NEIL ABERCROMBIE
GOVERNOR

PATRICIA MCMANAMAN
DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
P. O. Box 339
Honolulu, Hawaii 96809-0339

January 30, 2012

TO: The Honorable John M. Mizuno, Chair
House Committee on Human Services

FROM: Patricia McManaman, Director

SUBJECT: **H.B. 2285 - RELATING TO MEDICAID**

Hearing: Monday, January 30, 2012; 8:30 a.m.
Conference Room 329, State Capitol

PURPOSE: The purpose of this bill is to direct the Office of the Auditor to conduct a management and financial audit of the QUEST Expanded Access (QExA) plans and submit its findings to the 2013 Legislature.

DEPARTMENT'S POSITION: The Department of Human Services respectfully opposes this bill. As part of the condition for the QExA program, the federal government provides extensive oversight of the program. The QExA plans are required to submit quarterly as well as annual reports regarding program services to the Med-QUEST Division (MQD). MQD, in turn, reviews the reports to ensure the QExA plans are in compliance with contract requirements. The reports are also submitted to the Centers for Medicare and Medicaid Services (CMS) who also reviews the reports to ensure program services are being provided as described in 1115 waiver documents.

In addition, the federal government requires that the Department obtain an independent external quality review of all our health plans on an annual basis. Areas that they are required to

review are the same areas specified in the proposed legislation: quality, timeliness, and access to health care services that the health plan furnishes to its enrollees through its network of providers. We will provide you with a copy of the most recent report for all of our health plans.

The External Quality Review Organization further validates information, data and procedures to the determine services are being provided as stated in their policies and procedures, are reliable and in accordance with valid data collection methods and analysis, and comply with federal requirements. These reports are public documents and available on our website.

The Department believes that the audit would be duplicative of the current multiple levels of review and an inefficient use of taxpayer funds. If an evaluation were to be conducted because the federal requirements are insufficient, then DHS believes all health plans in QUEST and QExA would need to be evaluated.

Attached please find a Memorandum of Law prepared by the Attorney General, dated November 25, 2011, rebutting the assertion the Department of Human Services is not in compliance with Act 69, Session Laws of Hawaii 2009, or that DHS has, at any time, violated procurement law, federal regulatory law, or any other law of the State of Hawaii.

Thank you for the opportunity to testify on this bill.

HHS

NEIL ABERCROMBIE
GOVERNOR

DAVID M. LOUIE
ATTORNEY GENERAL

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
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November 25, 2011

Mr. John McComas
Chief Executive Officer
AlohaCare
1357 Kapiolani Blvd., Suite 1250
Honolulu, HI 96814

VIA FACSIMILE (973-0726) & U.S. MAIL

Re: October 25, 2011 Letter to Patricia McManaman, Director, Department of Human Services re: Insurance Premium Tax

Dear Mr. McComas:

Director of Human Services Patricia McManaman received your letter dated October 25, 2011, which enclosed a legal memo by AlohaCare's counsel, Feldesman, Tucker, Leifer, Fidell LLP (Feldesman). Director McManaman forwarded your letter and the enclosure to our office for review and response.

Your letter raises a number of concerns related to the pending procurement of QUEST Medicaid managed care services being conducted by the Department of Human Services (the Department). We understand that you believe that the Department is favoring for-profit health plans to the detriment of nonprofit health plans such as AlohaCare, and that the State is improperly using for-profit health plans to increase federal revenue to the State, putting the State's federal funding at risk. The specific assertions made by AlohaCare and Feldesman are that:

1. the Department's use of federal financial participation (FFP) to pay the State insurance premium tax to for-profit Medicaid managed care health plans is unconstitutional;

2. using FFP to pay insurance premium taxes is prohibited by federal Medicaid law;

3. the Department is disregarding Act 69, SLH 2010, codified as HRS § 103F-401.5, by paying the insurance premium tax to for-profit health plans, and that this is contrary to legislative intent and fundamentally unfair to nonprofit competitors; and,

4. the Department may "steer" more business to for-profit health plans that are subject to the tax because of the opportunity to maximize federal revenue.

mailed/faxed:
DEC - 1 2011

We appreciate your concern about the integrity of the Hawaii Medicaid program, and the time you have taken to bring these concerns to our attention. For the reasons stated more fully below, we disagree with the analysis and conclusion provided by Feldesman.

