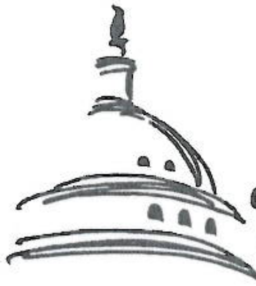

MEMORANDUM March 3, 2011

To: Senate Finance Committee
Attention:

From:
Legislative Attorney

Subject: **Authority of the Secretary of HHS To Waive the Maintenance of Effort Requirements in Section 2001(b) of PPACA**

This responds to your request for a legal analysis of the authority of the Secretary of Health and Human Services ("Secretary") to waive the maintenance of effort requirements of Section 2001(b) of P.L. 111-148, the Patient Protection and Affordable Care Act ("PPACA"), under the demonstration project waiver authority of Section 1115(a) of the Social Security Act.[1]

Section 1115 Waiver Authority

The Medicaid program, established by Title XIX of the Social Security Act,[2] is a cooperative effort by the federal government and the states to provide medical care for persons "whose income and resources are insufficient to meet the costs of necessary medical services."[3] Medicaid is funded jointly by the federal government and the states, and is administered by the states. To participate in the Medicaid program, a state must have a plan for medical assistance approved by the Secretary, and must comply with all applicable conditions.[4] Many, though not all, of the state plan requirements are listed in Section 1902(a) of the Social Security Act.[5]

States may apply for waivers under various provisions of the Social Security Act, including the Home and Community-based services waivers under section 1915(c) of the Social Security Act,[6] and the demonstration project waiver under Section 1115 of the Social Security Act ("section 1115"). Section

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[1] 42 U.S.C. § 1315(a).

[2] 42 U.S.C.§§ 1396 *et seq.*

[3] 42 U.S.C. § 1396.

[4] "A state is not required to participate in Medicaid, but once it chooses to do so, it must create a plan that conforms to the requirements of the Medicaid statute and the federal Medicaid regulations." Dep't of Health Servs. V. Sec'y of Health & Human Servs., 823 F2d 323, 325 (9th Cir. 1987). *See also,* Pharmaceutical Research and Manufacturers of America v. Walsh, 538 U.S. 644, 650 (2003).

[5] 42 U.S.C. § 1396a(a).

[6] 42 U.S.C. § 1396n(c).

1115, the subject of this analysis, allows the Secretary to waive the requirements of specific sections of the Social Security Act, including section 1902, for any "experimental, pilot or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of title… XIX of this chapter… in a state or states."[7] The Secretary may waive the specified provisions "to the extent and for the period he finds necessary to enable such State or States to carry out such project."[8]

The Secretary's discretion to approve demonstration projects under Section 1115 is broad, and the courts have been reluctant to circumscribe the Secretary's authority under this provision.[9] In the seminal case of *Aguayo v. Richardson,*[10] the Second Circuit Court of Appeals upheld a waiver allowing the creation of a mandatory "workfare" program for Aid to Families With Dependant Children recipients, holding that section 1115 waiver decisions by the Secretary were valid so long as the Secretary had a "rational basis for determining that the programs were 'likely to assist in promoting the objectives' of [the Social Security Act]."[11] Subsequent court decisions have reiterated that Congress has entrusted the judgment of whether a particular project is likely to assist in promoting the objectives of the program under the Social Security Act to the Secretary, and not to the courts:

> Given the large degree of judgment vested in the Secretary with respect to the approval of section 1115 projects, it is not for the courts to deny the Secretary the right to approve a project merely because the Court might in certain situations disagree with his judgment. That judgment is committed to the Secretary and must be sustained as long as he exercises it within the confines of the statute.[12]

While the courts have held that the decisions of the Secretary regarding section 1115 waivers are subject to review under the Administrative Procedure Act ("APA"), the courts have held that "[t]he APA does not give the court power 'to substitute its judgment for that of the agency,' but only to 'consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.'"[13] Thus, a court's review of whether or not an agency's decision was "arbitrary or capricious" under the APA, is "highly deferential" and carries the presumption that the agency's decision is valid.[14]

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[7] Section 1115(a) of the Social Security Act, 42 U.S.C.§ 1315(a).

[8] 42 U.S.C. § 1315(a)(1).

[9] Some commentators have argued that the Secretary's use of section 1115 waivers has exceeded appropriate legal boundaries, and that the use of waivers by the Executive Branch exceeds constitutional authority. *See* Jonathan R. Bolton, *The Case of the Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program,* 37 Colum. J.L. & Soc. Probs 91 (2003), and, Philip Hamburger, *Are Health-Care Waivers Unconstitutional?*, February 8, 2011, available at http://www.nationalreview.com/articles/259101/are-health-care-waivers-unconstitutional-philip-hamburger.

[10] 473 F.2d 1090 (2d Cir. 1973).

[11] *Id.* at 1105.

