



January 15, 2021

DISALLOWANCE CA/2021/001/MAP

Ms. Jacey Cooper
Chief Deputy Director, Health Care Programs
State of California, Department of Health Care Services
Director's Office, MS 0000
Sacramento, CA 95899-7413

Dear Ms. Cooper:

This letter serves as notice of a disallowance in the amount of \$200,000,000 Federal Financial Participation ("FFP") due to California's violation of the Weldon Amendment.¹ On January 24, 2020, the U.S. Department of Health & Human Services' ("HHS" or the "Department") Office for Civil Rights ("OCR") notified the State of California that it had violated the Weldon Amendment by mandating that all health care plans subject to regulation by the California Department of Managed Health Care ("DMHC") cover abortion without exclusion or limitation.² You were provided 30 days to come into compliance or face further appropriate action,³ but have not come into compliance.⁴

The Weldon Amendment protects "institutional or individual health care entit[ies]" from "discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."⁵ The definition of "health care entity" in the Weldon Amendment includes individual "health insurance plan[s]."⁶ On August 22, 2014, the DMHC, a California agency, discriminated against health care plans offered by seven health care service plan issuers by forcing those issuers to cover abortion without exclusion or limitation in every plan product they offered, lest they be found to be out of compliance with California law⁷ and face disciplinary actions, including license suspension or revocation⁸ or

¹ See, e.g., Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Div. A., § 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019) as extended by the Continuing Appropriations Act, 2021, Pub. L. No. 116-159, Div. A., § 101(8), 134 Stat. 709, 710 (Oct. 1, 2020).

² Letter from Roger T. Severino, Dir., Office for Civil Rights, U.S. Dep't of Health & Human Servs. to the Honorable Xavier Becerra, California Att'y Gen. at 1-2 (Jan. 24, 2020) ("Notice of Violation Letter") (citations removed), <https://www.hhs.gov/sites/default/files/ca-notice-of-violation-abortion-insurance-cases-01-24-2020.pdf>.

³ We enclosed a copy of the January 24th Notice of Violation letter for your convenience.

⁴ In response to the Notice of Violation Letter, California stated, "California will take no 'corrective action' in response to the Notice." Letter from the Honorable Xavier Becerra, Att'y Gen., Cal., to Roger Severino, Dir., Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Feb. 21, 2020) at 4 (on file with OCR).

⁵ *Supra*, note 1.

⁶ *Id.*

⁷ See, e.g., Letter from Michelle Rouillard, Dir. Cal. Dep't of Managed Health Care, to John Ternan, Pres. Aetna, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/aetna082214.pdf>.

administrative penalties.⁹ California has also emphasized that it will “aggressively monitor” health plan issuer compliance.¹⁰ As a result of California’s mandate, seven health plan issuers were compelled to remove coverage exclusions and limitations regarding abortion coverage, which forced at least 35 employer groups, associated with at least 28,647 individuals, out of health plans that until that time had not covered elective abortions.¹¹ By forcing all health insurance plans under its jurisdiction to cover abortion without exclusion or limitation, California is violating the Weldon Amendment, which requires HHS to restrict funds that are currently made available to the state.

This letter constitutes your notice of disallowance in the amount of \$200,000,000 FFP due to your continued non-compliant status under the Weldon Amendment. Accordingly, you are to make a decreasing adjustment on line 10B of the next quarterly expenditure report (CMS-64) in the amount of \$200,000,000 FFP and reference CA/2021/001/MAP. This reflects a disallowance of \$200,000,000 FFP from expenditures claimed on California’s CMS-64 for the quarter ending June 30, 2020, that was filed on December 9, 2020, with respect to Medicaid expenditures made during that quarter. This is the first quarter for which California has submitted a claim for Medicaid FFP after the quarter in which the period afforded to the state to come into compliance with the Weldon Amendment ended.¹² Your continued non-compliant status under the Weldon Amendment will result in future disallowances of \$200,000,000 every quarter, for an annual disallowance total of \$800,000,000, until you comply with the Weldon Amendment. For each quarter to which a disallowance similar to this one will apply, we will send a disallowance letter with the relevant instructions for the necessary decreasing adjustment.

The Weldon Amendment specifies that “[n]one of the funds made available in this Act may be made available to a . . . State or local government, if such . . . government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.” Continuing Appropriations Act, 2021, Pub. L. No. 116-159, Div. A., § 101(8), 134 Stat. 709, 710 (Oct. 1, 2020). We have determined that the disallowance amount of \$200,000,000 satisfies certain constitutional requirements for this federal enforcement action. First, the disallowance is related to California’s violation, as required by *South Dakota v. Dole*, 483 U.S. 203 (1987), because the California Medicaid agency is one of the state agencies that enforces the discriminatory state law, specifically, with respect to managed care plans in California’s Medicaid program. Second, because the Medicaid program is so large – it is California’s largest HHS grant – we expect this disallowance amount to induce the state to correct its

⁸ CAL. HEALTH & SAFETY CODE § 1386(a).

⁹ 2017 ANNUAL REPORT at 12 and 16. *See also* Wong Dep. 122:5-21 (testifying that failure of a healthcare plan to provide coverage for all legal abortions is considered a violation of the Knox-Keene Act subject to administrative penalties handled by enforcement office).

¹⁰ Letter from Gabriel Ravel, Gen. Counsel & Deputy Dir., Dep’t of Managed Health Care, Cal. Health & Human Servs. Agency, to Michael Leoz, Regional Manager, Office for Civil Rights, U.S. Dep’t of Health & Human Servs. at 5 (Jan. 20, 2015) at 3 (on file with HHS OCR) [hereinafter “2015 DMHC Data Response”].