Using FFP to Pay the Insurance Premium Tax to QUEST Health Plans is Constitutional

Feldesman asserts that the United States is bearing the legal incidence of the State insurance premium tax, and therefore the tax violates the Supremacy Clause. That is incorrect. The legal incidence of the State insurance premium tax falls on the seller – in this case the contracted health plans – and not on the buyer, which is the State and Federal governments.

It is well-established that sellers may pass on their cost for state taxes to buyers, including the Federal Government. See, Alabama v. King & Boozer, 314 U.S. 1 (1941), and Matter of: Vermont Gasoline Tax, 1983 WL 26285, 63 Comp. Gen. 49 (1983). By so doing, the "legal incidence" of the tax is not shifted from the seller to the buyer.

The U.S. Supreme Court recognized that a state tax imposed upon a **seller** of goods or services may be passed on to the purchaser as a "normal incident" of doing business, and that "the asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributed to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." Alabama, 314 U.S. at 8-9; accord, Vermont Gasoline Tax, 1983 WL 26285 at *1, 63 Comp. Gen. at 49.

Hawaii law is clear that this tax is an obligation of the **seller**:

> **Each authorized insurer**, except with respect to all life insurance contracts, ocean marine insurance contracts, and real property title insurance contracts, **shall pay to the director of finance** through the commissioner a tax of 4.265 per cent on the gross premiums written from all risks or property resident, situated, or located within this State . . ..

§ 431:7-202(a), Haw. Rev. Stat.

The legal incidence of the insurance premium tax under QUEST clearly falls on the health plans, and not on the State or Federal government. Therefore, payment of the tax does not violate the Supremacy Clause.[1]

Using FFP to Pay the Insurance Premium Tax to QUEST Health Plans is Allowed by Medicaid Law

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[1] See, also, G. parent v. State of Hawaii, 676 F.Supp.2d 1006, 1034-35 (USDC, Dist. of Haw. 2009). The federal district court in Hawaii specifically found that "the CMS did not act arbitrarily or capriciously . . . when it reviewed the actuarial soundness of the capitation rates" for the Medicaid managed care contracts in question since the insurance premium tax was not a levy against the Federal Government, and does not violate the Federal Government's immunity from state taxation.

The next assertion is that the insurance premium tax is ineligible for FFP under federal law. As acknowledged by Feldesman, the federal government has placed limitations on FFP available to states for Medicaid expenditures when a state receives health care related taxes. States may receive reimbursement for health care-related taxes in accordance with 42 CFR § 433.68. While it is not clear whether Feldesman believes the insurance premium tax is or is not a health care related tax, Feldesman argues that the insurance premium tax must be excluded from the expenditures reported by the State to calculate FFP. That is incorrect.

The insurance premium tax is not a health care-related tax. A health care-related tax is one that is "related to health care items or services, or to the provision of, the authority to provide, or payment for, such items or services."[2] 42 CFR § 433.55(a). Moreover, at least 85 percent of the burden of the tax revenue must fall on health care providers in order for it to be considered "related to health care items or services." 42 CFR § 433.55(b). Since the insurance premium tax is imposed on all insurers in Hawaii, with limited exceptions, and not just on health care insurers, it is not a health care-related tax and is, therefore, not subject to the restrictions on health care-related taxes under federal law.

But even if the insurance premium tax is considered to be a health care-related tax, it would be a permissible health care-related tax that is eligible for FFP under federal law because it is broad based, uniformly imposed, and does not violate specified hold harmless provisions. 42 CFR §§ 433.68(a) and (b), 433.70. The insurance premium tax is "broad based" because it is imposed on all insurers, including managed care organizations. 42 CFR § 433.68(c). In fact, this tax has been in place since the Hawaii Insurance Code was adopted in 1987. See, Act 347, Sess. L. Haw. (1987). The insurance premium tax is uniform because it is imposed on gross provider revenue or receipts at a uniform rate for all services, and the amount of the tax is not directly correlated to payments under the Medicaid program. 42 CFR § 433.68(d). Finally, the insurance premium tax does not violate the hold harmless provisions because there is no direct or indirect guarantee by the unit of government imposing the tax that an insurer will receive their money back. 42 CFR § 433.68(f); HRS § 431:7-202. Specifically, there is nothing in the State insurance code that guarantees that any insurer subject to the insurance premium tax will get a payment, offset, or waiver of that tax.[3] Therefore, revenue from the insurance premium tax is eligible for FFP.

