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

Center for Medicaid, CHIP and Survey & Certification

SMDL# 11-001

February 25, 2011

Re: Maintenance of Effort

Dear State Medicaid Director:

This letter and the accompanying Questions and Answers (Q&As) are part of a series that provide guidance on the "maintenance of effort" (MOE) provisions in the Patient Protection and Affordable Care Act, P.L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010; P.L. 111-152 (together known as the Affordable Care Act). In this letter and the enclosed Q&As, we address the Affordable Care Act MOE provisions for Medicaid and the Children's Health Insurance Program (CHIP) generally, and specifically answer questions related to their application to the nonapplication of the MOE provision for certain adult populations in States with a budget deficit, section 1115 waivers and demonstration projects, and the treatment of premiums.

The MOE provisions in the Affordable Care Act generally ensure that States' coverage for adults under the Medicaid program remains in place pending implementation of coverage changes that become effective in January 2014. The Medicaid MOE provisions relating to adults expire when the Secretary determines that an Exchange established by the State under section 1311 of the Affordable Care Act is fully operational. The MOE provisions for children under age 19, in both Medicaid and CHIP are effective through September 30, 2019.

In general, the Affordable Care Act MOE statutory provisions are very similar to the MOE provisions in section 5001(f)(1) of the American Recovery and Reinvestment Act (Recovery Act, P.L. 111-5). Therefore, unless otherwise indicated, the Recovery Act MOE provisions and guidelines that have been issued by the Centers for Medicare & Medicaid Services (CMS) are applicable to implementation of the Affordable Care Act MOE provisions and continue to apply through the remainder of the Recovery Act increased FMAP period which ends on June 30, 2011. The guidance set forth in the enclosures clarifies some points that were not previously addressed, and also addresses the different context of the Affordable Care Act provisions. We continue to review the application of the MOE provisions under the Affordable Care Act and will be issuing further guidance based on questions and issues that arise.

We hope this guidance is informative. Please submit any questions you have about the Affordable Care Act MOE provisions to Mr. Bill Lasowski at William.Lasowski@cms.hhs.gov.

Sincerely,

/s/

Cindy Mann
Director

Enclosures

cc:

CMS Regional Administrators

CMS Associate Regional Administrators
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ENCLOSURE A: THE AFFORDABLE CARE ACT
MAINTENANCE OF EFFORT (MOE)--QUESTIONS & ANSWERS

MOE In General

Q1. What are the general Medicaid and CHIP MOE provisions under the Affordable Care Act?

Answer. The MOE provisions in the Affordable Care Act specify that existing coverage for adults under the Medicaid program generally remains in place until the Secretary determines that an Exchange established by the State under section 1311 of the Affordable Care Act is fully operational, which is likely to be January 1, 2014, and, for children, under both Medicaid and the Children's Health Insurance Program (CHIP), through Federal fiscal year 2019. As discussed below, exceptions apply to the Medicaid MOE for States experiencing or projecting a deficit to permit Medicaid eligibility restrictions for certain nonpregnant, nondisabled adults.

Sections 1902(a)(74) and 1902(gg) of the Social Security Act (the Act), as added by section 2001(b) of the Affordable Care Act, contain the Medicaid MOE provision. With certain exceptions, as a condition of receiving Federal Medicaid funding, States must maintain Medicaid "eligibility standards, methodologies, and procedures" that are no more restrictive than those in effect on March 23, 2010 (the date of enactment of the Affordable Care Act). The CHIP MOE provision is in section 2105(d)(3) of the Act, as added by section 2101(b) of the Affordable Care Act. The CHIP MOE also requires maintenance of CHIP "eligibility standards, methods and procedures" in effect on March 23, 2010 as a condition of continued Medicaid funding, with certain exceptions such as to permit enrollment of CHIP eligibles in qualified health plans certified by the Secretary if funding under the State's available Federal CHIP allotments is insufficient after September 30, 2015, or to allow the State to impose a limitation related to the establishment of waiting lists in order to limit expenditures under the CHIP program to those for which Federal funds are available.

The statutory language requiring maintenance of "eligibility standard, methods and procedures" is very similar to the Medicaid MOE provision in section 5001(f)(1) of the American Recovery and Reinvestment Act (Recovery Act, P.L. 111-5). Therefore, in general, and unless otherwise indicated, the Recovery Act MOE provisions and guidelines are applicable to implementation of Affordable Care Act Medicaid MOE provisions. We are continuing to review these guidelines and new questions and issues as they arise and may issue further Q&A's; please continue to let us know your questions.

