Abbreviated Analysis

California Senate Bill 858: Health Care Service Plans - Discipline: Civil Penalties

Summary to the 2021–2022
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SUMMARY

The California Senate Committee on Health requested that the California Health Benefits Review Program (CHBRP)[1] conduct an evidence-based assessment of California Senate Bill (SB) 858. SB 858 would make changes to how the Department of Managed Health Care (DMHC) calculates and assesses administrative and civil penalties against the entities it regulates. SB 858 would codify, and make some amendments to, the list of specific factors (e.g. the nature, scope, and gravity of the violation, etc.) that DMHC must consider when determining the appropriate dollar amount for an administrative penalty against a regulated entity. It also would authorize DMHC to impose a corrective action plan (CAP) on a health plan to enable future compliance with state law. SB 858 would increase the base amount of a civil penalty assessed on a regulated entity from a maximum of $2,500 per violation to a minimum of $25,000 per violation. Beginning January 1, 2023, SB 858 would require the dollar amounts of administrative and civil penalties enumerated in specified sections of the Health and Safety Code to be multiplied by four. Starting on January 1, 2024, these administrative and civil penalty rates would be subject to an annual adjustment based on the average change in rates (e.g. premiums and cost sharing) for the individual and group markets the previous year.

Benefit Coverage. If enacted, SB 858 would affect the health insurance of approximately 22.1 million enrollees (56.2% of all Californians). If enacted, the law would affect the health insurance of enrollees in only DMHC-regulated plans, including that of Medi-Cal managed care beneficiaries regulated by DMHC.

Policy Context. Since 1999, DMHC has had authority to regulate and provide oversight to California's managed health care plans. DMHC also ensures managed care laws are upheld by other entities, including health care agents, medical groups, and providers. The DMHC Director has broad authority over the enforcement actions taken against regulated entities, including health plans. Examples of DMHC enforcement actions include the assessment of administrative penalties, cease and desist orders, and requests for corrective action plans. DMHC states that the primary purpose of an enforcement action is to change plan behavior to comply with the law.

Regulatory Approaches. The imposition of increased financial sanctions, as in SB 858, is one of a number of distinctive (but often mutually compatible) regulatory enforcement and compliance strategies identified in legal scholarship. Although "mega-penalties" tend to impact corporate consciousness differently than other sanctions, it is unclear if and how financial exposures pressure companies to change their behavior to comply with the law. The literature also states trust and perceptions of system legitimacy and fairness are also factors that influence behavior and subsequent compliance with the law.

Fiscal Impacts of SB 858. The fiscal impacts of SB 858 will depend on the bill's effects on the behavior of both DMHC and its regulated entities, and there is limited literature to predict the behavioral response post-enactment. As such, after reviewing over eight years of data on historical enforcement actions, CHBRP prepared three scenarios which reflect potential fiscal impacts of SB 858. The three scenarios reflect 1) no change in frequency of violations, 2) a decrease in violations, and 3) an increase in violations.

CHBRP found that since 2014, 1,763 administrative penalties and two civil penalties have been assessed by DMHC that would have been impacted in its fiscal analysis of SB 858.

Given the historical rarity of civil penalties imposed by the DMHC, the net fiscal impact post-enactment from civil penalties is likely minimal. CHBRP assumes there will be no change in the frequency of civil penalty violations in any of the scenarios presented.

CHBRP assumed a change of 10% for the scenarios illustrating an increase or decrease in frequency of violations.

Scenario 1 (no change): The fiscal estimates CHBRP provides in this scenario serve as an

[1] Refer to CHBRP's full report for full citations and references.

illustration of the potential magnitude of SB 858. Violations categorized as *Grievance and Appeals* were most common (n=747) with an average cost of $8,883 per violation at baseline. Post-enactment, CHBRP estimates these violations would cost $35,532 per violation and average a total of $3,304,476 annually. Enforcement actions taken on violations for both timely access and related reporting constituted administrative penalties with the highest dollar amount, but happened less frequently (n<1 per year). These penalties were an average of $760,000 per violation at baseline and would be $3,040,000 post-enactment. The civil penalties at baseline cost $50,000 and $100,000; CHBRP estimates they would be $2,000,000 and $4,000,000, respectively, in 2023.

Scenario 2 (decrease in frequency of violations): Post-enactment, violations related to administrative penalties could decrease in frequency due to aversity to financial risk (plans striving harder to avoid being penalized the higher penalty amounts stipulated by SB 858). The increase in financial penalties could also result in a higher number of settlement agreements and corrective action plans (CAPs) to correct deficiencies. An increase in CAPs could lead to additional costs to health plans, but could also spur changes in behavior to increase compliance that otherwise may not have occurred. CHBRP applied a 10% decrease to the average number of violations per year and multiplied the figure by the estimated average penalty amount per enforcement action post-enactment. For this scenario, CHBRP estimates violations categorized as *Grievance and Appeals* would occur 84 times per year, and that DMHC would assess an annual average total of $2,984,688 in penalties.

Scenario 3 (increase in frequency of violations): Recent changes in the Medi-Cal program, such as implementation of the CalAIM program, may increase the number of violations associated with administrative penalties as DMHC-regulated entities adjust to the new standards and systems for healthcare coverage. CHBRP applied a 10% increase to the average number of violations per year and multiplied the figure by the estimated average penalty amount per enforcement action post-enactment. For this scenario, CHBRP estimates violations categorized as *Grievance and Appeals* would occur 102 times per year, and that DMHC would assess an annual average total of $3,624,264 in penalties.

Considerations for Policymakers. Rigorous regulatory enforcement and changes in behavior to achieve compliance is predicated on cooperation between the regulator and the entities it regulates. While there is no ideal regulatory framework that works for a particular industry, regulators with flexibility may be able to achieve a balance between tough sanctions and persuasion to achieve desired compliance.

California's healthcare system is complex, with multiple regulators, including DMHC, the California Department of Insurance (CDI), and the Department of Health Care Services (DHCS). Neither CDI nor DHCS are included in the provisions of SB 858; however, it is worth noting that they have statutory authority to enforce laws and regulations on some of the same entities as DMHC.

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POLICY CONTEXT

On February 18, 2022, the California Senate Committee on Health requested that CHBRP[2] conduct an evidence-based assessment of the impacts of Senate Bill (SB) 858, Health Care Service Plans: Discipline: Civil Penalties. As discussed with the California Senate Committee on Health, CHBRP conducted an abbreviated analysis of SB 858 to estimate its expenditure impacts and potential impacts on compliance and health outcomes.

Bill-Specific Analysis

Bill Language

SB 858 would make changes to how the Department of Managed Health Care (DMHC) assesses and calculates administrative and civil penalties against the entities it regulates. The bill applies to all DMHC-regulated plans, including DMHC-regulated Medi-Cal managed care plans.

Administrative Penalties

The bill codifies, and makes some amendments to, the list of specific factors (e.g. the nature, scope and gravity of the violation; the health plan's history of violations; the financial status of the plan, etc.) that DMHC must consider when determining the appropriate dollar amount for an administrative penalty against a health plan. It also would authorize DMHC to impose a corrective action plan (CAP) on a health plan to require future compliance with state law. Should DMHC exercise this authority, SB 858 would require DMHC to use medical surveys, financial examinations, and other means to ensure timely compliance.

Beginning January 1, 2023, SB 858 would require the dollar amounts of administrative penalties enumerated in specified sections of the Health and Safety Code to be multiplied by four. Starting on January 1, 2024, these administrative penalty rates would be subject to an annual adjustment based on the average change in rates (e.g. premiums and cost sharing) for the individual and group markets the previous year. See Table 1 for estimates of the administrative penalties mandated by SB 858.