Moreover, as noted on page 2 of the Feldesman memo, the Federal Government has itself confirmed that the payment of the insurance premium tax is an allowable cost for purposes of developing Medicaid reimbursement rates. See, letter dated May 21, 2008 from the Centers for Medicare and Medicaid Services, U.S. Department of Health and Human Services (CMS) to Congressman Abercrombie, attached. Therefore, it is clearly permissible for the State to claim FFP for the insurance premium tax, and the State's federal funding is not at risk.

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[2] Services of managed care organizations are considered a "class" of health care items or services. 42 U.S.C. § 1396b(w)(7)(A)(viii).

[3] Even if the insurance premium tax provided a prohibited guarantee of payment, offset or waiver, it would still be a permissible tax because the revenues from the tax are less than or equal to 5.5%. 42 CFR § 433.68(f)(3)(i)(A).

The Department's Treatment of the Insurance Premium Tax Does Not Compromise the Actuarial Soundness of Those Rates

The next assertion by Feldesman is that the rates paid to the for-profit Medicaid health plans are not actuarially sound. That is incorrect. As noted by Feldesman, 42 CFR 438.6(c)(4)(ii) requires that the State document assurances that the rates are "based" upon services covered under the State plan, or costs directly related to providing these services. It is clear that the insurance premium tax is a cost directly related to providing services, and Feldesman provides no legal support otherwise.

Moreover, this rule does not require that capitation rates be equal between plans. In order for the rates paid to the health plans to be actuarially sound, they must fairly compensate the plans for their actual expenses. This is why the QUEST request for proposals provides for risk adjustments to the base rates, including enhanced payments based on member usage of FQHC[4] and behavioral health services, and diagnosis or pharmacy based risk adjustments. Similarly, 42 CFR § 438.6(c)(4)(ii) does not prohibit the inclusion of a non-discriminatory pass-through tax in rates paid to health plans who are subject to the tax. In fact, the Department's actuary informed us that not paying the insurance premium tax would result in rates that are not actuarially sound.

The Department's Medicaid managed care capitation rates are actuarially sound because they are developed in accordance with generally accepted actuarial principles and practices, appropriate for the populations to be covered and the services to be furnished under the contract, and are certified by actuaries who meet the qualification standards established by the American Academy of Actuaries and follow the practice standards established by the Actuarial Standards Board. 42 CFR § 438.6(c). We understand that the Department's actuary calculates the capitation rates for Medicaid in Hawaii in the same manner as it does for other states that it services.

As noted above, state taxes imposed on a seller are a recognized cost of doing business which may be passed on to the buyer, including the Federal Government. The tax is properly evaluated in the QUEST program's actuarial calculations, certified by the Department's actuary, and subject to review and approval by CMS. Therefore, payment of tax does not affect the actuarial soundness of the capitation rates.

Payment of the Insurance Premium Tax Does Not Violate HRS § 103F-401.5

Feldesman's next assertion is that the Department's treatment of the insurance premium tax violates HRS section 103F-401.5.[5] That is incorrect. HRS section 103F-401.5 requires proposals to include all costs, fees, and taxes, and any contract must be for the amount of the proposal. The statute clearly addresses procurements in which bidders make a price proposal.

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[4] FQHC means Federally Qualified Health Center.

[5] Feldesman asserts that HRS § 103F-401.5 "prevents a recurrence of the unlawful activity" described in its memo. As noted above, the Department has never engaged in "unlawful activity."

Feldesman acknowledges that no financial proposals are being accepted for the QUEST procurement, and therefore this provision is inapplicable.