Nonapplication of Medicaid MOE

Q2. Are there circumstances under which the Affordable Care Act Medicaid MOE rules do not apply?

Answer. Yes. Under section 1902(gg)(3) of the Act, as added by the Affordable Care Act, during the period January 1, 2011 through December 31, 2013, if the State submits a certification to the Secretary that it has or projects a budget deficit for the current or following State fiscal year, the Medicaid MOE provision does not apply for certain adults during that year. (See Q4 about the interaction with the Recovery Act MOE provision.) Specifically, this exception to the MOE provision may be applied to adults who are not eligible for coverage on the basis of pregnancy or disability and whose incomes are above 133 percent of the Federal poverty level (FPL). (See Q5 for more details on the specific options available to States.)

It is important to note that, while the MOE would not apply, the State would need to submit a Medicaid State plan amendment (or amendment to a waiver/demonstration under section 1115 of the Social Security Act, as appropriate) to implement any reduction in eligibility.

Q3. What conditions must a State meet in order to qualify for the nonapplication of the Medicaid MOE provision?

Answer. The State must submit to the Secretary a certification, signed by a State official responsible for State finances, that:

- the State has or projects a budget deficit during the State fiscal year (SFY) for which the certification is made, and/or

- the State projects it will have a budget deficit for the SFY following the SFY in which the certification is submitted.

Enclosure B to this document provides a template for Affordable Care Act certification that a State could use for purposes of certifying the circumstances that would permit the nonapplication of the MOE provision.

Q4. When the State submits such a certification, what is the effective date of the nonapplication of the Affordable Care Act Medicaid MOE for the specified populations?

Answer. The period of nonapplication of the MOE provisions for the specified populations may begin no earlier than January 1, 2011 and end no later than December 31, 2013.

The effective/beginning date of the nonapplication of MOE period is the later of:

- January 1, 2011,

- The date the State submits and CMS receives the certification referenced in Q3, or

- A later date requested by the State.

Interaction with Recovery Act Medicaid MOE Provision during the Period January 1, 2011 through June 30, 2011. States should be aware that the Medicaid MOE provisions of the Recovery Act, along with the associated increased matching rate, remain applicable through June 30, 2011. The budget deficit exception to the Affordable Care Act Medicaid MOE does not apply to the Recovery Act. Any violation of such Recovery Act Medicaid MOE provisions could result in the loss of the increased FMAP available under the Recovery Act. In that regard, States should carefully consider the implications of any more restrictive eligibility provisions they may wish to implement during the first two calendar quarters of 2011. CMS can provide technical assistance to States that are considering whether to proceed prior to July 2011.

The ending date of the nonapplication of MOE period with respect to a particular certification submitted by a State is the earlier of:

- The last day of the current SFY in which the certification is submitted, or the last day of the succeeding SFY for which the State certifies a budget deficit or

- December 31, 2013.

Example. If a State certifies it has a budget deficit for the current SFY (for example, SFY 2011) and projects it will have a budget deficit for the following SFY (SFY2012), the MOE provisions would not apply for the individuals identified in Q2 during both SFYs. Based on this certification, the period of nonapplication of the MOE provision would extend only through the end of SFY 2012. If the State sought to begin or continue the application of more restrictive eligibility provisions in SFY 2013 under the nonapplication of MOE provision, it would need to provide a certification of a projected deficit for SFY 2013 by the end of SFY 2012.

In accordance with the date a State submits and CMS receives the State certification of a budget deficit, and the State's request for a particular (later) effective date, if any, CMS will respond in writing to the State indicating the period of the nonapplication of the MOE provision.

Q5. Does a qualifying State that submits a certification have flexibility in how the nonapplication of the Affordable Care Act Medicaid MOE provision would apply?

Answer. Yes, a State could choose to apply eligibility restrictions for all of the individuals for which the nonapplication of MOE provision applies, or a State has the flexibility to impose less encompassing restrictions in their eligibility

provisions in order to continue to provide eligibility for certain groups of individuals. Any eligibility restrictions that the State imposes must be included in a Medicaid State plan amendment (or waiver amendment, as applicable) and CMS will work with States to determine what options are allowable based on the specific circumstances in the State. The following are some of the options (which are not mutually exclusive) that may be available to States:

> Option 1. Apply more restrictive eligibility criteria immediately to all affected individuals above 133 percent of the FPL (new applicants and existing beneficiaries) with an effective date requested by the State (in accordance with the MOE provisions).
>
> Option 2. Apply more restrictive criteria immediately only to affected individuals who are new applicants, and for affected individuals who are current beneficiaries apply the more restrictive criteria at the time of their next redetermination (phase in changes).
>
> Option 3. Apply the more restrictive criteria to some eligibility groups of individuals. For example, a State that covered nonpregnant, nondisabled adults up to 200 percent of the FPL could decide to lower eligibility to 185 percent of the FPL rather than 133 percent of the FPL.