Civil Penalties

SB 858 would also increase the base amount of a civil penalty assessed on a regulated entity from a maximum of $2,500 per violation to a minimum of $25,000 per violation. The bill defines violations and calculates civil penalties as follows:

- An ongoing violation is subject to a minimum $25,000 civil penalty for each day that it continues, whether continuous or not;
- Each enrollee harmed by a violation is considered a separate and distinct violation that is subject to a minimum $25,000 civil penalty; and
- A civil penalty must be calculated by multiplying the number of enrollees affected by the number of days the violation continues.

Beginning January 1, 2023, SB 858 would require the dollar amount of civil penalties enumerated in specified sections of the Health and Safety Code to be multiplied by four. These sections include that which SB 858 amends to increase civil penalties from a maximum of $2,500 per violation, to a minimum of $25,000 per violation. As such, CHBRP interprets this provision to require, beginning January 1, 2023,

[2] CHBRP's authorizing statute is available at http://chbrp.org/faqs.php.

all civil penalties to be assessed at a minimum of $100,000 per violation. See Table 1 for estimates of the civil penalties mandated by SB 858.

Starting on January 1, 2024, these civil penalty rates would be subject to an annual adjustment based on the average change in rates (e.g. premiums and cost sharing) for the individual and group markets the previous year.

Relevant Populations

If enacted, SB 858 would affect the health insurance of approximately 22.1 million enrollees (56.2% of all Californians). This represents 95% of the 22.8 million Californians who will have health insurance regulated by the state and may be subject to any state health benefit mandate law where health insurance is regulated by the California Department of Managed Health Care (DMHC) or the California Department of Insurance (CDI).[3] If enacted, the law would affect the health coverage of enrollees in DMHC-regulated plans only, including that of Medi-Cal managed care beneficiaries enrolled in health plans regulated by DMHC.

Table 1. Penalty Amounts Impacted Post-Enactment

Health and Safety Code Section	Description	Penalty Type	Penalty Amount Enumerated (Baseline)	Penalty Amount Post-enactment
1367.01	Utilization review and licensing standards	Administrative	Not enumerated	Determined by DMHC
1367.03	Timely access	Administrative	Not enumerated	Determined by DMHC
1368	Failure to institute a grievance	Administrative	Not enumerated	Determined by DMHC
1368.04	Grievance and appeals	Administrative	Not enumerated	Determined by DMHC
1371.37	Prohibition against unfair payment practices	Administrative	Not enumerated	Determined by DMHC
1374.27	Health care plan coverage contract changes	Administrative	Not enumerated	Determined by DMHC
1374.34	Prolonging the independent medical review process	Administrative	$5,000 for each day the decision is not implemented	$20,000 for each day the decision is not implemented
1374.9	Standards – violation of Section 1374.7 on refusing to enroll a person based on a person's genetic characteristics	Administrative	$2,500 for first violation; $5,000-$10,000 for second violation; $15,000-$100,000 for subsequent violations	$10,000 for first violation; $20,000-$40,000 for second violation; $60,000-$400,000 for subsequent violations

[3] SB 858 would also impact DMHC-regulated specialty health plans.

Health and Safety Code Section	Description	Penalty Type	Penalty Amount Enumerated (Baseline)	Penalty Amount Post-enactment
1380	Medical surveys - Operation and renewal requirements and procedures	Administrative	Not enumerated	Determined by DMHC
1387	Civil penalties	Civil	$2,500 per violation	$100,000 per violation
1388	Discipline of solicitors or solicitor firms	Administrative	Not enumerated	Determined by DMHC
1389.8	False attestation by underwriter	Civil	$0 - $10,000	$0 - $40,000
1390	Willful violation of Knox-Keene Act	Criminal	$0 - $10,000	$0 - $40,000
1393.6	Willful violation of Knox-Keene Act	Administrative	Person/solicitor/solicitor firm: $250 for first violation; $1,000 for second violation; $2,500 for subsequent violations. Health plans: $2,500 for first violation; $5,000 - $10,000 for second violation; $15,000 - $100,000 for subsequent violations.	Person/solicitor/solicitor firm: $1,000 for first violation; $4,000 for second violation; $10,000 for subsequent violations. Health plans: $10,000 for first violation; $20,000 - $40,000 for second violation; $60,000 - $400,000 for subsequent violations.

Source: California Health Benefits Review Program, 2022.
Key: DMHC = Department of Managed Health Care.

California Policy Landscape

California Law and Regulations

The Department of Managed Health Care (DMHC) was established in 2000[4] through consumer sponsored legislation. Its funding is solely supported by assessments on health plans. Existing law requires DMHC to regulate and maintain oversight of all managed health care plans. DMHC currently oversees 94 full-service plans and 46 specialty health plans. Specialty health plans offer coverage for only specific types of care, including dental, vision, behavioral or mental health, or chiropractic services. DMHC also ensures managed care laws are upheld by other entities, including health care agents, medical groups, and providers.

DMHC-regulated Medi-Cal managed care plans have additional oversight from the Department of Health care Services (DHCS), which contracts with each of them. Medi-Cal managed care plan contracts with

[4] The 1999 legislation establishing the new DMHC (AB 78) transferred regulatory responsibility for Health Maintenance Organizations (HMOs) from the Department of Corporations to DMHC.

DHCS can include punitive-type provisions, including monetary sanctions and corrective action plans (CAPs).

Oversight Mechanisms

It is the intent of DMHC to resolve problems with noncompliance at the lowest level wherever possible, and to rely on stronger enforcement actions only when necessary.[5] To accomplish this, DMHC uses a wide range of reporting and surveillance tools to assist with oversight. Examples include quarterly grievance reports, reviews of block transfer fillings, engagement with its customer complaint center, premium rate review for health plans, medical surveys, and financial examinations, among others. SB 858 would require DMHC use medical surveys, financial examinations, and other means to monitor a health plan if the plan failed to comply with a CAP in a timely manner.

Existing law requires DMHC to complete a comprehensive evaluation of each health plan's compliance with state law, referred to as a "routine medical survey", at least once every three years. Additional non-routine medical surveys may be completed if, at the discretion of DMHC's Director, it is deemed necessary. Routine medical surveys must include a review of a health plan's procedures for obtaining health services, utilization management, peer review mechanisms, quality assurance mechanisms, and overall plan performance in the provision of health care benefits and meeting the needs of enrollees. Non-routine medical surveys focus on a specific area(s) where a health plan has failed to comply with the law. Following publication of a final report on each medical survey, health plans are allowed 18 months to correct any deficiencies found by DMHC.[6]

DMHC is also required to complete a review of each health plan's financial and administrative affairs at least once every five years to evaluate regulatory compliance with the Knox-Keene Act.[7] Non-routine financial examinations are completed on a case-by-case basis.

Enforcement Authority

The Health and Safety Code provides the DMHC with statutory authority. Code enforcement actions are authorized under 18 general grounds for discipline[8] (see Table 2) and several specific violations, such as those related to timely access, utilization management, grievances and appeals, and unfair payment patterns.[9]

Table 2. General Grounds for Disciplinary Action of Health Plans

Health and Safety Code Section	Description
1386(b)(1)	Failure to operate in accordance with organization documents filed with the Department.
1386(b)(2)	Improper usage of outdated evidence of coverage or schedule of charges.
1386(b)(3)	Failure to provide basic health care services as set forth in the evidence of coverage.
1386(b)(4)	Failure to provide access to adequate network.

[5] Communication with content expert in March 2022.
[6] Health and Safety Code Section 1380(a).
[7] Health and Safety Code Section 1382.
[8] Health and Safety Code Section 1386.
[9] DMHC violation references. Available at: https://wpso.dmhc.ca.gov/enfactions/violation.aspx.

