

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



**Financial Management Group**

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Amir Bassiri  
Medicaid Director, Deputy Commissioner  
New York State Department of Health  
Empire State Plaza, Corning Tower, Room 1466  
Albany, New York 12237

DEC 20 2024

Dear Deputy Commissioner Bassiri:

This is in response to your request for a waiver of the broad-based and uniformity requirements related to the state of New York's Managed Care Organization (MCO) tax. Upon review and consideration of the information formally provided to the Centers for Medicare & Medicaid Services (CMS) on September 4, 2024, I am writing to inform you that your request for a waiver of the broad-based and uniformity provisions of sections 1903(w)(3)(B) and (C) of the Social Security Act (the Act) is approved.

The tax structure for which New York requested a waiver would be imposed as follows:

- (i) Medicaid member months below 250,000 member months will be taxed at a rate of \$126.00 per member month;
- (ii) Medicaid member months greater than or equal to 250,000 member months, but less than 500,000 member months will be taxed at a rate of \$88.00 per member month;
- (iii) Medicaid member months greater than 500,000 member months will be taxed at a rate of \$25.00 per member month;
- (iv) Essential Plan member months less than 250,000 member months will be taxed at a rate of \$13.00 per member month;
- (v) Essential Plan member months greater than or equal to 250,000 member months will be taxed at a rate of \$7.00 per member month;
- (vi) Non-Essential Plan non-Medicaid member months less than 250,000 member months will be taxed at a rate of \$2.00 per member month; and
- (vii) Non-Essential Plan non-Medicaid member months greater than or equal to 250,000 member months will be taxed at a rate of \$1.50 per member month.

Section 1903(w)(3)(E) of the Act specifies that the Secretary shall approve broad-based and uniformity waiver applications if the net impact of the tax is generally redistributive, and the amount of the tax is not directly correlated to Medicaid payments.

Federal regulations at 42 CFR 433.68(e)(2) describe the statistical test necessary for a state to demonstrate that the proposed structure is generally redistributive. New York's statistical demonstration is addressed below. Moreover, federal regulations at 42 CFR 433.68(f) describe the

circumstances in which a direct correlation would exist. Upon review of the New York statute implementing the proposed MCO tax and review of New York's proposed methodology for increasing Medicaid reimbursement to Managed Care Organizations, it appears that no direct correlation exists between the tax and any associated increases in Medicaid reimbursement.

To determine the generally redistributive nature of the proposed member month tax, New York calculated the slope (expressed as B1) of a linear regression for a broad-based and uniform tax in which the dependent variable was each MCO's percentage share of the total tax paid, if the tax was uniformly imposed on all member months in the state and the independent variable was each MCO's number of Medicaid member months. New York then calculated the slope (expressed as B2) of a linear regression for the state's actual proposed tax program in which the dependent variable was each MCO's percentage share of the total tax paid and the independent variable was the number of Medicaid member months for each MCO.

Using the member month and tax rate data you provided, CMS also performed the regression analysis calculations required in the regulations for the proposed tax. CMS finds that the result of the generally redistributive calculation for the tax is **1.0409**.

Therefore, we are able to approve your request to modify your waiver of the broad-based and uniformity provisions of sections 1903(w)(3)(B) and (C) of the Act for the proposed MCO member month tax. Please be advised that any future changes to the taxing structure, including a non-uniform change to the approved tax rates, may require the state of New York to submit a new broad-based and/or uniformity waiver request.

Federal regulations at 42 CFR 433.72(c)(2) specify that a waiver will be effective for tax programs commencing on or after August 13, 1993, on the first day of the calendar quarter in which the waiver is received by CMS. CMS received the state of New York's initial request for a waiver of the broad-based and uniformity requirements on September 4, 2024, with a requested effective date of January 1, 2025. Therefore, the effective date of New York's request for a waiver of the broad-based and uniformity requirements is January 1, 2025.

CMS is also providing a companion letter to this tax waiver approval letter that informs the state that CMS is currently contemplating proposing regulatory changes through the notice-and-comment rulemaking process that could have an impact on New York's MCO tax if finalized. Please be advised that any changes to the federal requirements concerning health care-related taxes may require the state to come into compliance by modifying its tax structure.

CMS reserves the right to perform a financial management review at any time to ensure that the state's operation of the tax on managed care organizations continues to meet the requirements of section 1903(w) of the Act.

I hope this information addresses all your concerns. If you have further questions or need additional information, please contact Jonathan Endelman at (410) 786-4738.

Sincerely,



Rory Howe  
Director  
Financial Management Group



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Medicaid Director, Deputy Commissioner  
New York State Department of Health  
Empire State Plaza, Corning Tower, Room 1466  
Albany, New York 12237

**DEC 20 2024**

Dear Deputy Commissioner Bassiri:

This letter is being sent as a companion to our approval of New York's request for a waiver of the broad-based and uniformity requirements under sections 1903(w)(3)(B) and (C) of the Social Security Act (the Act) for the state's Managed Care Organization (MCO) tax.

