §354.4005 of this subchapter, a financial management services agency (FMSA) and consumer directed services (CDS) employer must comply with the following requirements:

(1) a CDS employer must ensure a service provider accurately documents the service using an EVV system as described in the EVV Policy Handbook; and

(2) an FMSA must:

(A) ensure that the EVV visit transaction is transmitted and accepted into the EVV aggregator;

(B) submit claims in accordance with:

(i) HHSC's rules;

(ii) the EVV Policy Handbook;

(iii) MCO billing requirements, as applicable; and

(iv) all other applicable HHSC program billing requirements; and

(C) ensure the EVV visit transaction matches the claim submitted to HHSC or the MCO as described in the EVV Policy Handbook.

(c) Failure to comply with the requirements in this section may result in claim denial or recoupment.

§354.4011. Member Rights and Responsibilities.

(a) Notice by HHSC. Under the traditional Medicaid service model, HHSC must inform each member who receives a service described in §354.4005 of this subchapter (relating to Applicability) that the program provider, service provider, and member are required to comply with electronic visit verification (EVV) requirements.

(b) Notice by a managed care organization (MCO). Under the managed care delivery system, an MCO must inform each member who receives a service described in §354.4005 of this subchapter that the program provider, service provider, and member are required to comply with EVV requirements.

(c) Member Rights and Responsibilities. HHSC or an MCO, as applicable, must

inform each member of the member's rights and responsibilities regarding EVV.

§354.4013. Additional Requirements.

(a) A program provider, a consumer directed services (CDS) employer, a financial management services agency (FMSA), a service provider, a member, and a managed care organization (MCO) must administer the requirements of this subchapter in an effective, accurate, and efficient manner, in compliance with all applicable state and federal laws, rules, regulations, policies, and guidelines; including the HHSC electronic visit verification (EVV) requirements in the EVV Policy Handbook.

(b) The provisions of this subchapter do not relieve a program provider, CDS employer, an FMSA, a service provider, a member, or an MCO from other obligations under contract, law, or rule related to documentation requirements and compliance with applicable federal and state laws related to confidentiality of a member's information, including the requirements of the Health Insurance Portability Accountability Act of 1966, 42 U.S.C. §1320d, et. seq., and regulations adopted under that act (45 CFR Parts 160 and 164).