We will work with States interested in making changes for applicants but not for current beneficiaries (grandfathering in current beneficiaries). Whether and how this can be done will depend on the specific circumstances in the State.

In exercising any of the above options, States must still follow all applicable requirements for making changes in its Medicaid program; for example, States must still submit and have approved any appropriate Medicaid State plan amendments or waivers/waiver amendments. States must also follow all existing rules regarding the termination of coverage, including determining whether an individual's eligibility should continue under another unaffected eligibility category and providing all applicable notice and appeal rights.

In implementing any changes, States must ensure that the application of any more restrictive eligibility standards, methodologies, or procedures, or combination of such (more restrictive) provisions would not result in the loss of eligibility for individuals who are eligible based on pregnancy or disability or whose income is at or below 133 percent of the FPL, as would be determined in accordance with the standards, methodologies and procedures in effect on March 23, 2010. CMS will work with States to develop and implement the appropriate mechanisms to ensure that this requirement is met.

Q6. Do these nonapplication provisions apply to adults covered through CHIP 1115 demonstrations?

Answer. No, but neither do the Affordable Care Act MOE provisions for CHIP apply to adults; that is, the CHIP MOE provision in section 2105(d)(3) of the Act, as amended by the Affordable Care Act, only applies to children. The nonapplication of MOE provisions in section 1902(gg)(3) of the Act do not apply to children - whether in CHIP or Medicaid. However, adults covered in a dual XIX Medicaid-CHIP demonstration could be affected by the Medicaid MOE provisions in section 1902(gg) of the Act and therefore potentially by the nonapplication provisions as well.

MOE and Section 1115 Waivers and Demonstrations

Q7. Do the Affordable Care Act MOE provisions apply to Medicaid section 1115 waivers and demonstrations?

Answer. Yes. The Medicaid MOE provisions in the Affordable Care Act, like those in the Recovery Act, refer to the eligibility requirements "under the State plan ... or under any waiver of such plan" under Medicaid including a waiver/demonstration under section 1115 of the Social Security Act. As discussed below, the MOE provisions apply subject to, and in accordance with, the requirements in each State's section 1115 waiver/demonstration in effect on March 23, 2010.

Q8. How is the termination or modification of a Medicaid section 1115 demonstration affected by the Affordable Care Act MOE provisions?

Answer. Every section 1115 demonstration includes an expiration date in the special terms and conditions (STCs). A State's assumption of responsibilities under a demonstration and the Secretary's approval of a demonstration are time limited. The MOE provision in the Affordable Care Act does not require a State to request that the Secretary continue a demonstration after the date that the demonstration would expire under the STCs in effect on March 23, 2010. However, during the time period covered by a demonstration in effect as of March 23, 2010, a State may not terminate or modify the demonstration to the extent that such termination or modification would result in more restrictive eligibility standards, methodologies and procedures without violating the MOE provision. Specifically:

- If a State chose to terminate a demonstration that was in effect on March 23, 2010 at the end of the demonstration approval period, that would not constitute an MOE violation. The extent to which a State may then restrict eligibility and still comply with the MOE provisions will depend on the specifics of each State's demonstration and its underlying State Plan. However, if a State chooses to end its demonstration prior to the expiration of the demonstration

approval period, that would constitute an MOE violation to the extent that eligibility is adversely affected.

- If a State requests a renewal at the end of the demonstration in effect as of March 23, 2010, with modifications to the terms and conditions, it may do so. This would not be an MOE violation. However, if a State seeks to modify its terms and conditions in ways that would restrict eligibility standards, methodologies or procedures before the demonstration approval period has expired, that would constitute an MOE violation.

- A State could move coverage of individuals out of its demonstration project and into its State plan as long as the end result is the individuals who would be eligible under the demonstration project as of March 23, 2010 remain eligible for medical assistance (see question 4 below). This would not be an MOE violation.

NOTE: Refer to Questions 11 and 12 regarding the effects of provisions in the original CHIP law which could be affected by potential terminations or modifications of a Medicaid demonstration.