HRS section 103F-401.5 further provides that no contract "shall include any other payment, rebate or direct or indirect consideration that is not included in the proposal, such as insurance premium or general excise tax rebates to or waivers for an applicant or bidder." HRS § 103F-401.5. Again, there are no financial proposals being submitted in the QUEST procurement, and therefore the statute does not apply. But even if financial proposals were being solicited, this provision would not prohibit payment of the insurance premium tax as long as the insurance premium tax is included in the proposal.

Contrary to Feldesman's memo, payment of the insurance premium tax to for-profit insurers does not constitute a rebate or waiver of the insurance premium tax. As noted above, the health plan remains at all times liable for paying the tax, and passing on the cost of a nondiscriminatory state tax has long been recognized as a normal part of doing business. The statute does not preclude coverage of such taxes in the contract price. Therefore, the QUEST procurement does not violate HRS § 103F-401.5.

There Is No Financial Conflict Of Interest

The final assertion is that paying the insurance premium tax to for-profit health insurers "amounts to preferential treatment of for-profit health plans." By paying the tax to for-profit health plans and not to nonprofit health plans, AlohaCare asserts that it is being compensated less than the for-profit health plans. That is incorrect.

The insurance premium tax is essentially a pass-through tax upon which the for-profit health plan makes no money. Nonprofit health plans are, by definition, exempt from paying the insurance premium tax, as well as income taxes. Since for-profit health plans are not separately reimbursed for income taxes as a pass-through cost by the State, for-profit health plans receiving the same capitation payment as a nonprofit health plan must bear the burden of income taxes that are not imposed on nonprofit health plans. This is not preferential treatment of for-profit health plans.

While the insurance premium tax is eligible for FFP, the Department is not using that eligibility for FFP to "steer[] more business to plans subject to the tax." Any health plan – whether for-profit or nonprofit – that meets the technical requirements of the RFP will be offered a contract. There is no numerical factor assigned to whether a bidder is a nonprofit or for-profit entity when analyzing the technical requirements of the contract.

You also express concern with the quality-based formula that will eventually be used by the Department to determine priority for auto-assignment of members to health plans when they do not choose their own health plan. The Department will use objective weighting for performance on externally validated Medicaid qualified measures, such as but not limited to CAHPS[6] scores and HEDIS[7] measures, consistent with financial incentives and value-driven

[6] CAHPS means Consumer Assessment of Healthcare Providers and Systems.

health care requirements. Therefore, the Department cannot and will not be "steering" business to for-profit health plans over nonprofit health plans.

Conclusion

As explained above, none of the assertions made by Feldesman are correct. The Department's procurement of QUEST services is being conducted in a neutral and fair manner for the benefit of its clients, in compliance with State and Federal law. The Department's payment of the insurance premium tax to for-profit health plans is legal, and does not disadvantage AlohaCare because the net result is that both the for-profit and nonprofit health plans are paid the same rate for the same services. In fact, for-profit health plans remain at a financial disadvantage because for-profit entities will still be liable for income taxes, while nonprofit entities will not.

We hope we have demonstrated that the Department is acting lawfully and fairly in its procurement of QUEST managed care services. Again, thank you for sharing your concerns with us.

Sincerely yours,

LEE-ANN N.M. BREWER
Deputy Attorney General

APPROVED:

DAVID M. LOUIE
Attorney General

c: Patricia McManaman, Director, Dept. of Human Services

Encl.

[7] HEDIS means Healthcare Effectiveness Data and Information Set.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services

Region IX
Division of Medicaid & Children's Health Operations
90 Seventh Street, Suite 5-300 (5W)
San Francisco, CA 94103-6706

MAY 2 1 2008

The Honorable Neil Abercrombie
Congress of the United States
House of Representatives
1502 Longworth House Office Building
Washington, D.C. 20515

Dear Representative Abercrombie:

I am responding to your letter to Acting Administrator Kerry Weems, who has referred your letter to me. You had two questions related to the recent award by the Hawaii Department of Human Services of two contracts under its QUEST Expanded Access (QEXA) managed care program to serve its Medicaid Aged, Blind and Disabled (ABD) population.