Health and Safety Code Section	Description
1386(b)(5)	Director may, after notice and opportunity for hearing, by order suspend or revoke any license issued to a plan, or assess administrative penalties, if the director determines that the continued operation of the plan will constitute a substantial risk to its subscribers and enrollees.
1386(b)(6)	Plan has violated, attempted or conspired to violate, or assisted in or abetted in violation of, the Knox-Keene Act or rule or regulation adopted by, or order issued by, the DMHC Director.
1386(b)(7)	Plan has engaged in conduct that constitutes fraud or dishonest dealing or unfair competition, as defined by Section 17200 of the Business and Professions Code.
1386(b)(8)	Plan has permitted, or aided or abetted any violation by an employee or contractor who is a holder of any certificate, license, permit, registration, or exemption issued, pursuant to the Business and Professions Code that would constitute grounds for discipline against the certificate, license, permit, registration, or exemption.
1386(b)(9)	Aiding, abetting, or permitting the commission of any illegal act.
1386(b)(10)	Engagement of a person as an officer, director, employee, associate, or provider of the plan contrary to the provisions of an order issued by the DMHC director pursuant to Section 1388 of the Health and Safety Code.
1386(b)(11)	Engagement of a person as a solicitor or supervisor of solicitation contrary to the provisions of an order issued by the DMHC director pursuant to Section 1388 of the Health and Safety Code.
1386(b)(12)	Plan, or related parties, has been convicted of or pleaded nolo contendere to a crime, or committed any act involving dishonesty, fraud, or deceit, which crime or act is substantially related to the qualifications, functions, or duties of a person engaged in business in accordance with this chapter
1386(b)(13)	Violations of the Health Care Providers' Bill of Rights, the law related to advocacy for appropriate care by a health care practitioner, or the law related to communication between a licensed health care provider with a patient about their health care.
1386(b)(14)	Plan has been subject to a final disciplinary action taken by California, another state, an agency of the federal government, or another country for any act or omission that would constitute a violation of the Knox-Keene Act.
1386(b)(15)	Plan violates the Confidentiality of Medical Information Act.
1386(b)(16)	Violation related to coverage for a reservist at the time the reservist was ordered to active duty.
1386(b)(17)	Violation related to care provided by a noncontracting hospital.
1386(b)(18)	Violation related to the Health Care Payments Data System.

Source: California Health Benefits Review Program, 2022.
Key: DMHC = Department of Managed Health Care.

Enforcement Actions

All enforcement actions taken by the DMHC are approved by the Director and imposed by the Office of Enforcement. DMHC states "the primary purpose of an enforcement action is to change plan behavior to comply with the law."[10] The DMHC Director has broad authority over enforcement actions. Enforcement actions may include cease and desist orders, the imposition of administrative penalties, freezing enrollment, nonrenewal of licensure, and the request for corrective actions by health plans. When appropriate, CAPs may be required to ensure future compliance by the health plan. Although California law does not require health plans to comply with CAPs, the DMHC may require a plan to submit a CAP as part of a negotiated agreement. Legal action is pursued on a case-by-case basis. Civil and criminal penalties may also be assessed on health plans. Under existing law, courts may impose a civil penalty of no more than $2,500 per violation.[11] DMHC does not prosecute criminal penalties for violations of the Knox-Keene Act; those are pursued by local and state criminal prosecutors.

Administrative Penalty Assessments

Per regulation, DMHC, when assessing administrative penalties against a health plan, shall determine the appropriate amount of the penalty based on one or more of the following factors (but may consider additional ones not on this list)[12]:

- The nature, scope, and gravity of the violation;
- The good or bad faith of the plan;
- The plan's history of violations;
- The willfulness of the violation;
- The nature and extent to which the plan cooperated with the Department's investigation;
- The nature and extent to which the plan aggravated or mitigated any injury or damage caused by the violation;
- The nature and extent to which the plan has taken corrective action to ensure the violation will not recur;
- Whether the violation is an isolated incident;
- The financial status of the plan;
- The financial cost of the health care service that was denied, delayed, or modified; and/or
- The amount of the penalty necessary to deter similar violations in the future.

SB 858 would codify these factors, currently in regulation, pertaining to the determination of the appropriate amount of an administrative penalty. SB 858 would also specifically enumerate what shall be considered with regard to the last three factors in the bulleted list above. See Appendix B for a comparison.

The fines assessed on health plans, once collected, are placed into the Managed Care Administrative Fines and Penalties Fund and the Health Care Services Plan Fines and Penalties Fund. The first supports a loan repayment program for physicians who serve medically underserved populations; the second finances the Major Risk Medical Insurance Program and the Medi-Cal program.[13]

[10] DMHC website Available at: https://www.dmhc.ca.gov/aboutthedmhc.aspx#enforcement.
[11] Health and Safety Code Section 1387.
[12] Cal. Code of Regs, Tit. 28, Section 1300.86(b).
[13] Health and Safety Code Section 1341.45(c).

Civil Penalty Assessment

Existing law states that any person who violates the Knox-Keene Act shall be liable for a civil penalty not to exceed $2,500 for each violation, which must be assessed and recovered in a civil action. The civil action must be brought in the name of the people of the State of California by the DMHC Director.

Enforcement Process

The length of time of each enforcement action varies greatly and depends on the circumstances of the violation and internal goals of each party. In general, once a violation is discovered, the Office of Enforcement will prepare an accusation for the DMHC Director's review. Once approved, the accusation, including any associated administrative penalties, will be sent to the accused party. If the accused party does not wish to contest the accusation, a Letter of Agreement (LOA) will be signed by DMHC and the accused party. If there is no agreement between the two parties, the accused party has the right to an administrative hearing upon request.[14] Both parties present their cases to the administrative law judge, who can either agree with one party or the other, or modify the terms of the accusation. After the judge states their decision, the DMHC Director can accept, modify, or reject the judge's decision. The losing party can then choose to appeal and take the case to a Superior Court; this process can continue all the way to the California Supreme Court. Throughout the enforcement process, the parties may attempt to negotiate an agreement. If both parties agree to the terms, a settlement agreement may be signed. Cases rarely go to Superior Courts.

Once signed, LOAs – which often include CAPs – become a binding contract between the two parties. Thus, any CAP included in the LOA is considered agreed to by the health plan and is enforceable by DMHC. Depending on the violation, CAPs may be completed almost immediately or may take several years to complete based on the specific deliverable, such as reporting requirements.[15]

Changes to DMHC Regulatory Landscape

California is undergoing significant changes to its Medi-Cal program, the effects of which have substantial impacts on DMHC-regulated entities. In addition to expanding Medi-Cal coverage for residents 50 years of age and older, the Department of Health Care Services (DHCS) is transforming the Medi-Cal delivery system with its California Advancing and Innovating Medi-Cal (CalAIM) program. CalAIM includes several mandates for DMHC-regulated Medi-Cal managed care plans as the state moves towards the use of whole person care approaches. As of January 1, 2022, DHCS also implemented its Medi-Cal Rx program, which transitions all Medi-Cal pharmacies services from managed care to fee-for-service. Several of these new programs require changes to billing systems, the provision of care, and coordination between providers and health plans.

Similar Requirements in Other States

Other states also penalize health plans using monetary sanctions for violations of state law. For example, the Department of Insurance in Massachusetts may assess penalties of $500 for violations for which no other penalty is provided by law.[16] CHBRP is not aware of legislation in other states that would increase administrative and civil penalties on health plans.

[14] Government Code, Chapter 5, commencing with Section 11500.
[15] Communication with the Department of Managed Health Care on March 10, 2022.
[16] Massachusetts State Law, Part I, Title XXII, Chapter 176A, Section 28.

