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

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

APR 21 2015

Ms. Ruth Kennedy, Medicaid Director
Bureau of Health Services Financing
Department of Health and Hospitals (DHH)
628 North 4th Street
Baton Rouge, LA. 70821-9030

Reference File # LA/2014/001/MAP

Re: **Reconsideration Decision: Impermissible Provider-Related Donations**

Dear Ms. Kennedy:

I have reviewed the State of Louisiana's Request for Reconsideration of CMS's disallowance of $189,999,295 in Federal Financial Participation (FFP), based on a Total Computable (TC) of $311,576,411, for the period between January 1, 2013 and May 23, 2014. I hereby affirm the disallowance because the State has not met its burden of documenting the allowability of its claims for FFP.

The CMS disallowance, issued on December 23, 2014, was based on Louisiana's collection of impermissible provider-related donations. On May 9, 2014, CMS notified your agency that it had disapproved the proposed State Plan Amendments (SPAs) 13-23, 13-25, and 13-28 as a result of provisions in the related Cooperative Endeavor Agreements (CEAs) that required substantial advance lease payments by the participating hospitals that were linked to increased Medicaid payments to the same privately-owned hospitals.

As explained in CMS's disallowance letter, Section 1903(w) of the Social Security Act (the Act) places limitations on the use of provider-related donations as funding sources for expenditures claimed by states as the basis for FFP. Among these limitations, as set forth in implementing regulations at 42 C.F.R. § 433.54, FFP is not available to the extent that it would be based on the use of such financing sources when there is a "hold harmless arrangement" under which providers (or the provider class) could be effectively repaid for a provider-related donation through any direct or indirect payment, offset, or waiver. A hold harmless arrangement is defined to include circumstances in which an increased Medicaid payment is conditional on the receipt of a donation.

In this case, Supplemental and Disproportionate Share Hospital (DSH) payments made under the pending SPAs were linked to CEAs that provided for "advance lease payments" from

the privately-owned hospitals, in addition to equipment lease payments and potential additional rent. These advance lease payments were not usual and customary industry payment arrangements and were linked to the increased Medicaid payments. As a result, CMS determined that these payments were not reasonable and necessary lease payments, but were provider-related donations in conjunction with a hold harmless arrangement.

In the Request for Reconsideration, the State asserts that the disallowance is unfounded and should be reversed in its entirety and presents a few arguments to support its assertion. Specifically, the State claims that the advance lease payments were not improper donations, but were merely prepayments by the hospitals for the fair market value (FMV) of leased facilities. After reviewing the information provided with the State's reconsideration request, the State has not met its burden to demonstrate that the advance lease payment structures were allowable lease payments at fair market value.

Additionally, the State contends that it has corrected or cured the hold harmless arrangement issue because the terms of SPA 14-25 no longer explicitly link the supplemental Medicaid payments to CEA participation or the remittance of advance lease payments. However, the original CEAs, leases, advance lease payments (donations), and lump sum supplemental payments occurred prior to the effective date of SPA 14-25 on May 24, 2014. The subsequent approval of SPA 14-25 did not transform the nature of the advance lease payments that had already occurred from impermissible donations to fair market transactions.

The State also asserts that even if CMS were correct that some portion of the advance lease payments exceeded the FMVs of the transactions, only lease amounts in excess of FMV should be considered impermissible donations subject to disallowance. The State, however, has not provided documentation to support the fair market value of the advance lease payments. Absent such documentation, or alternative valuation models, CMS has determined that the entire amount of the advanced lease payments made to the State constituted impermissible provider-related donations.

Finally, the State disagrees with CMS's explanation of its right to retain the disallowed FFP during the pendency of the administrative process and that CMS appeared to assert that the Total Computable amount was at issue. CMS agrees that the State has the right to retain the disallowed funds during the pending of the administrative appeals process and that only the FFP in the amount of $189,999,295 is in dispute. If the State becomes liable for any portion of the retained FFP, interest will be assessed on that portion of the FFP, as required by section 1903(d)(5) of the Act and 42 C.F.R. § 433.38.

After careful consideration, CMS cannot accept the arguments advanced by the State in its Request for Reconsideration. While CMS recognizes the State's efforts at corrective action, such measures do not address the State's noncompliance for the period in question. For the reasons stated above, as well as in CMS's December 23, 2014 disallowance letter, the $311,576,411 TC ($189,999,295 FFP) disallowance is affirmed.

Pursuant to 42 C.F.R. § 430.42(f), the State may appeal the disallowance to the DAB within 60 calendar days after the date that the State receives this decision on reconsideration. A notice 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 requests for 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 the CMS Associate Regional Administrator.

The state must attach to the appeal request, a copy of this disallowance decision; a copy of the reconsideration decision, if applicable; note its intention to appeal the disallowance, the amount in dispute; and a brief statement of why the disallowance is wrong. In addition, the state should reference Disallowance Number **LA/2014/001/MAP** in the appeal request. The Board will notify the state 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 the undersigned official.

Should you require further details regarding this matter, please contact Mr. Bill Brooks, Associate Regional Administrator, Division of Medicaid and Children's Health at (214) 767-4461.

Sincerely,

Vikki Wachino
Acting Director

cc: Bill Brooks/CMS
Dorothy Ferguson/CMS
Jeff Reynolds/DHH
Jen Steele/DHH
Pam Diez/ DHH