Your first question concerns why the Federal government is paying state premium taxes as part of the Hawaii Medicaid program managed care contracts to serve the Aged, Blind and Disabled (ABD) population under Hawaii's QEXA program.

Under the Medicaid program, the states can consider Medicaid's portion of a permissible health care-related tax as an allowable cost for purposes of developing Medicaid reimbursement rates. We affirmed this in the preamble of our recent Medicaid final rule at 42 CFR 433 on health-care related taxes issued on February 22, 2008.

Your second question concerns the two managed care organizations (MCOs) selected by the Department of Human Services: you note that these plans have neither "significant operations in Hawaii" nor any "experience or network in the community." CMS requires States to implement a free and open competitive procurement of Medicaid services that follows applicable state procurement laws as set forth in Medicaid regulations at 42 CFR 457.940. While CMS requires states to follow their own procurement laws when contracting for Medicaid services, CMS also has extensive regulations at 42 CFR 438.206 and 42 CFR 438.207 that states must follow to ensure access to available services and adequate provider network capacity when implementing Medicaid managed care.

I hope this information is helpful. Should you need any other assistance from my staff, please contact Cheryl Young, CMS State Medicaid Coordinator for Hawaii, at 415-744-3598 or at Cheryl.Young@cms.hhs.gov.

Sincerely,

Jackie L. Glaze

Jackie L. Glaze
Acting Associate Regional Administrator
Division of Medicaid and Children's Health Operations

cc: Lillian Koller, Department of Human Services
Patty Johnson, Department of Human Services
Mary Rydell, CMS

TO : COMMITTEE ON HUMAN SERVICES
Rep. John M. Mizuno, Chair
Rep. Jo Jordan, Vice-Chair

FROM: Eldon L. Wegner, Ph.D.
POLICY ADVISORY BOARD FOR ELDER AFFAIRS (PABEA)

HEARING: 8:30 am Monday January 30 2012
Conference Room 329, Hawaii State Capitol

SUBJECT: HB 2285 Relating to Medicaid

POSITION: The Policy Advisory Board for Elder Affairs, **supports** HB 1913 which directs the auditor to conduct a management a financial audit of the services provided by Evercare and Ohana Health Plan to Medicaid clients under Quest Expanded Access.

RATIONALE:
The Policy Board for Elder Affairs has a statutory obligation to advocate on behalf of the senior citizens of Hawaii. While we advise the Executive Office on Aging, we do not speak on behalf of the Executive Office of Aging.

Since the beginning, there have been many issues with the performance of Evercare and Ohana Health Plan to Medicaid clients under Quest Expanded Access. These complaints from providers as well clients of the program continue, even though there has been time to address the start-up issues of a new program.

Therefore, we believe a thorough audit and evaluation such as called for in this bill is in order at this time.

Thank you for allowing me to testify on this bill.

From: mailinglist@capitol.hawaii.gov [mailto:mailinglist@capitol.hawaii.gov]
Sent: Sunday, January 29, 2012 7:34 PM
To: HUStestimony
Cc: Brenda.Kosky@gmail.com
Subject: Testimony for HB2285 on 1/30/2012 8:30:00 AM

Testimony for HUS 1/30/2012 8:30:00 AM HB2285

Conference room: 329
Testifier position: Support
Testifier will be present: No
Submitted by: Brenda Kosky
Organization: Consumer Family & Youth Alliance
E-mail: Brenda.Kosky@gmail.com
Submitted on: 1/29/2012

Comments:

From: mailinglist@capitol.hawaii.gov [mailto:mailinglist@capitol.hawaii.gov]
Sent: Sunday, January 29, 2012 10:51 AM
To: HUStestimony
Cc: robertscottwall@yahoo.com
Subject: Testimony for HB2285 on 1/30/2012 8:30:00 AM

Testimony for HUS 1/30/2012 8:30:00 AM HB2285

Conference room: 329
Testifier position: Support
Testifier will be present: Yes
Submitted by: Scott Wall
Organization: Individual
E-mail: robertscottwall@yahoo.com
Submitted on: 1/29/2012

Comments: