



TO: Medical Care Advisory Committee

DATE: May 12, 2022

FROM: James Ramirez, Director, Major Procurements Office

SUBJECT: Certification of Managed Care Organizations Prior to Contract Award

Agenda Item No.: #6aii

Amendments to: Proposed new §353.8 Certification of Managed Care Organizations Prior to Contract Award, in the Texas Administrative Code, Title 1, Part 15, Chapter 353, Subchapter A

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

The proposal implements Texas Government Code, §533.0035, added by Senate Bill 1244, 87th Legislature, Regular Session, 2021.

The proposed new rule sets out the process HHSC will use to determine whether contract to a managed care organization (MCO) satisfies the certification requirements under Texas Government Code, Section 533.0035. The proposed new rule sets forth that HHSC does not award a contract to an MCO that does not receive certification and sets forth an appeal process for an MCO to appeal a denial of certification by HHSC.

Proposed new §353.8(b) sets forth that HHSC will certify an MCO following the evaluation of proposals submitted in response to a solicitation. The certification does not impact the MCO's final score, but failure to obtain certification results in no further consideration of the MCO for the contract award. Proposed new §353.8(c) sets forth that in its certification determination, HHSC may review the material submitted by the MCO in response to the solicitation; materials related to the MCO's past performance in any state, including materials required to be monitored by a state's managed care program under 42 Code of Federal Regulations §438.66(c); and any additional information and assurances requested by HHSC from the MCO for purposes of the certification.

Proposed new §353.8(d) sets forth that HHSC provides notice of approval or denial of certification by electronic mail to the MCO and that a notice of denial sets forth the reasons for the denial of certification. Section 353.8(d) also provides that an MCO that is denied certification may appeal the denial by submitting an appeal to the solicitation's sole point of contact no later than 10 business days after the date HHSC transmits the notice of denial of certification.

Proposed new §353.8(e) sets forth that the MCO's appeal must specifically address the reasons for the denial of the certification as stated in the denial notice and precisely state the argument, authorities, and evidence the MCO offers in support of

its appeal. Proposed new §353.8(f) sets forth how HHSC resolves an appeal by dismissing the appeal as untimely, upholding the denial of certification, or reversing the denial of certification and certifying the MCO. Proposed new §353.8(g) sets forth that after the expiration of the appeal period and the resolution of any pending appeals, MCOs that obtained the required certification will proceed to the next phase of the contract award process.

Proposed new §353.8(h) sets forth that HHSC's determination not to certify an MCO is not a contested case proceeding under the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001.

ISSUES AND ALTERNATIVES:

HHSC anticipates that some MCOs may respond positively because the proposed new rule may ensure that all MCOs are treated equally by having a standardized certification process without adding a substantive burden on MCOs. Some MCOs may not respond positively because the certification process adds additional steps in the procurement process and may require an MCO to appeal a denial of certification.

STAKEHOLDER INVOLVEMENT:

To make the proposed rule effective as early as possible, HHSC submitted the proposed rule for publication in the *Texas Register* before presenting the rule to the Medical Care Advisory Committee (MCAC) on May 12, 2022, and to the HHSC Executive Council on May 19, 2022.

HHSC will consider any comments received during the public comment period and during the MCAC and HHSC Executive Council meetings.

FISCAL IMPACT:

None

RULE DEVELOPMENT SCHEDULE:

May 2022	Publish proposed rule in <i>Texas Register</i>
May 12, 2022	Present to Medical Care Advisory Committee
May 19, 2022	Present to HHSC Executive Council
July 2022	Publish adopted rule in <i>Texas Register</i>
July 2022	Effective date

REQUESTED ACTION: (Check appropriate box)

The MCAC recommends approval of the proposed rule for publication.

Information Only

TITLE 1 ADMINISTRATION
PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 353 MEDICAID MANAGED CARE
SUBCHAPTER A GENERAL PROVISIONS

PROPOSED PREAMBLE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §353.8, concerning Certification of Managed Care Organizations Prior to Contract Awards.

BACKGROUND AND PURPOSE

The proposal implements Texas Government Code, §533.0035, added by Senate Bill 1244, 87th Legislature, Regular Session, 2021.

The proposed new rule sets out the process HHSC will use to determine whether a managed care organization (MCO) satisfies the certification requirements under Texas Government Code, §533.0035. The proposed new rule sets forth that HHSC does not award a contract to an MCO that does not receive certification and sets forth an appeal process for an MCO to appeal a denial of certification by HHSC.

Proposed new §353.8(b) sets forth that HHSC will certify an MCO following the evaluation of proposals submitted in response to a solicitation. The certification does not impact the MCO's final score, but failure to obtain certification results in no further consideration of the MCO for the contract award.

Proposed new §353.8(c) sets forth that in its certification determination, HHSC may review the material submitted by the MCO in response to the solicitation; materials related to the MCO's past performance in any state, including materials required to be monitored by a state's managed care program under 42 Code of Federal Regulations §438.66(c); and any additional information and assurances requested by HHSC from the MCO for purposes of the certification determination.