Q9. What is the interaction between the MOE provision and Medicaid section 1115 demonstration budget neutrality requirements?

Answer. The STCs governing section 1115 demonstrations include budget neutrality requirements that are designed to assure that the costs to the Federal Government in the Medicaid program under the demonstration are not greater than such costs would have been absent such demonstration. In general, a State is at risk for expenditures incurred under the demonstration in excess of the Federal budget cap.

The Affordable Care Act MOE requires that a State not adopt demonstration eligibility "standards, methodologies, and procedures" that are more restrictive than those in effect on March 23, 2010. However, if a State anticipates that the Federal costs under its section 1115 demonstration could exceed what would be permitted under the demonstration's budget neutrality agreement, it may comply with the procedures specified in the STCs to change its program to maintain budget neutrality without violating the MOE provisions. For example, if the demonstration STCs explicitly allow the State to impose an enrollment cap to keep expenditures within the budget caps, the State may do so consistent with the STCs in effect on March 23, 2010, to the extent necessary to comply with the demonstration budget requirements. If the STCs do not specify the actions a State may take to keep expenditures within the budget caps, the State should work with CMS to address and adhere to the budget neutrality requirements in accordance with the STCs and the MOE provisions in the Affordable Care Act.

NOTE: Refer to Questions 11 and 12 regarding the effects of provisions in the original CHIP law which could be affected by potential terminations or modifications of a Medicaid demonstration.

Q10. Would a State that moves coverage of populations currently covered under a section 1115 demonstration to coverage under a State plan be in compliance with the Affordable Care Act MOE provisions?

Answer. Yes, as long as the State, at a minimum, maintains the eligibility standards, methodologies, and procedures in effect on March 23, 2010. Under the new section 1902(gg)(4)(B), conversion to State plan coverage that does not restrict eligibility relative to March 23, 2010, would be in compliance with the MOE provisions. States considering such a conversion should work with CMS to discuss the details relative to their particular demonstration.

Q11. How do the Affordable Care Act MOE provisions for section 1115 demonstrations under the Children's Health Insurance Program (CHIP) differ from such requirements for section 1115 demonstrations under Medicaid?

Answer. The MOE provisions in the Affordable Care Act specify that existing coverage for adults under the Medicaid program generally remains in place through January 2014, or when the Secretary determines that a State Exchange is fully operational, and, for children, under both Medicaid and CHIP through Federal fiscal year 2019. Other than with respect to these different periods during which the MOE provisions apply, the treatment of the Affordable Care Act MOE provisions, as applied to Section 1115 demonstrations under CHIP, is the same as the treatment under the Medicaid program, as described in questions 7 through 10 above.

NOTE: Refer to Question 12 regarding the effect of provisions in the original CHIP law applicable under CHIP which could be affected by potential terminations or modifications of a Medicaid demonstration.

Q12. How do other requirements in CHIP that applied prior to the Affordable Care Act which continue to apply, affect States' Medicaid section 1115 demonstrations?

Answer. The CHIP law in effect prior to the enactment of the Affordable Care Act includes provisions which continue to apply after the enactment of the Affordable Care Act, and could have an impact on the termination or modification of a State's Medicaid 1115 demonstration.

In particular, the provision in CHIP statute at section 2105(d)(1) of the Act provides that no payment shall be made from a State's available CHIP allotments

if the State adopts any income and resource eligibility standards for children under its Medicaid program that are more restrictive than were applied under the State's Medicaid State plan as of June 1, 1997. If a State terminates the Medicaid demonstration without providing coverage for children eligible as of June 1, 1997 under its Medicaid State plan (or another demonstration), it would violate this CHIP provision.

Additionally, dropping children by terminating or amending a Medicaid demonstration may have other effects on CHIP. Many States define the CHIP population to include individuals with family incomes under a certain level who are not eligible for Medicaid. In that instance, children who are no longer eligible under a Medicaid demonstration would become eligible under CHIP. We also note that the CHIP statute at section 2102(b)(1)(B)(i) of the Act provides that, within any defined group of targeted low-income children, States are precluded from covering children with higher family income levels without covering children with lower family incomes. As a result, some States (such as those which drop children through the termination or amendment of a demonstration) may need to adjust CHIP financial eligibility levels to ensure coverage of children with lower family incomes.

States seeking to drop children from a Medicaid demonstration should work with CMS to determine whether adjustments are necessary to ensure compliance with CHIP requirements.

