DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICAID & CHIP SERVICES

JAN 3 0 2020

Ms. Mari Cantwell
Chief Deputy Director
Health Care Programs
California Department of Health Care Services
P.O. Box 997413
MS 0000
Sacramento, California 95899

Dear Ms. Cantwell:

This is in response to your request for a waiver of the broad-based and uniformity requirements in connection with a proposed tax on managed care organizations. The proposed tax would be imposed on a per member month basis at a rate that varies according to ranges of the cumulative number of member months covered by the managed care organization for the state fiscal year (SFY), whether the member months are paid by Medicaid or a non-Medicaid payer, and by SFY. The rates also vary from each year. The variable rate structure effectively exempts from taxation all 12 managed care organizations that do not have Medicaid member months and results in a tax liability for all managed care organizations that do have Medicaid member months. Upon careful review and consideration of the information provided by the State of California, I regret to inform you that CMS is unable to approve your request for waiver of the broad-based and uniformity requirements.

The state included with its waiver request a demonstration that appears to meet the statistical linear regression test in 42 CFR 433.68(e)(2) necessary to obtain a waiver for non-uniform taxes. However, 42 CFR 433.72(b)(3) states that for CMS to approve a waiver request the state must also demonstrate that tax program does not contain a hold harmless provision specified in 42 CFR 433.68(f).

42 CFR 433.68(f)(2) and (3), which implement sections 1903(w)(4)(B) and (C) of the Social Security Act (the Act), specify that there is in effect a hold harmless provision if either of the following applies:

- All or any portion of the Medicaid payment to the taxpayer varies based only on the tax amount, including where Medicaid payment is conditional on receipt of the tax amount.
- The State (or other unit of government) imposing the tax provides for any direct or indirect payment, offset, or waiver such that the provision of that payment, offset, or waiver directly or indirectly guarantees to hold taxpayers harmless for all or any portion of the tax amount.

The Medicaid statute governing health care-related taxes is designed to permit health care-related taxes only to the extent that they are not connected to the receipt, or non-receipt, of Medicaid payments. As proposed, California would effectively exempt from taxation all managed care organizations that do not have Medicaid member months. Such managed care organizations provide for the delivery of health benefits and additional services through contracted arrangements without expecting or accepting any Medicaid payments. The proposed tax structure means that there is a correlation between the Medicaid payment and the tax liability; if the managed care organizations receive a Medicaid payment, they incur tax liability. Conversely, if they do not receive Medicaid payments, they do not incur a tax liability. The exclusion of non-Medicaid participating managed care organizations also can be viewed as recognition that the tax on other managed care organizations that do participate in Medicaid is designed to be returned to those facilities through Medicaid payments. Therefore, because the proposed tax appears to involve a hold harmless arrangement, CMS is unable to approve the requested waiver.

Should the state collect the tax as proposed, section 1903(w)(1)(A)(ii) of the Act and 42 CFR 433.70 require that CMS deduct from the state's Medicaid expenditures claimed on the Form CMS-64, prior to calculating federal financial participation (FFP), the total amount of tax revenue collected.

If you have any questions or wish to discuss further, please contact Mr. Fran McCullough at francis.mccullough@cms.hhs.gov.

Sincerely,

Original Signed By

Calder Lynch

Acting Deputy Administrator and Director