The proposed new §353.8(d) sets forth that HHSC provides notice of approval or denial of certification by electronic mail to the MCO and that a notice of denial sets forth the reasons for the denial of certification. Proposed new §353.8(d) also provides that an MCO that is denied certification may appeal the denial by submitting an appeal to the solicitation's sole point of contact no later than 10 business days after the date HHSC transmits the notice of denial of certification.

Proposed new §353.8(e) sets forth that the MCO's appeal must specifically address the reasons for the denial of the certification as stated in the denial notice and precisely state the argument, authorities, and evidence the MCO offers in support of its appeal.

Proposed new §353.8(f) sets forth how HHSC resolves an appeal by dismissing the appeal as untimely, upholding the denial of certification, or reversing the denial of certification and certifying the MCO.

Proposed new §353.8(g) sets forth that after the expiration of the appeal period and the resolution of any pending appeals, MCOs that obtained the required certification will proceed to the next phase of the contract award process.

Proposed new §353.8(h) sets forth that HHSC's determination not to certify an MCO is not a contested case proceeding under the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001.

FISCAL NOTE

Trey Wood, HHSC Chief Financial Officer, has also determined that for each year of the first five years that the rule will be in effect, enforcing or administering the rule 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 will be in effect:

- (1) the proposed rule will not create or eliminate a government program;
- (2) implementation of the proposed rule will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;
- (4) the proposed rule will not affect fees paid to HHSC;
- (5) the proposed rule will create a new rule;
- (6) the proposed rule will expand an existing rule;
- (7) the proposed rule will not increase the number of individuals subject to the rule; and
- (8) the proposed rule 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 applies to health care MCOs, none of which are classified as small businesses, micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed rule will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule is necessary to implement legislation that does not specifically state that §2001.0045 applies to the rule.

PUBLIC BENEFIT AND COSTS

Stephanie Stephens, State Medicaid Director, has determined that for each year of the first five years the rule is in effect, individuals receiving services under managed care will benefit from having a rule that ensures potential MCO contract awardees are able to fulfill the terms of the contract to successfully provide the managed care services for which the awardee is chosen.

Trey Wood has also determined that for the first five years the rule is in effect, persons who are required to comply with the proposed rule may incur economic costs because the rule may require a health care MCO to alter its business practices. The proposal allows an MCO to appeal the denial of certification and may require an MCO to provide additional information and assurances to HHSC for purposes of the certification determination. However, HHSC does not have sufficient information to determine the cost 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 Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 701 W. 51st Street, Austin, Texas 78751; or emailed to HHSCRulesCoordinationOffice@hhs.texas.gov.

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 22R049" in the subject line.

STATUTORY AUTHORITY

The new section is 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 agencies, and §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority.

The new section implements Texas Government Code §533.0035.

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) 487-3373.

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 1 ADMINISTRATION
PART 15 TEXAS HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 353 MEDICAID MANAGED CARE
SUBCHAPTER A GENERAL PROVISIONS

§353.8. Certification of Managed Care Organizations Prior to Contract Awards.

(a) As provided by §533.0035 of the Texas Government Code, the Texas Health and Human Services Commission (HHSC) awards a contract under Chapter 533 of the Texas Government Code to a managed care organization (MCO) only if the MCO has been certified by HHSC as reasonably able to fulfill the terms of the contract, including all requirements of applicable federal and state law.

(b) HHSC determines whether to certify an MCO following the evaluation of the proposals submitted in response to a solicitation. Certification and the certification determination process described in this section do not impact an MCO's final score in the evaluation, but failure to obtain certification results in no further consideration of the MCO for the contract award.

(c) In its certification determination, HHSC may review:

(1) materials submitted by the MCO in response to the solicitation;

(2) materials related to the MCO's past performance in any state, including materials required to be monitored by a state's managed care program under 42 C.F.R. §438.66(c); and

(3) any additional information and assurances requested by HHSC from the MCO for purposes of the certification determination.

(d) HHSC provides notice of approval or denial of certification by electronic mail to an MCO. A notice of denial sets forth the reasons for the denial of certification. If an MCO is denied certification, the MCO may appeal the denial by submitting an appeal to the solicitation's sole point of contact no later than 10 business days after the date HHSC transmits the notice of denial of certification.

(e) An appeal must specifically address the reasons for the denial of the certification as stated in the notice of denial and precisely state the argument, authorities, and evidence the MCO offers in support of its appeal.

(f) To resolve an appeal, HHSC:

(1) dismisses the appeal as untimely;

(2) upholds the denial of certification; or

(3) reverses the denial of certification and certifies the MCO as reasonably able to fulfill the terms of the contract, including all requirements of applicable federal and state law.

(g) After the expiration of the appeal period and the resolution of any pending appeals, MCOs that obtained the required certification will proceed to the next phase of the contract award process.

(h) HHSC's determination whether to certify that an MCO is reasonably able to fulfill the terms of a contract is not a contested case proceeding under the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001.