Treatment of Premiums under MOE Provisions

Q13. How does the treatment of premiums under the Affordable Care Act MOE differ from that under the Recovery Act?

Answer. Under the Recovery Act Medicaid MOE provision, CMS guidance indicated that the imposition and requirement for individuals to pay premiums was considered to be an eligibility provision for purposes of the MOE compliance. Thus, the imposition of increases to existing premiums or the imposition of new premiums after the Recovery Act MOE date was not consistent with the MOE. In general, under the Affordable Care Act MOE provisions this is still the case.

Particularly in light of the longer time frame for the Affordable Care Act MOE period, we have reevaluated the part of our guidance that precluded customary incremental increases in premiums to reflect authorization already in a State plan or demonstration, inflation adjustments, or in certain cases of new coverage. Inflation adjusted increases were permitted by Congress with respect to nominal cost sharing under section 1916 of the Act, and, it would be consistent with that provision to permit such increases under the MOE. Thus, we are revising our prior guidance so that the following would not be considered an MOE violation in Medicaid and CHIP:

- States that had explicit language approved in their State plan or demonstration, as of July 1, 2008 for Medicaid (the date of the Recovery Act MOE provision) and March 23, 2010 for CHIP (the Affordable Care Act enactment), to automatically increase premiums on a regular basis (e.g., based on annual changes in Federal poverty level, or increases tied to capitation payments for health plans), may increase premiums in accordance with their approved State plan or demonstration language. These policies will be considered "in effect" as of the applicable MOE date and therefore not a violation of the MOE.

- For premiums in effect as of July 1, 2008 for Medicaid or March 23, 2010 for CHIP, States can adopt, through State plan or demonstration amendments, certain inflation-related adjustments to those premium levels. Such inflation adjustments must be based on (and no more than) the percentage increase in the Consumer Price Index trended forward using the applicable CPI-M (or another State specific index submitted by the State and approved by CMS). States can apply the inflation adjustment retroactive to the premium base amount in effect on March 23, 2010; or they can apply a more limited adjustment (e.g., covering only the past year). For example, in SFY 2013, a State could adopt a premium adjustment equal to the change in the CPI-M for 2013 compared to the CPI-M for 2012.

- States are not precluded from adopting premiums if they are applied to new coverage provided after July 1, 2008 for Medicaid and March 23, 2010 for CHIP, and the new coverage and premium amount is consistent with other provisions of law. For example, if a State expands CHIP eligibility for children with incomes between 200 and 225 percent of the FPL, it can impose a premium on the newly eligible children, consistent with the CHIP statute and regulations.

Q14. Would a premium increase related to a beneficiary enrolling in a higher cost health plan be considered "new coverage"?

Answer. The imposition of a higher premium for individuals enrolling in a higher cost plan would not be a violation of MOE provisions as long as it is the choice of the beneficiary to enroll in the higher cost plan and the premium increase is not a condition of eligibility. However, if a beneficiary enrolled in a lower-cost plan is required to enroll in the higher-cost plan, and then such individuals are required to pay the higher-cost premiums, that would be a violation of the MOE.

Q15. Is an increase in copayments implemented before or after March 23, 2010 considered a MOE violation?

Answer. No. Copayments are not conditions of eligibility (but instead are related to the use of covered benefits) and increases in copayments are not considered to be an MOE violation.

Enclosure B: State Certification Statement Template

The following language can be used by States for the certification required by a State under the nonapplication of MOE provision of section 1902(gg)(3) of the Social Security Act, as amended by the Affordable Care Act. As applicable for the period(s)/State fiscal years for which the State is indicating its certification of a budget deficit, the State should check either the first, second, or both check boxes indicated.

The Honorable Kathleen Sebelius
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S. W.
Washington, D.C. 20201

Dear Secretary Sebelius:

In accordance with and for the purposes of section 1902(gg)(3) of the Social Security Act, as amended by the Affordable Care Act, I certify that the State of (*Fill-in*):

[ ] Has or projects to have a budget deficit during the State fiscal year (*fill-in SFY)* representing the period *(fill-in the MM/DD/YYYY - MM/DD/YYYY of the SFY*)

[ ] Projects a budget deficit for the State fiscal year (*fill-in SFY)* representing the period *(fill-in the MM/DD/YYYY - MM/DD/YYYY of the SFY*) following the State fiscal year in which this certification is submitted.

Sincerely yours,

(**Enter Name of Appropriate Official in the State who has the delegated authority in the State to certify as to the status of the State budget and projected budget deficits in the State)**)

Date: (Enter Date of Certification)