[12] Crane v. Matthews, 417 F. Supp. 532, 539 (N.D. Ga. 1976). *See also* Georgia Hospital Ass'n v. Dept. of Medical Assistance, 528 F. Supp. 1348, 1355 (N.D. Ga. 1982) wherein the court stated that section 1115 "does not require the Court to find whether this project in fact will promote the objectives of the program, but rather, whether the Secretary, as stated in *Aguayo,* had a rational basis for his determination."

[13] Beno v. Shalala, 30 F.3d 1057, 1073 (9th Cir. 1994), *quoting* citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). *See also* C.K. v. New Jersey Department of Health and Human Services, 92 F.3d. 171 (3rd Cir. 1996).

[14] Newton-Nations v. Rodgers, 2010 U.S. Dist. LEXIS 29901 (D. Ariz., 2010). *See also* Irvine Medical Center v. Thompson, 275 F.3d 823, 830-831 (9th Cir. 2002). 5 U.S.C. § 706 provides that courts may "hold unlawful and set aside agency action, findings, and conclusions found to be…arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Maintenance of Effort Requirements Under Section 2001(b) of PPACA

Section 2001(b) of PPACA , entitled "Maintenance of Medicaid Income Eligibility," amends section 1902(a) of the Social Security Act,[15] to provide that a state plan for medical assistance must "provide for maintenance of effort under the State plan or under any waiver of the plan in accordance with subsection (gg)." Subsection (gg) provides as follows:

> (1) GENERAL REQUIREMENT TO MAINTAIN ELIGIBILITY STANDARDS UNTIL STATE EXCHANGE IS FULLY OPERATIONAL. –
>
> Subject to the succeeding paragraphs of this subsection, during the period that begins on the date of enactment of the Patient Protection and Affordable Care Act and ends on the date on which the Secretary determines that an exchange established by the State under section 1311 of the Patient Protection and Affordable Care Act is fully operational, as a condition for receiving any Federal payments under section 1903(a) for calendar quarters occurring during such period, a State shall not have in effect eligibility standards, methodologies, or procedures under the State plan under this title or under any waiver of such plan that is in effect during that period, that are more restrictive than the eligibility standards, methodologies, or procedures, respectively, under the plan or waiver that are in effect on the date of enactment of the Patient Protection and Affordable Care Act.
>
> (2) CONTINUATION OF ELIGIBILITY STANDARDS FOR CHILDREN UNTIL OCTOBER 1, 2019.—
>
> The requirement under paragraph (1) shall continue to apply to a State through September 30, 2019, with respect to the eligibility standards, methodologies, and procedures under the State plan under this title or under any waiver of such plan that are applicable to determining the eligibility for medical assistance of any child who is under 19 years of age (or such higher age as the State may have elected).
>
> (3) NONAPPLICATION.—
>
> During the period that begins on January 1, 2011, and ends on December 31, 2013, the requirement under paragraph (1) shall not apply to a State with respect to nonpregnant, nondisabled adults who are eligible for medical assistance under the State plan or under a waiver of the plan at the option of the State and whose income exceeds 133 percent of the poverty line (as defined in section 2110(c)(5)) applicable to a family of the size involved if, on or after December 31, 2010, the State certifies to the Secretary that, with respect to the State fiscal year during which the certification is made, the State has a budget deficit, or with respect to the succeeding State fiscal year, the State is projected to have a budget deficit. Upon submission of such a certification to the Secretary, the requirement under paragraph (1) shall not apply to the State with respect to any remaining portion of the period described in the preceding sentence.

This maintenance of effort ("MOE") provision generally requires states with Medicaid programs in effect on March 23, 2010, the date of enactment of PPACA, to maintain their programs with the same eligibility standards, methodologies, or procedures until the state's insurance exchange is operational, which is expected to be in 2014. The Medicaid MOE for children up to age 19 continues until September 30, 2019. Failure to comply with the MOE requirements means a state risks losing all of its federal Medicaid matching funds. Section 2001(b)(3) provides for an exemption to this MOE requirement for states that have, or are projected to have, a budget deficit, but only for non-pregnant, non-disabled adults who are eligible for medical assistance under a state plan or waiver of a state plan, and whose income exceeds

[15] 42 U.S.C. § 1396a.

133% of the federal poverty level. This MOE provision does not prohibit states from cutting Medicaid in other ways, such as by reducing provider reimbursement rates or by eliminating optional benefits. Neither are states prohibited from expanding Medicaid coverage during the MOE period.

The Secretary's Authority To Waive the PPACA Maintenance of Effort Requirements

Congress placed the PPACA MOE requirements, described above, in section 1902(a) of the Social Security Act. The Secretary has the authority, when she chooses to grant a section 1115 demonstration project waiver to a state, to waive compliance with the provisions of section 1902.[16] While the conclusion that the Secretary has the authority to waive the PPACA MOE requirements seems straightforward, the possibility that the language of Section 2001(b) might be interpreted to limit the Secretary's undeniably broad authority under Section 1115, should be examined.