BACKGROUND ON REGULATORY APPROACHES

As discussed in the *Policy Context*, SB 858 would make changes to how the Department of Managed Health Care (DMHC) calculates and assesses administrative and civil penalties against the entities it regulates. The impacts of SB 858 post-enactment depend on its effects on the behavior of both DMHC and its regulated entities; compliance with statutory requirements could either increase, decrease, or remain the same as a result of the increase in penalty amounts and process for the assessment of penalty amounts as mandated by SB 858. The bill uses one of several approaches to enforcement by imposing higher monetary sanctions on regulated entities.

CHBRP searched for literature specific to the impacts of different regulatory enforcement approaches on the behavior of health plans but was unable to find such literature. CHBRP identified literature on approaches to regulatory enforcement for large organizations that sociolegal[17] scholars view as generalizable to multiple entities that can provide insight to the challenges associated with regulatory enforcement.

The Study of Regulatory Enforcement

Legal scholars note that effective regulatory enforcement is a complex and nuanced undertaking (Fenn and Veljanovski, 1988). Organizations as a whole tend to respond due to three primary stressors, including the financial expectations to owners and investors, the pressure to comply with applicable laws and regulations, and social expectations from employees, community groups, and the news media (Gunningham et al., 2003 and 2004). The interaction among these three primary stressors can strongly influence the behavior of an organization. In particular, the relationship between social and legal expectations can be significant for organizations for reasons such as the potential damage to a business's reputation due to regulatory prosecution (Hodges, 2015).

Sociolegal literature points to several different regulatory approaches in attempt to achieve compliance by regulated entities. Examples include the use of strictly punitive measures; viewing regulation as a social process that relies heavily on gentle persuasion; adapting to the actions of regulated entities; and risk-based regulation, among others. Due to the complexities of regulatory enforcement, a combination of various approaches can often provide better outcomes for regulators than individual ones alone (Gunningham, 2015). The scholar Hodges contends that legal systems, in order to achieve maximal compliance, must consider the larger construct of the social system, including family, business, social, and political groups, and ensure alignment between both systems' norms and procedures (Hodges, 2015). Furthermore, trust and perceptions of system legitimacy and fairness are factors in the behavior of individuals and organizations which influence their compliance with the law (Ayres and Braithwaite, 1992; Hodges, 2015; Kim, 1993; Lind and Tyler, 1988; Tyler, 2006).

Financial Penalties and Accountability

It is unclear if, and how, financial exposures pressure companies to change their behavior to comply with the law. One study found that "mega-penalties" tend to impact corporate consciousness differently than other sanctions (Gunningham et al., 2003). However, there do not appear to be data reporting that individuals' or organizations' behavior changed as a result of damages awards being imposed on firms (Hodges, 2015). The risk of having to pay fines may cause companies to make efforts to reduce their financial risk; however, the risk alone may not be a sufficient incentive to fully comply with the underlying substantive rules. Scholars note that a primary incentive for organizations to settle is the significant, irrecoverable expense of discovery in civil proceedings (Hodges, 2015).

[17] Relating to the relationship between law and society.

As regulators work to change behaviors of regulated entities, accountability – or the "answerability in the implementation of regulatory provisions" – has been a topic of increased interest (May, 2007). The literature finds that compliance within regulated industries is socially constructed, sometimes through dialogue between the regulated entities and regulatory enforcement officials (Hodges, 2015). As such, an important function of enforcement actions is to raise awareness of existing regulations and provide regulated entities with consistent reminders of how to maintain compliance and achieve regulatory goals (Hodges, 2015). Some sociolegal scholars conclude that "imaginative cooperation" has at least equal – and potentially more – importance as government monitoring and legal pressures in achieving effective regulation (Hodges, 2015). Although, as previously noted, large penalties often draw the attention of businesses entities, changing the long-term behavior of regulated entities requires cooperation between the regulator and the regulated entity, and an understanding of how best to align the entity's internal rules and culture with existing regulations.

Enforcement and SB 858

As referenced in the literature, organizations react to financial, legal, and social stressors. In the context of SB 858, the social stressors include patients, providers, the public, the Legislature, and the Governor's Administration, among others. While the DMHC Director has broad authority with regard to what enforcement actions to take, the Director's decisions are made within the broader context of the Governor's goals and objectives as well as the impact of the enforcement action(s) on health care consumers and the health care system overall.

ESTIMATED IMPACTS

As discussed in the *Policy Context*, SB 858 would make changes to how the Department of Managed Health Care (DMHC) calculates and assesses administrative and civil penalties against the entities it regulates. The process of enforcement by DMHC under existing law involves a number of factors that may contribute to the final monetary sanction DMHC assess on a regulated entity. As such, CHBRP is unable to estimate the precise fiscal impacts of SB 858. However, in this section, CHBRP illustrates the potential magnitude of the impacts of SB 858, based on historical data of DMHC enforcement actions.

Overview of Historical DMHC Enforcement Actions

To establish a baseline for potential scenarios that may occur if SB 858 was enacted, CHBRP reviewed enforcement action data from the DMHC's publicly-accessible Enforcement Action Database.[18] CHBRP analyzed data only for penalties incurred after the implementation of the Affordable Care Act in California (ACA), to account for potential differences in regulatory enforcement approaches between healthcare system models. Four major provisions of the ACA took effect at the beginning of 2014 in California (McDonough and Adashi, 2014).[19] Thus, CHBRP selected 2014 to present as the basis for its projections. The total time range used in the analysis was January 1, 2014 through March 19, 2022.

Analytic Approach and Key Assumptions

CHBRP analyzed fiscal data based on the categorization of the final enforcement action taken on a regulated entity. DMHC categorizes violations within its database in several manners, one of which is by document category, which describes the documents associated with the most current enforcement action taken on regulated entity. Document categories include:

1. Accusation;
2. Amended accusation;
3. Amended cease and desist order;
4. Cease and desist order;
5. Civil complaint;
6. Judicial order/ruling;
7. Letter of admonishment;
8. Letter of agreement;
9. Lift cease and desist order;
10. Miscellaneous agreement;
11. Order;
12. Order appointing conservator;
13. Order taking possession;
14. Other; and
15. Settlement agreement.

[18] DMHC Enforcement Action Database. Available at: https://wpso.dmhc.ca.gov/enfactions/actionSearch.aspx.
[19] First, extension of the "guaranteed issue" provision to all individual health insurance policies inclusive of the elimination of "medical underwriting" in the face of a preexisting condition. Second, implementation of the "individual shared responsibility" provision also known as the "individual mandate." Third, provision of tax credits and cost-sharing subsidies to middle- and lower-income adults for the purchase of individual health insurance. And fourth, expansion of Medicaid coverage in participating states to include previously ineligible low-income adults.

Administrative Penalties

- In the analysis of administrative penalties, CHBRP included only violations categorized as a letter of agreement. Notwithstanding civil complaints, judicial orders/rulings, and settlement agreements, all other document categories are not relevant to the cost impacts of SB 858 because they do not include monetary sanctions as part of the enforcement action based on the category type (i.e. document categories 1-4, 7, and 9-14 from the list above). Settlement agreements would be impacted by SB 858; however, the final dollar amount of the monetary sanctions associated with these penalties are dependent on the outcome of negotiations between DMHC and the accused entity. The increase in penalty amount may influence negotiations differently depending on the circumstance of each enforcement case. CHBRP is unable to account for those potential changes and therefore cannot illustrate the effects on settlement agreements for this scenario.

