

Comment: Several commenters asked us to clarify whether a State must contract with an EQRO in order to fulfill its EQR obligations under these regulations, and specifically whether it would fail to fulfill its obligation under the law if it contracts with an entity not qualified to be an EQRO.

Response: To fulfill its obligations under this regulation, a State must contract with an EQRO to conduct an analysis and evaluation of the aggregated information produced from, at a minimum, the mandatory EQR-related activities and produce the EQR results as required under § 438.364. In response to this comment, we have made clarifying changes to § 438.370 to better explain for what activities and functions States can obtain a 75 percent, or 50 percent match. That is, States can obtain the 75 percent enhanced match for EQR (the analysis and evaluation of information produced from EQR-related activities), EQR-related activities, and the production of EQR results as long as these functions and activities are conducted by an EQRO. States can obtain the 50 percent match for EQR-related activities conducted by entities not qualified as EQROs. However, States must contract with an EQRO that meets the requirements of § 438.354 to perform the EQR function of analyzing and evaluating the aggregate information from EQR-related activities. If a State did not so contract, it would be out of compliance with the requirement in section 1932(c)(2) of the Act for EQR.

Comment: One commenter asked whether the enhanced FFP is available for the optional activities a State may include in an EQR. Another commenter supported the enhanced FFP rates provided for in the Act.

Response: The enhanced FFP is available for the optional EQR activities as long as they are conducted by an EQRO that meets the requirements of § 438.354 using the appropriate CMS protocol or a consistent protocol.

Comment: One commenter requested clarification as to whether the upper payment limit (UPL) can be adjusted to take into account administrative expenses and if not, whether States will be able to request waivers of the UPL to reflect these additional expenses.

Response: The Medicaid managed care final regulation replaced the UPL requirements at § 447.361 with new rate setting rules (§ 438.6) by incorporating and expanding requirements for actuarial soundness. These new requirements recognize administrative costs and allow for States to adjust capitation rates to reflect MCO and PIHP administrative costs.

Comment: One commenter recommended that we revise § 438.370 to require States to appropriate a portion of the enhanced FFP to cover each MCO's administrative cost associated with meeting this EQR requirement.

Response: We believe that the statute does not permit States to use the enhanced funds to pay for MCO and PIHP administrative costs associated with EQR. The 75 percent enhanced match is only available for costs incurred by States for contracting with an EQRO. However, as noted above, with the elimination of the UPL, States now reflect administrative costs in capitation payments to MCOs and PIHPs.

Comment: One commenter asked us to clarify whether validation activities are reimbursable at the 75 percent enhanced FFP rate for EQR activities.

Response: The following validation activities are reimbursable at the 75 percent enhanced match as long as they are conducted by an EQRO that meets the requirements of § 438.354 and the EQRO uses protocols developed by us, or protocols consistent with our protocols: validation of performance measures, validation of performance improvement projects, validation of consumer or provider surveys, and validation of encounter data.

L. Miscellaneous Comments on the Preamble of the December 1, 1999 Proposed Rule

We noted in the preamble to the proposed rule that we followed two principles in its development: first, to provide flexibility to State agencies; and second, to reflect well-accepted advances in the methods of quality measurement and improvement.

The proposed rule also acknowledged that in a separate rule published in 1998, we had proposed to eliminate the requirements in § 434.53 that States have a system of periodic medical audits.

The proposed rule included a proposed effective date of 60 days following publication with provisions that must be implemented through contracts with EQROs to be effective with contracts entered into or revised on or after 60 days, but no longer than 12 months from the effective date. We received the following comments relating to the above issues.

Comment: Several commenters expressed support for the approach taken in the proposed rule in providing flexibility for States, and asked us to retain mechanisms States already have in place for EQR. Several commenters, however, found that the proposed rule did not afford States the flexibility and

discretion afforded by the BBA. One commenter argued that States that demonstrate that their quality improvement processes meet or exceed the goals of these regulations should be permitted to continue with current arrangements. The commenter further contended that section 1932(c)(1)(B) of the Act, which requires that the Secretary's standards not preempt any State standards that are more stringent than those in the proposed rule, supports their position.

Response: Section 1932(c)(1)(B) of the Act refers to the quality assessment and improvement strategy that States are required to develop and implement. The components of this strategy were set forth in the Medicaid managed care final rule published on June 14, 2002. The EQR requirement is one component of this overall State strategy. We agree that the statute allows States to exceed the requirements of the quality assessment and improvement strategy as outlined in the Medicaid managed care final rule. However, the BBA also required the Secretary to undertake the activities set forth in this rule; that is, establish a method for identifying qualified entities to conduct EQR, develop protocols to be used for EQR, and otherwise implement the EQR provisions of the BBA. States will continue to have the flexibility to exceed the requirements included in this rule and conduct optional EQRO-related activities.

Comment: Several commenters asked us to explain how QISMC, the final Medicaid rules, and the EQR compose a cohesive vision and how States should integrate the proposed rule into other quality assessment and performance improvement activities. One of the commenters believed that the proposed rule appeared to set a standard for an overall evaluation rather than a specific external review study. Since QISMC sets overall standards, the commenter believed that a nonduplicative connection to QISMC was important. The second commenter asked us to clarify how the EQR regulations will fit in with current and pending State requirements.

Response: This final rule, as did the proposed rule, provides for an overall evaluation by an EQRO of the MCO's or PIHP's ability to provide timely and quality services to Medicaid beneficiaries as required by section 1932(c)(2) of the Act. The mandatory EQR activities are based on standards and activities that States must have in place under subpart D of the Medicaid managed care final rule.

Key elements of the QISMC document were incorporated into the Medicaid