



Protocols®

The Medicare Secondary Payer Act: Medicare Set-aside Legal Reference Sheet

	Commutation ("Full Funding")	Compromise (With Funds for Future Medical)	Compromise (Past Medical Only)	Waiver
Statutory Basis	42 U.S.C.1395y(b)(2)	42 U.S.C. 1395y(b)(2)	42 U.S.C. 1395y(b)(2)	42 U.S.C. 1395y(b)(2)(B)(5)
Regulation	42 C.F.R. 411.46(a); <i>See Note 1</i>	42 C.F.R. 411.46(b)-(d); 42 C.F.R. 411.47	42 C.F.R. 411.46(b)-(d); 42 C.F.R. 411.47	None; <i>See Note 2</i>
Basic Legal Requirement	Reasonable medical cost projection	Reasonable Allocation	No allocation if for past medical only	CMS must agree to a waiver in writing
Available CMS Review?	Yes; <i>See Note 1</i>	No	No	Yes
Medical Cost Projection?	Recommended	Recommended	Often Not Necessary	Recommended
Administrative Appeal Rights?	Yes; but very limited	None	None	None; waivers are voluntary by CMS
Federal Court Appeal Rights?	Yes; in 10th Circuit, Likely elsewhere	Yes	Yes; (Administrative rules may apply)	Maybe; Waivers permissive

Note 1: There is no defined legal standard concerning how medical projections are completed. CMS utilizes certain rules when it reviews projections. The effect of these rules is an inflation of the projections due to CMS re-pricing or including procedures not otherwise part of the settlement. Prior to 2001, if the parties to a settlement negotiated a settlement that included x, y and z for future care, that was the care that was accepted by Medicare as the "Medicare set-aside" as long as the parties did not act in concert to purposely settle for less than full value. Legal issues with CMS requiring additional care are: (1) it may exceed the statutory authority given to CMS under the Medicare Secondary Payer Act; (2) it fails to recognize the reasonableness of the projection (or recognize state law) and; (3) it shifts the burden on the submitter to show the projections as reasonable instead of Medicare showing an illegal cost shift.

Note 2: Technically, waivers are authorized for conditional payment reimbursement (liens) and not the MSA requirements. CMS, in practice, is granting waivers for certain settlements concerning the MSA requirements.

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