Civil Penalties

- In the analysis of civil penalties, CHBRP included only violations categorized as a civil complaint or judicial order/ruling, as those are the only potential document categories that qualify as civil penalties.[20]

Administrative and Civil Penalties, 2014-2022

Since ACA implementation, DMHC has taken 2,192 enforcement actions against regulated entities. Of those, 1,763 are related to administrative penalties[21] and 7 are related to civil penalties which are relevant to the language of SB 858 (see Table 3). During that time, DMHC has collected a total of $150,000 from civil penalties, and approximately $3.4 million each year in fines related to administrative penalties.[22]

Table 3. DMHC Enforcement Actions: Total Civil and Administrative Penalties, 2014-2022

Penalty Type	Number of Violations
Administrative (a)	**1763**
With monetary sanctions	1732
Without monetary sanctions	31
Civil (b)	**7**
With monetary sanctions	2
Without monetary sanctions	5

Source: California Health Benefits Review Program, 2022; DMHC Enforcement Action Database, 2022.

(a) Administrative penalties include only violations with a DMHC document category of “Letter of Agreement” as those are the only administrative penalties relevant to the fiscal analysis of SB 858.

(b) Civil penalties include only violations with a DMHC document category of “Civil Complaint” or “Judicial Ruling/Order.”

[20] Communication with DMHC on March 10, 2022.
[21] Categorized as letters of agreement.
[22] Based on data analyzed in DMHC’s Enforcement Action Database on March 19, 2022, including assumptions stated previously by CHBRP.

Potential Fiscal Scenarios of SB 858

The fiscal impacts of SB 858 will depend on the bill's effects on the behavior of both DMHC and its regulated entities, and there is limited literature to predict the behavioral response, post-enactment. As such, after reviewing over eight years of data on historical enforcement actions, CHBRP prepared three scenarios which reflect potential fiscal impacts of SB 858. The three scenarios reflect 1) the status quo (i.e. no change in frequency), 2) a decrease in violations, and 3) an increase in violations. CHBRP provides fiscal estimates after applying SB 858's increases in dollar amounts for civil and administrative penalties post-enactment, and discusses factors for consideration for each scenario.

Analytic Approach and Assumptions

CHBRP made the following considerations for the scenarios presented:

- Given the large number of administrative penalties assessed between 2014 and 2022 (n=1,763), CHBRP calculated baseline estimates in two manners: 1) CHBRP determined the ten most common enforcement actions with monetary sanctions,[23] and 2) CHBRP determined the ten enforcement actions with the highest dollar amount in monetary sanctions, and averaged the dollar amount of the monetary sanctions as baseline estimates. The ten costliest enforcement actions were not presented in scenarios 2 and 3 (i.e. decrease and increase, respectively) by frequency of violations due to the rarity of their occurrence between 2014 and 2022.
- Given the small number of civil penalties assessed between 2014 and 2022 (n=2), all civil penalties in this time range were included to show baseline data.
- To estimate the administrative penalties post-enactment, CHBRP calculated the average penalty amount for each enforcement action by multiplying the quantity by 4, a requirement of SB 858 for violations committed after January 1, 2023. The estimated total annual penalty amount for the enforcement actions associated with a particular violation(s) post-enactment was calculated by finding the average number of enforcement actions per year and multiplying it by the estimated average penalty amount in 2023.
- To estimate the civil penalties post-enactment, CHBRP calculated estimated the initial number of violations at baseline by dividing the assessed penalty by $2,500. That total was then multiplied by $100,000 to account for the increase of civil penalties from $2,500 to $25,000 post-enactment, and the mandated multiplier of four that would begin January 1, 2023.
- CHBRP looks at fiscal costs for only one-year post-enactment in its analysis. Therefore, CHBRP did not factor the annual adjustments that would begin in 2024 into its calculations.

Given the historical rarity of civil penalties imposed by the DMHC, CHBRP does not project an impact on civil penalties for any of the three scenarios.

For scenarios 2 and 3, CHBRP presents results for a change in frequency of 10% for violations associated with administrative penalties as an illustration.

In each of the scenarios, the costs for corrective action plans (CAPs)[24] are not considered; the costs for the creation, monitoring, and completion of a CAP differ greatly depending on the circumstances of the enforcement action. As such, CHBRP is unable to estimate the costs of CAPs at baseline or for those related to future compliance post-enactment in any scenario presented.

[23] Based on DMHC's references for individual violations. https://wpso.dmhc.ca.gov/enfactions/violation.aspx.

[24] DMHC may use a corrective action plan (CAP) as part of the process to ensure a health plan achieves compliance after a violation. CAPs may also be used to ensure future compliance by a health plan.

Scenario 1: No Change in Frequency of Violations

Administrative Penalties Post-enactment

Since 2014, enforcement actions associated with violations categorized by DMHC as solely "Grievance and Appeals" have occurred most frequently, with a total of 747.[25] Post-enactment, CHBRP estimates the average fine of enforcement actions against violations categorized as "Grievance and Appeals" would be $35,532 with an annual average total in assessed penalties of $3,304,476 (Table 4). In the estimate of the total annual penalty amount post-enactment, CHBRP is demonstrating the net effects of the increase in penalty amounts under SB 858, not accounting for annual adjustments mandated by the bill.

Enforcement actions against violations that consisted of both "Timely Access" and "Timely Access Reporting" were the costliest, with an average fine of $760,000. Post-enactment, CHBRP estimates the average administrative penalty for enforcement actions against these types of violations would be $3,040,000 (Table 5). CHBRP did not calculate the estimated total annual penalty amount for enforcement actions against these types of violation categories because of their rare incidence (i.e. they occurred fewer than one or two times per year between 2014-2022). Therefore, these penalties may not occur in first year post-enactment.

Table 4. Scenario 1 (No change) – Average Administrative Penalty Amounts per Enforcement Action at Baseline and Post-Enactment, by Frequency

Violation Categories Associated with the Enforcement Action*	Number of Violations, 2014-2022	Average Number of Violations per Year, 2014-2022	Average Penalty Amount at Baseline	Estimated Average Penalty Amount per Enforcement Action, 2023	Estimated Total Annual Penalty Amount for All Enforcement Actions, 2023
Grievance and Appeals	747	93	$8,883	$35,532	$3,304,476
Improper Cancellation or Rescission of Coverage	193	24	$7,763	$31,052	$745,248
Timely Access Reporting	65	8	$8,467	$33,868	$270,944
Operating at Variance with the EOC	49	6	$9,270	$37,080	$222,480
Independent Medical Review	46	6	$42,141	$168,564	$1,011,384
Arbitration	40	5	$9,938	$39,752	$198,760
Grievance and Appeals; Operating at Variance with the EOC	30	4	$14,472	$57,888	$231,552

[25] DMHC may assess penalties in one enforcement action based on violations across multiple categories.

Violation Categories Associated with the Enforcement Action*	Number of Violations, 2014-2022	Average Number of Violations per Year, 2014-2022	Average Penalty Amount at Baseline	Estimated Average Penalty Amount per Enforcement Action, 2023	Estimated Total Annual Penalty Amount for All Enforcement Actions, 2023
Claims, Financial Solvency and Audits	28	4	$10,714	$42,856	$171,424
Provider Dispute Resolution; Financial Solvency and Audits	23	3	$4,945	$19,780	$59,340
Financial Solvency and Audits; Claims	20	3	$16,125	$64,500	$193,500

Source: California Health Benefits Review Program, 2022; DMHC Enforcement Action Database, 2022.

Note: CHBRP provides data for only the top 10 most frequent violations that resulted in monetary sanctions via administrative penalties. For a complete dataset, please refer to DMHC's Enforcement Action Database at https://wpso.dmhc.ca.gov/enfactions/actionSearch.aspx

* Categories are described in the same manner DMHC uses to categorize violation types. See DMHC's violation references for more information at https://wpso.dmhc.ca.gov/enfactions/violation.aspx. DMHC may assess multiple penalties in a single enforcement action based on violations across multiple categories.

Key: EOC = Evidence of Coverage.

