DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF DIRECTOR

ACTION REFERRAL

TO	DATE
Johnson	2-7-13

DIRECTOR'S USE ONLY	ACTION REQUESTED
1. LOG NUMBER .10.241	[ ] Prepare reply for the Director's signature DATE DUE _____
2. DATE SIGNED BY DIRECTOR _____ cc: Mr. Keck, COS, Dep, CMS file Ref Log #156	[ ] Prepare reply for appropriate signature DATE DUE _____ [ ] FOIA DATE DUE _____ [X] Necessary Action

APPROVALS (Only when prepared for director's signature)	APPROVE	* DISAPPROVE (Note reason for disapproval and return to preparer.)	COMMENT
1. Cleared 3/15/13, letter attached.			
2.			
3.			
4.			

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Atlanta Regional Office
61 Forsyth Street, Suite 4T20
Atlanta, Georgia 30303

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES

DIVISION OF MEDICAID & CHILDREN'S HEALTH OPERATIONS

January 17, 2013

Mr. Anthony E. Keck, Director
South Carolina Department of Health & Human Services
P O Box 8206
Columbia, SC 29202-8206

Re: Deferral Control Number SC/2012/3/E/02/MAP

Dear Mr. Keck:

We are in receipt of your letter dated January 11, 2013 requesting a sixty day extension to prepare a written response to the deferral action number SC/ 2012/3/E/02/MAP processed and included with the Finalization of the State's CMS-64 Q-3 FY 2012 Medicaid Grant Award.

Your request for an additional sixty days to prepare a written response has been granted. We are requesting that the State provide additional documentation and related calculations to support the $17,416,373 claimed on the CMS-64 Q-3 FY2012 within the sixty day time period. However, no response is necessary if you agree to make a decreasing adjustment on the next CMS-64 report to remove the claim and close this deferral.

If you have questions or need additional information, please contact Davida Kimble, Financial Branch Manager, at (404) 562-7496, or Michelle White, Financial Analyst, at (404) 562-7328.

Sincerely,

Jackie Glaze

Jackie Glaze
Associate Regional Administrator
Division of Medicaid & Children's Health Operations

log letter 000241

South Carolina Department of Health & Human Services

Anthony E. Keck, Director
Nikki R. Haley, Governor

March 15, 2013

Jackie Glaze
Associate Regional Administrator
Division of Medicaid & Children's Health Operations
U.S. Department of Health & Human Services
Centers for Medicare & Medicaid Services
Atlanta Regional Office
61 Forsyth Street, Suite 4T20
Atlanta, Georgia 30303

Re: Deferral Control Number SC/2012/3/E/02/MAP

Dear Ms. Glaze:

This correspondence is in response to the deferral of $17,416,373 in federal financial participation (FFP), an amount representing corrections of prior credits listed on the Form CMS 64 submitted by the South Carolina Department of Health & Human Services (DHHS) for the quarter ending June 30, 2012. In the deferral letter, which DHHS received on November 20, 2012, you explained that the Centers for Medicare & Medicaid Services (CMS) rejected these corrections as not allowable under the rule requiring state "expenditures" to be claimed within two years of being made, *see* 42 U.S.C. § 1320b–2; 45 C.F.R. § 95.7. For the reasons set forth below, disallowance of these funds would be inappropriate.

These corrections are not claims for FFP in "expenditures," and they therefore are not subject to the two-year claim-filing rule. Rather, DHHS's corrections were an effort to recover funds that the State erroneously credited to CMS by over-reporting the amount of its drug rebates, program integrity recoupments, and accounts receivable for federal fiscal years 2007, 2008, and 2009. These corrections reflect money CMS received to which it was not entitled and, unlike for expenditures, there is no time limit on a correction of erroneous crediting.

FFP for state "expenditures" must be claimed within two years of when the state agency "made" those expenditures. § 95.7. This rule is expressly limited to "expenditures." *See* § 1320b–2 ("[A]ny claim by a State for payment with respect to an expenditure . . . shall be filed . . . within the two-year period . . . ." (emphasis added)); § 95.7 ("[W]e will pay a State for a State agency expenditure . . . only if the State files a claim with us for that expenditure within 2 years . . . . (emphasis added)).

CMS acknowledges that this $17.4 million represents over-reported credits in past years, but appears to take the position that correcting prior excess credits to CMS constitutes claims for

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"expenditures" that were "made" in earlier periods within the meaning of Section 1132 and § 95.7. This is incorrect. The expenditures that were offset by the over-reported credits that DHHS now seeks to correct were timely claimed in a Form CMS 64 in 2007, 2008, or 2009. While these claimed expenditures were offset at the time by over-reported credits, they were nonetheless claimed on one of those prior forms. The $17.4 million does not correspond to medical assistance expenditures that DHHS long ago incurred but failed to claim until now. Rather, it represents funds not owed to CMS that DHHS mistakenly remitted to CMS. In fact, CMS itself recognizes a distinction between these corrections and claims for expenditures—it issued a different deferral, also for failure to comply with the timely claim-filing rules, for $11.2 million in expenditures that it alleges DHHS made in 2007, 2008, and 2009 but did not claim until the June 2012 Form CMS 64.

CMS's position is inconsistent with its own regulations, which generally prohibit claiming FFP in expenditures more than two years after they are made, but expressly permit a State to make a downward adjustment to a provider overpayment credit amount long after the two-year window has closed on the expenditures that were offset by the overstated credit. *See* 42 C.F.R. § 433.320(c). As explained in § 433.320(c)(2), "[t]he 2-year filing limit for retroactive claims for Medicaid expenditures does not apply [to downward adjustments of overpayments]. A downward adjustment is not considered a retroactive claim but rather a reclaiming of costs previously claimed." *Id.* (emphasis added).

Not only would a disallowance of these funds be inconsistent with the relevant statutory and regulatory authorities, it would be in significant tension with considerations of state sovereignty and federalism. Relying in part on these important values, in a case involving a federal-state grant program, the Supreme Court has held that "Congress may fix the terms on which it shall disburse federal money to the States" but "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Nothing in the Social Security Act "unambiguously" permits the federal government to keep funds inadvertently credited to it. Retaining these deferred funds would inappropriately enrich the federal government at the State's expense—a significant affront to South Carolina's sovereignty and the interests of federalism.

If this deferred amount is disallowed, CMS will in effect retain funds that belong to the State. There is no basis in law for CMS to enjoy a windfall from a State's erroneous crediting of an amount to which CMS was not entitled. The language of the Medicaid statute and regulations do not authorize such a result. Honoring South Carolina's $17.4 million correction is the proper course here.

DHHS appreciates your attention to this matter. If you have any questions about this response, please contact Louis J. Krause at 803-898-0348.

Sincerely,

Anthony E. Keck
Director