Section 2001(b) of PPACA is a very specific provision that sets forth a significant limitation on the states' ability to impose more restrictive eligibility standards before 2014 when state insurance exchanges become operational. The legislative language suggests that Congress wanted to insure that current Medicaid enrollees would not lose Medicaid coverage before 2014 while the new health reform provisions are being implemented. The only exception to the MOE requirement is a limited hardship exemption which may be invoked by states dealing with a budget deficit. Section 2001(b) applies to both state plans and to waivers of state plans. A state may not impose eligibility standards that are more restrictive than were in effect as of enactment of PPACA "under the State plan under this title or under the waiver of such state plan that is in effect during that period..." It may be possible to read the specific inclusion of waivers in this prohibition as limiting the authority of the Secretary to issue a waiver of section 2001(b) under section 1115. One might argue that the only way to provide for more restrictive eligibility standards for mandatory coverage groups, for example, would be to obtain a section 1115 waiver, which would constitute the imposition of more restrictive eligibility standards "under a waiver of such state plan that is in effect during that period."

The suggestion that Section 2001(b) might be interpreted to preclude being waived under Section 1115 does not mean the Secretary must espouse such a reading of the statutory language. Rather, it raises the possibility that the language may be susceptible to differing interpretations. One might also argue that section 2001(b) does not limit the Secretary's authority under section 1115, since it does not contain language such as "not withstanding any other provision of law." Neither does that provision specifically restrict the Secretary's use of section 1115, as Congress provided in the MOE provision in section 5001(f) of P.L. 111-5, the American Recovery and Reinvestment Act of 2009.[17] On the other hand, section 2001(b) of PPACA provides only one specific exception to its MOE requirements for children and adults, *i.e.*, the hardship exemption in section 2001(b)(3). States experiencing or anticipating budget deficits are directed to this limited relief exemption. The counterargument may be that, so long as the Secretary uses her section 1115 waiver authority to permit a state to try out a demonstration project "likely to assist in

[16] The Centers for Medicare and Medicaid Services ("CMS") has taken the position that there are two types of Medicaid waiver authority that may be requested by states under Section 1115: a waiver of portions of section 1902 to operate a demonstration program (section 1115(a)(1)), and the provision of federal financial participation for costs that otherwise cannot be matched under section 1903 (section 1115(a)(2)). Demonstrations under the section 1115 waiver authority must be budget neutral over the life of the project. *See* https://www.cms.gov/MedicaidStWaivProgDemoPGI/03_Research&DemonstrationProjects-Section1115.asp.

[17] "Except as provided in paragraph (2)(A)(iii), the Secretary may not waive the application of this subsection...under section 1115 of the Social Security Act, or otherwise." Section 5001(f)(4) of P.L. 111-5.

promoting the objectives of" the Medicaid program, not to simply cut Medicaid enrollees in order to cope with budget deficits, that these two authorities can co-exist, serving, as they do, different purposes.

Since the section 1115 demonstration project provision was enacted by Congress in 1962, the courts have accorded considerable deference to the Secretary's interpretation of that provision. Courts are also likely to defer to agency interpretations of the more recent PPACA MOE provision. A court analysis of an agency interpretation of Section 2001(b) of PPACA would be governed by the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources defense Council, Inc.* ("*Chevron*"),[18] in which the Court established a two-step process for reviewing agency interpretations of federal statutes. First, a court would look at whether "the intent of Congress is clear" on the "precise question at issue."[19] If the court, using traditional tools of statutory construction, determines that Congress has spoken to the precise question at issue, "that intention is the law and must be given effect."[20] However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[21] In such cases, where a court examines an agency interpretation under the second step of *Chevron,* "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[22]

On February 25, 2011, the Secretary issued guidance in the form of a letter to state Medicaid directors on implementation of the PPACA MOE requirements.[23] This guidance includes clarification of the applicability of the MOE requirements to several situations, including the termination or modification of a state 1115 waiver demonstration project. However, this guidance does not include any indication of whether the Secretary views section 2001(b) of PPACA as providing a limitation upon the Secretary's section 1115 authority to waive the requirements of section 1902, which would include the PPACA MOE requirements, for demonstration projects. Based on the principles discussed above, it appears the Secretary would have a substantial basis upon which to conclude that the specific language of section 2001(b) of PPACA does not limit her general 1115 waiver authority, presumably allowing her to waive the MOE requirements in section 2001(b) in furtherance of a demonstration project. Conversely, it is possible that the Secretary may interpret section 2001(b) as limiting her broad authority to grant a section 1115 waiver of the PACCA MOE requirements. In either case, it is likely that the courts would accord considerable deference to the Secretary's interpretation of the provisions in question, and uphold the Secretary's determination as "a reasonable interpretation made by the administrator of an agency."[24]

[18] 467 U.S. 837 (1984).

[19] *Id.* at 842.

[20] *Id.*at 843 n.9.

[21] *Id.* at 843.

[22] *Id.* at 844.

[23] Letter available at http://healthreform.kff.org/~/media/Files/KHS/docfinder/cms_moe_letter_2282011.pdf.

[24] 467 U.S. at 844.