The Center for Medicare & Medicaid Services (CMS) is concerned that New York's existing MCO tax and recent waiver request imposes a significantly higher tax rate on Medicaid member months than on comparable non-Medicaid member months. As described in detail below, this approach could be viewed as conflicting with the statutory requirement that the Secretary of Health and Human Services only approve tax waiver requests that are "generally redistributive in nature." By design, this tax disproportionately burdens the Medicaid program while minimizing the tax cost of MCOs that serve relatively low percentages of Medicaid individuals. CMS intends to take imminent action to develop and propose new regulatory requirements through the notice-and-comment rulemaking process to address this issue. Furthermore, CMS recommends that New York carefully consider how to mitigate or avoid any possible budgetary and program challenges that could result from CMS' intended rulemaking.

CMS conducted a review of the state's waiver request and determined that the state's tax would impose a much higher tax burden on Medicaid member months compared to non-Medicaid member months. Specifically, Medicaid member months comprise about 53% of all member months but experience over 93% of the total tax burden. Section 1903(w)(3)(E) of the Act provides, as relevant here, that the Secretary shall approve a health care-related tax waiver for the broad-based and/or uniformity requirements if the net impact of the tax and associated Medicaid expenditures is "generally redistributive in nature." Implementing regulations in 42 CFR § 433.72(b) require that, "for CMS to approve a waiver request, the state must demonstrate, to CMS's satisfaction," that "[t]he net impact of the tax and any payments made to the provider by the state under the Medicaid program is generally redistributive, as described in § 433.68(e)[.]" In turn, 42 CFR § 433.68(e) specifies two statistical tests for determining whether a given tax waiver request would result in a tax program that is "generally redistributive" with the applicable test depending on whether the state is requesting a waiver of the broad-based requirement only or is requesting a waiver of the uniformity requirement (whether or not the state also is seeking a waiver of the broad-based requirement).

Because New York requested a waiver of the broad-based and uniformity requirements, the applicable statistical test is specified in 42 C.F.R. § 433.68(e)(2) and is referred to as the “B1/B2 test.”

CMS, then known as the Health Care Financing Administration, implemented the statistical test approach in a 1992 interim final rule with comment period, 57 Fed. Reg. 55118 (Nov. 24, 1992) (1992 IFC). In preamble to the 1992 IFC, we explained that we intended this approach “to balance our desire to give states some degree of flexibility in designing tax programs with our need to preclude use of revenue derived from taxes imposed primarily on Medicaid providers and activities.” *Id.* at 55128. “For purposes of these regulations,” we explained, “we have interpreted the term ‘redistributive’, as used in the statute, to mean the tendency of a state’s tax and payment program to derive revenues from taxes imposed on non-Medicaid services in a class of items or services (or providers of these services), and to use these revenues as the state’s share of Medicaid payments. To the extent that a tax is imposed more heavily on providers with low Medicaid utilization than high Medicaid providers, the tax would be considered redistributive.” *Id.*

We finalized the statistical tests in a 1993 final rule, 58 Fed. Reg. 43156 (Aug. 13, 1993). In the preamble to the final rule, we confirmed the interpretation of the concept of “generally redistributive” described in the 1992 IFC. Specifically, we stated that “our definition of ‘generally redistributive’ is the tendency of a state’s tax and payment program to derive revenues from taxes imposed on non-Medicaid services in a class and to use these revenues as the state’s share of Medicaid payments.” *Id.* at 43164.

New York’s tax on MCOs, due to its tendency to derive revenues from Medicaid, does not appear consistent with the definition of “generally redistributive” as defined in the preambles to the 1992 IFC and the August 1993 final rule. New York’s tax derives revenues mainly from Medicaid services (instead of non-Medicaid services) and uses these revenues as the state’s share of Medicaid payments. Accordingly, we are concerned that this tax program fails to be “generally redistributive in nature.” However, CMS is approving New York’s request for a waiver of the broad-based and uniformity requirements because the state’s proposal meets the applicable statistical test specified in 42 CFR § 433.68(e)(2), with a B1/B2 value of at least 1. As specified in 42 CFR § 433.68(e)(2)(ii), where the state demonstrates to the Secretary’s satisfaction that the value of B1/B2 is at least 1, “CMS will automatically approve the waiver request.”

For the reasons described above, the result of the statistical test, in this instance, does not appear consistent with either the definition of generally redistributive or reflective of the expected results based on the intended design of the statistical test. As outlined above, CMS intends to develop and propose new regulatory requirements through the notice-and-comment rulemaking process to address this issue. As with any notice-and-comment rulemaking process, the public at large, including the state of New York, would have the opportunity to provide any comments or input on any proposed changes to current regulations. Please be advised that any future changes to the federal requirements concerning health care-related taxes may require the state of New York to come into compliance by modifying its tax structure.



If you have any additional questions or need further assistance, please contact Jonathan Endelman at (410) 786-4738.

Sincerely,



Rory Howe  
Director  
Financial Management Group