¹¹ Letter from Gabriel Ravel, Gen. Counsel & Deputy Dir., Dep’t of Managed Health Care, Cal. Health & Human Servs. Agency, to Michael Leoz, Regional Manager, Office for Civil Rights, U.S. Dep’t of Health & Human Servs., at 3 (Jan. 20, 2015) (on file with HHS OCR).

¹² *See* Notice of Violation Letter.

violation of the Weldon Amendment without inflicting significant harm on the Medicaid program itself or its beneficiaries. While the Supreme Court opined in *Dole* that a five percent reduction in federal highway grant funds disbursed to a state was “relatively mild,” the \$200,000,000 quarterly disallowance here amounts to a mere quarter of a percent of the Medicaid funds California receives annually from the Department. Third, because statutes and court decisions interpreting the California constitution are at issue, it is appropriate to disallow federal funds like Medicaid that flow to the state as a whole, rather than to a state subcomponent, which is in keeping with the plain language of the Weldon Amendment requirement that “[n]one of the funds made available in this Act may be made available to . . . a [s]tate.” Fourth, CMS has disallowed similar or larger amounts of federal funds flowing to the California Medicaid program for violations not related to the Weldon Amendment, so there is precedent for the magnitude of this enforcement approach.

This is my final decision. Under Section 1116(e) of the Act, you have the opportunity either to request reconsideration of this disallowance from the Secretary or to appeal this disallowance to the Departmental Appeals Board (DAB). This disallowance shall be the final decision of the Department unless, within 60 calendar days after you receive this decision, you file a written request for reconsideration to the Secretary or a written notice of appeal to the DAB.

Written requests for reconsideration should be delivered or mailed to me at the above address. The request for reconsideration should include: (1) a copy of the disallowance letter; (2) a statement of the amount in dispute; (3) a brief statement of why the disallowance should be reversed or revised, including any information to support your position with respect to each issue; and (4) additional information regarding factual matters or policy considerations. See 42 C.F.R. §430.42(b)(2) through (4). Your request for reconsideration should include all of the information that you believe is necessary for the Secretary’s review of your request. Requests for reconsideration should be sent by registered or certified mail to establish the date the reconsideration was received by CMS.

If you request reconsideration from the Secretary and receive an unfavorable determination, you may appeal the disallowance to the DAB within 60 calendar days after the date that you receive the unfavorable determination.

Written notices of appeal may be submitted to the DAB by mail, by facsimile (fax) if under 10 pages, or electronically using the DAB’s electronic filing system (DAB E-File). Submissions are considered made on the date they are postmarked, sent by certified or registered mail, deposited with a commercial mail delivery service, faxed (where permitted), or successfully submitted via DAB E-File. The Board will notify you of further procedures.

If you fax your notice of appeal (permitted only if the notice of appeal is under 10 pages), you should use the Appellate Division’s fax number, (202) 565-0238.

To use DAB E-File to submit your notice of appeal, you or your representative must first become a registered user by clicking "Register" at the bottom of the DAB E-File homepage, <https://dab.efile.hhs.gov/>; entering the information requested on the "Register New Account"

form; and clicking the "Register Account" button. Once registered, you or your representative should login to DAB E-File using the e-mail address and password provided during registration; click "File New Appeal" on the menu; click the "Appellate" button; and provide and upload the requested information and documents on the "File New Appeal-Appellate Division" form. Detailed instructions can be found on the DAB E-File homepage.

Written notices of appeal should be delivered or mailed to U.S. Department of Health and Human Services, Departmental Appeals Board, MS 6127, Appellate Division, 330 Independence Ave., S.W., Cohen Building Room G-644, Washington, DC 20201, with a copy sent to me.

You must attach to the appeal request a copy of this disallowance letter and a copy of the reconsideration decision, if applicable; note your intention to appeal the disallowance, the amount in dispute; and include a brief statement of why the disallowance is wrong. In addition, you should reference disallowance number CA/2021/001/MAP in the appeal request. The DAB will notify you of further procedures. If the state chooses to appeal this disallowance, a copy of the notice of appeal should be mailed or delivered (the state should use registered or certified mail to establish the date) to me.

As provided in section 1903(d)(5) of the Act and 42 C.F.R. § 430.42(b)(3), if the state disputes this disallowance, the state may elect to retain the disputed amount pending a final administrative decision. The state may exercise its option to retain the disputed funds by notifying CMS in writing no later than 60 days after the date this letter is received. If the final administrative decision upholds the disallowance and the state has elected to retain the funds during the appeals process, the proper amount of the disallowance plus interest computed pursuant to section 1903(d)(5) of the Act and 42 C.F.R. § 433.38 will be offset in a subsequent grant award.

In the absence of a reconsideration request or notice of appeal stating an intent to retain disputed funds pending a final administrative decision, CMS will recover \$200,000,000 by issuing a negative Medicaid grant award to the state's applicable Medicaid subaccount in the Payment Management System (PMS), and will continue to take action each quarter to disallow \$200,000,000, to be described in a similar disallowance notice for the relevant quarter, until the State of California cures its violation of the Weldon Amendment.

If you have any questions please contact me at (410) 786-1685.

Sincerely,



Karen M. Shields
Deputy Director
Center for Medicaid & CHIP Services

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Enclosure: January 24, 2020, Notice of Violation Letter

Cc: Roger Severino, Director of the Office for Civil Rights