Table 5. Average Administrative Penalty Amounts per Enforcement Action at Baseline and Post-Enactment, by Dollar Amount

Violation Categories Associated with the Enforcement Action*	Average Penalty Amount at Baseline	Average Estimated Penalty Amount Post-enactment
Timely Access; Timely Access Reporting	$760,000	$3,040,000
Timely Access; Basic Health Care Services; Timely Access Reporting	$500,000	$2,000,000
Utilization Review; Licensing Standards; Grievance and Appeals; Operating at Variance with the EOC	$250,000	$1,000,000
Licensing Standards; Provider Dispute Resolution; Claims; Financial Solvency and Audits; Material Modifications	$150,000	$600,000
Quality Assurance; Delegation Oversight; Licensing Standards; Utilization Review	$146,538	$586,152
Financial Solvency and Audits; Basic Health Care Services; Claims	$100,000	$400,000
Provider Networks; Utilization Review; Licensing Standards	$100,000	$400,000

Violation Categories Associated with the Enforcement Action*	Average Penalty Amount at Baseline	Average Estimated Penalty Amount Post-enactment
Licensing Standards; Grievance and Appeals; Utilization Review; Balance Billing by Contracted Providers; Operating at Variance with the EOC; Claims; Independent Medical Review; Financial Solvency and Audits	$100,000	$400,000
Licensing Standards; Basic Health Care Services; Operating at Variance with the EOC	$100,000	$400,000
Claims; Provider Dispute Resolution; Financial Solvency and Audits	$95,000	$380,000

Source: California Health Benefits Review Program, 2022; DMHC Enforcement Action Database, 2022.

Note: CHBRP provides data for only the top 10 costliest violations that resulted in monetary sanctions via administrative penalties. For a complete dataset, please refer to DMHC's Enforcement Action Database at https://wpso.dmhc.ca.gov/enfactions/actionSearch.aspx

* Categories (in the left column of Table 5) are labeled in the same manner DMHC uses to categorize violation types. See DMHC's violation references for more information at https://wpso.dmhc.ca.gov/enfactions/violation.aspx. DMHC may assess multiple penalties in a single enforcement action based on violations across multiple categories.

Key: EOC = Evidence of Coverage.

Civil Penalties Post-Enactment

The two civil penalties with monetary sanctions since 2014 were assessed at $50,000 and $100,000.[26] As discussed in the *Policy Context*, SB 858 specifies that each enrollee harmed by a violation would constitute a separate and distinct violation. SB 858 further stipulates that a civil penalty must be computed by multiplying the number of enrollees by the number of days that the violation continues. Section 4 of SB 858 would require, beginning January 1, 2023, all penalty amounts enumerated in specific code sections, including those altered by Section 3 of SB 858, to be multiplied by four when calculating penalty amounts assessed by DMHC. CHBRP interprets this language to mean that all civil penalties would be assessed at a minimum of $100,000 post-enactment. CHBRP estimated the two civil penalties that were assessed between 2014-2022 would have a total of $2,000,000 and $4,000,000 if assessed for the same violations post-enactment (Table 6).

Table 6. - Civil Penalty Amounts at Baseline and Post-enactment

Civil Penalty Between 2014 and 2022	Penalty Amount at Baseline	Estimated Number of Violations per Penalty	Estimated Penalty Amount, 2023
Violation #1	$50,000	20	$2,000,000
Violation #2	$100,000	40	$4,000,000

Source: California Health Benefits Review Program, 2022.

[26] Section 3 of SB 858 would require all civil penalties to be assessed at a minimum of $25,000 per violation.

Scenario 2: Decrease in Frequency of Violations

Administrative Penalties

As discussed in the literature, sizeable monetary sanctions tend to impact corporate mindset differently than other types of sanctions. In the context of SB 858, the increased dollar amount of the administrative penalties may lead to a decrease in the frequency of violations. This reduction may occur for a variety of reasons, including an increased aversity to the financial burden of noncompliance.

Another potential outcome of increasing penalty amounts is that doing so could generate an increase in appeals of those penalties by regulated entities. While prior to enactment of SB 858 regulated entities may have determined it was most prudent to pay the penalty and enter into a letter of agreement (LOA)[27] with DMHC, with an increase in penalty amount, they may decide it is more beneficial to exercise their right to an administrative hearing. From 2014 to present, LOAs outnumbered settlement agreements nearly 6.5 to 1. Enactment of SB 858 may lead to a decrease in this ratio, the amount by which would depend on the decisions of the individual entity. The consequences of the increase in administrative hearings and resulting settlement agreements would be a delay in the outcome of an enforcement action, including implementation of a CAP to correct deficiencies. An increase in CAPs could lead to additional costs to both the regulated entity (for its implementation) and DMHC (for monitoring and oversight); however, the changes also could spur changes in behavior, increasing compliance that otherwise may not have occurred.

To illustrate the fiscal impacts in this scenario, CHBRP applied a 10% decrease to the average number of violations per year and multiplied the figure by the estimated average penalty amount per enforcement action post-enactment. CHBRP estimates violations categorized as “Grievance and Appeals” would occur 84 times per year, and that DMHC would assess an annual average total of $2,984,688 in penalties (Table 7).

Table 7. Scenario 2 (Decrease in Violations) – Average Administrative Penalty Amounts per Enforcement Action at Baseline and Post-Enactment, by Frequency

Violation Categories Associated with the Enforcement Action*	Number of Violations, 2014-2022	Average Number of Violations per Year, 2014-2022	Average Penalty Amount at Baseline	Estimated Number of Penalties, 2023	Estimated Average Penalty Amount per Enforcement Action, 2023	Estimated Total Annual Penalty Amount for All Enforcement Actions, 2023
Grievance and Appeals	747	93	$8,883	84	$35,532	$2,984,688
Improper Cancellation or Rescission of Coverage	193	24	$7,763	22	$31,052	$683,144
Timely Access Reporting	65	8	$8,467	7	$33,868	$237,076

[27] LOAs are the outcome of an enforcement action in which the regulated entity pays the fine for the violation but is not required to complete a CAP.

Violation Categories Associated with the Enforcement Action*	Number of Violations, 2014-2022	Average Number of Violations per Year, 2014-2022	Average Penalty Amount at Baseline	Estimated Number of Penalties, 2023	Estimated Average Penalty Amount per Enforcement Action, 2023	Estimated Total Annual Penalty Amount for All Enforcement Actions, 2023
Operating at Variance with the EOC	49	6	$9,270	5	$37,080	$185,400
Independent Medical Review	46	6	$42,141	5	$168,564	$842,820
Arbitration	40	5	$9,938	5	$39,752	$198,760
Grievance and Appeals; Operating at Variance with the EOC	30	4	$14,472	4	$57,888	$231,552
Claims, Financial Solvency and Audits	28	4	$10,714	4	$42,856	$171,424
Provider Dispute Resolution; Financial Solvency and Audits	23	3	$4,945	3	$19,780	$59,340
Financial Solvency and Audits; Claims	20	3	$16,125	3	$64,500	$193,500

Source: California Health Benefits Review Program, 2022; DMHC Enforcement Action Database, 2022.

Note: CHBRP provides data for only the top 10 most frequent violations that resulted in monetary sanctions via administrative penalties. For a complete dataset, please refer to DMHC's Enforcement Action Database at https://wpso.dmhc.ca.gov/enfactions/actionSearch.aspx

* Categories are described in the same manner DMHC uses to categorize violation types. See DMHC's violation references for more information at https://wpso.dmhc.ca.gov/enfactions/violation.aspx. DMHC may assess multiple penalties in a single enforcement action based on violations across multiple categories.

Key: EOC = Evidence of Coverage.

CHBRP does not provide projections of the ten costliest enforcement actions in Scenario 2 (i.e. decrease in violations) due to the rarity of their occurrence between 2014 and 2022. Seven of the top ten costliest enforcement actions occurred only once in the past eight years. The remaining three occurred, on average, fewer than one or two times per year. CHBRP estimates the fiscal impacts on the costliest enforcement actions under Scenario 2 would be similar to those presented in Scenario 1 (Table 5).

Civil Penalties

As discussed in the overview of historical DMHC enforcement actions, DMHC has assessed only two penalties against entities in the past eight years. Even with the significant increase in civil penalty amounts SB 858 requires, given the historical rarity of civil penalties imposed by DMHC, the net fiscal impact post-enactment is likely minimal. CHBRP estimates the fiscal impacts regarding civil penalties under Scenario 2 would be the same as those presented in Scenario 1 (Table 6).

Scenario 3: Increase in Frequency of Violations

Administrative Penalties

As mentioned in the *Policy Context*, California has made significant investments into its Medi-Cal program and enacted policies to increase coverage, while improving access and quality. As health plans adjust to the new changes, increases in penalties may arise. For example, part of these investments include the California Advancing and Innovating Medi-Cal (CalAIM) program, a multiyear effort to transform the state Medi-Cal program.[28] Under CalAIM, Medi-Cal managed care plans have several additional mandates, including the provision of enrollee assessments on enrollees' health risks and health-related needs, focus on wellness and preventions, the provision of care management and care transitions, and offering of housing supports and medically tailored meals. Historically, implementation of programs that significantly transformed the healthcare system has met challenges (e.g. the Affordable Care Act and Medi-Cal expansion). Achieving compliance has required time to educate stakeholders and change behaviors and systems. Given that the timelines of major healthcare system changes coincide with SB 858, there could be increased violations by DMHC-regulated entities as they learn to adjust to the new standards and systems for healthcare coverage.

To illustrate the fiscal impacts in this scenario, CHBRP applied a 10% increase to the average number of violations per year and multiplied the figure by the estimated average penalty amount per enforcement action post-enactment. CHBRP estimates violations categorized as "Grievance and Appeals" would occur 102 times per year, and that DMHC would assess an annual average total of $3,624,264 in penalties (Table 8).

Table 8. Scenario 3 (Increase in Violations) – Average Administrative Penalty Amounts per Enforcement Action at Baseline and Post-Enactment, by Frequency

Violation Categories Associated with the Enforcement Action*	Number of Violations, 2014-2022	Average Number of Violations per Year, 2014-2022	Average Penalty Amount at Baseline	Estimated Number of Penalties, 2023	Estimated Average Penalty Amount per Enforcement Action, 2023	Estimated Total Annual Penalty Amount for All Enforcement Actions, 2023
Grievance and Appeals	747	93	$8,883	102	$35,532	$3,624,264
Improper Cancellation or Rescission of Coverage	193	24	$7,763	26	$31,052	$807,352

[28] More information on CalAIM available at https://www.dhcs.ca.gov/CalAIM/Pages/calaim.aspx.

Violation Categories Associated with the Enforcement Action*	Number of Violations, 2014-2022	Average Number of Violations per Year, 2014-2022	Average Penalty Amount at Baseline	Estimated Number of Penalties, 2023	Estimated Average Penalty Amount per Enforcement Action, 2023	Estimated Total Annual Penalty Amount for All Enforcement Actions, 2023
Timely Access Reporting	65	8	$8,467	9	$33,868	$304,812
Operating at Variance with the EOC	49	6	$9,270	7	$37,080	$259,560
Independent Medical Review	46	6	$42,141	7	$168,564	$1,179,948
Arbitration	40	5	$9,938	6	$39,752	$238,512
Grievance and Appeals; Operating at Variance with the EOC	30	4	$14,472	4	$57,888	$231,552
Claims, Financial Solvency and Audits	28	4	$10,714	4	$42,856	$171,424
Provider Dispute Resolution; Financial Solvency and Audits	23	3	$4,945	3	$19,780	$59,340
Financial Solvency and Audits; Claims	20	3	$16,125	3	$64,500	$193,500

Source: California Health Benefits Review Program, 2022; DMHC Enforcement Action Database, 2022.

Note: CHBRP provides data for only the top 10 most frequent violations that resulted in monetary sanctions via administrative penalties. For a complete dataset, please refer to DMHC's Enforcement Action Database at https://wpso.dmhc.ca.gov/enfactions/actionSearch.aspx

* Categories are described in the same manner DMHC uses to categorize violation types. See DMHC's violation references for more information at https://wpso.dmhc.ca.gov/enfactions/violation.aspx. DMHC may assess multiple penalties in a single enforcement action based on violations across multiple categories.

Key: EOC = Evidence of Coverage.

As in Scenario 2, CHBRP does not provide projections of the ten costliest enforcement actions in Scenario 3 (i.e. increase in violations) due to the rarity of their occurrence between 2014 and 2022. CHBRP estimates the fiscal impacts regarding the costliest enforcement actions under Scenario 3 would be similar to those presented in Scenario 1 (Table 5).

Civil Penalties

As in Scenarios 1 and 2, given the historical rarity of civil penalties imposed by the DMHC, the net fiscal impact post-enactment from civil penalties is likely minimal. CHBRP estimates the fiscal impacts regarding civil penalties under Scenario 3 would be the same as those presented in Scenario 1 (Table 6).

Considerations for Policymakers

Rigorous regulatory enforcement and changes in behavior to achieve compliance is predicated on cooperation between the regulator and the entities it regulates. As noted in the literature, the recognition of compliance as a social construct that considers political and social pressures, in addition to legal and financial factors, is a key component of effective regulation. While there is no ideal regulatory framework that works for a particular industry, regulators with flexibility may be able to achieve a balance between tough sanctions and persuasion to achieve desired compliance.

California's healthcare system is complex, with multiple regulators, including DMHC, the California Department of Insurance (CDI), and the Department of Health Care Services (DHCS). Neither CDI nor DHCS are included in the provisions of SB 858; however; it is worth noting that they have statutory authority to enforce laws and regulations on some of the same entities as DMHC.

APPENDIX A TEXT OF BILL ANALYZED

On February 4, 2022, the California Senate Committee on Health requested that CHBRP analyze SB 858.

SENATE BILL **NO. 858**

Introduced by Senator Wiener

January 19, 2022

An act to amend Sections 1386 and 1387 of, and to add Section 1388.5 to, the Health and Safety Code, relating to health care service plans.

LEGISLATIVE COUNSEL'S DIGEST

SB 858, as introduced, Wiener. Health care service plans: discipline: civil penalties.

Existing law, the Knox-Keene Health Care Service Plan Act of 1975, provides for the licensure and regulation of health care service plans by the Department of Managed Health Care. Existing law authorizes the Director of the Department of Managed Health Care to take disciplinary measures, including the imposition of civil penalties, against a licensee when the director determines that the licensee has committed an act or omission constituting grounds for disciplinary action, as specified. Under existing law, a person who violates the act, or a rule or order adopted or issued under the act, is generally liable for a civil penalty not to exceed $2,500 per violation. Existing law also includes various provisions that assess specific civil and administrative penalties for certain violations. Fines and penalties under the act are deposited into the Managed Care Administrative Fines and Penalties Fund, and used, upon appropriation by the Legislature, for designated purposes.

This bill would increase the maximum base amount of the civil penalty from $2,500 per violation to $25,000 per violation, which would be adjusted annually commencing January 1, 2024, as specified. The bill would multiply the amounts of other specified civil and administrative penalties by 4, commencing January 1, 2023, and would also annually adjust those penalties, commencing January 1, 2024. The bill would authorize the director to impose a corrective action plan to require future compliance with the act, under certain circumstances. If a health care service plan fails to comply with the corrective action plan in a timely manner, the bill would require the department to monitor the health care service plan through medical surveys, financial examinations, or other means necessary to ensure timely compliance.

The bill would require the director, when assessing administrative penalties against a health care service plan, to determine the appropriate amount of the penalty for each violation, based upon

consideration of specified factors, such as the nature, scope, and gravity of the violation, whether the violation is an isolated incident, and the amount of the penalty necessary to deter similar violations in the future. The bill would require the director to provide a written explanation of the amount of the penalty, including the factors the director relied upon in assessing that amount.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

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THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(1) Some of the penalty amounts the Department of Managed Health Care is authorized to impose have not been altered since the enactment of the Knox-Keene Act in 1975. In 1975, the price of gasoline was $0.59 a gallon and a pound of chicken also cost $0.59.

(2) Other provisions of the Knox-Keene Act that include penalty amounts have not been updated since 1999 or 2000. Since then, health plan premiums in California for employer-sponsored coverage have quadrupled from one hundred sixty-three dollars ($163) per month in 2000 to six hundred sixty-one dollars ($661) per month in 2020, according to the California Employer Health Benefits Survey published by the California Health Care Foundation in August 2021.

(3) It is, therefore, the intent of the Legislature in enacting this act to provide the Department of Managed Health Care with additional authority to levy penalties and impose corrective action plans, while updating penalty amounts and ensuring that in the future, penalty amounts increase as health plan premiums increase.

SEC. 2. Section 1386 of the Health and Safety Code is amended to read:

1386. (a) The director may, after appropriate notice and opportunity for a hearing, by order suspend or revoke any license issued under this chapter to a health care service plan or assess administrative penalties if the director determines that the licensee has committed any of the acts or omissions constituting grounds for disciplinary action.

(b) The following acts or omissions constitute grounds for disciplinary action by the director:

(1) The plan is operating at variance with the basic organizational documents as filed pursuant to Section 1351 or 1352, or with its published plan, or in any manner contrary to that described in, and reasonably inferred from, the plan as contained in its application for licensure and annual report, or any modification thereof, unless amendments allowing the variation have been submitted to, and approved by, the director.

(2) The plan has issued, or permits others to use, evidence of coverage or uses a schedule of charges for health care services that do not comply with those published in the latest evidence of coverage found unobjectionable by the director.

(3) The plan does not provide basic health care services to its enrollees and subscribers as set forth in the evidence of coverage. This subdivision shall not apply to specialized health care service plan contracts.

(4) The plan is no longer able to meet the standards set forth in Article 5 (commencing with Section 1367).

(5) The continued operation of the plan will constitute a substantial risk to its subscribers and enrollees.

(6) The plan has violated or attempted to violate, or conspired to violate, directly or indirectly, or assisted in or abetted a violation or conspiracy to violate any provision of this chapter, any rule or regulation adopted by the director pursuant to this chapter, or any order issued by the director pursuant to this chapter.

(7) The plan has engaged in any conduct that constitutes fraud or dishonest dealing or unfair competition, as defined by Section 17200 of the Business and Professions Code.

(8) The plan has permitted, or aided or abetted any violation by an employee or contractor who is a holder of any certificate, license, permit, registration, or exemption issued pursuant to the Business and Professions Code or this code that would constitute grounds for discipline against the certificate, license, permit, registration, or exemption.

(9) The plan has aided or abetted or permitted the commission of any illegal act.

(10) The engagement of a person as an officer, director, employee, associate, or provider of the plan contrary to the provisions of an order issued by the director pursuant to subdivision ~~(c)~~ *(e)* of this section or subdivision (d) of Section 1388.

(11) The engagement of a person as a solicitor or supervisor of solicitation contrary to the provisions of an order issued by the director pursuant to Section 1388.

(12) The plan, its management company, or any other affiliate of the plan, or any controlling person, officer, director, or other person occupying a principal management or supervisory position in the plan, management company, or affiliate, has been convicted of or pleaded nolo contendere to a crime, or committed any act involving dishonesty, fraud, or deceit, which crime or act is substantially related to the qualifications, functions, or duties of a person engaged in business in accordance with this chapter. The director may revoke or deny a license hereunder irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

(13) The plan violates Section 510, 2056, or 2056.1 of the Business and Professions Code or Section 1375.7.

(14) The plan has been subject to a final disciplinary action taken by this state, another state, an agency of the federal government, or another country for any act or omission that would constitute a violation of this chapter.

(15) The plan violates the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code).

(16) The plan violates Section 806 of the Military and Veterans Code.

(17) The plan violates Section 1262.8.

(18) The plan violates Chapter 8.5 (commencing with Section 127671) of Part 2 of Division 107, including the data submission requirements of that chapter.

(c) In addition to the authority to conduct an onsite medical survey and prepare a corrective plan pursuant to Section 1380 and to conduct an assessment of the health care service plan's financial health, including, but not limited to, identification of the plan's available reserves, the director may impose a corrective action plan pursuant to this subdivision to require future compliance by the health care service plan with any other provision of this chapter. Failure by the health care service plan to comply with a corrective action plan imposed pursuant to this subdivision in a timely manner appropriate for rectifying noncompliance shall be monitored by the department through medical surveys, financial examinations, or other means necessary to assure timely compliance.

(d) (1) When assessing administrative penalties against a health plan, the director shall determine the appropriate amount of the penalty for each violation of this chapter based upon one or more factors, as applicable, including, but not limited to, the following:

(A) The nature, scope, and gravity of the violation.

(B) The good or bad faith of the plan.

(C) The plan's history of violations.

(D) The willfulness of the violation.

(E) The nature and extent to which the plan cooperated with the department's investigation.

(F) The nature and extent to which the plan aggravated or mitigated any injury or damage caused by the violation.

(G) The nature and extent to which the plan has taken corrective action to ensure the violation will not recur.

(H) The financial status of the plan, including reserves, financial solvency, revenues in excess of expenditures and other factors relating to the financial status of the domestic corporation and any parent company, subsidiary, affiliate, or other financially connected entity.

(I) The financial cost of the health care service that was denied, delayed, or modified, including whether the penalty is commensurate with or exceeds the avoided cost based on the number of enrollees estimated to be affected and the cost of the care denied, delayed or modified

(J) Whether the violation is an isolated incident.

(2) The amount of the penalty shall also take into account one or more of the following:

(A) The number of enrollees estimated to be affected.

(B) The frequency of the violation based on the number of days for a continuous violation or the estimated number of incidents with potential harm to enrollees.

(C) The severity of the potential harm in terms of loss of life, loss of health, or financial harm to the enrollee.

(D) The amount of the penalty necessary to deter similar violations in the future.

(3) The director shall provide written explanation of the amount of an administrative penalty, including the factors the director relied upon in assessing that amount.

(e) (1) The director may prohibit any person from serving as an officer, director, employee, associate, or provider of any plan or solicitor firm, or of any management company of any plan, or as a solicitor, if either of the following applies:

(A) The prohibition is in the public interest and the person has committed, caused, participated in, or had knowledge of a violation of this chapter by a plan, management company, or solicitor firm.

(B) The person was an officer, director, employee, associate, or provider of a plan or of a management company or solicitor firm of any plan whose license has been suspended or revoked pursuant to this section and the person had knowledge of, or participated in, any of the prohibited acts for which the license was suspended or revoked.

(2) A proceeding for the issuance of an order under this subdivision may be included with a proceeding against a plan under this section or may constitute a separate proceeding, subject in either case to subdivision ~~(d).~~

(f) A proceeding under this section shall be subject to appropriate notice to, and the opportunity for a hearing with regard to, the person affected in accordance with subdivision (a) of Section 1397.

SEC. 3. Section 1387 of the Health and Safety Code is amended to read:

1387. (a) ~~Any~~ *(1) A* person who violates ~~any~~ *a* provision of this chapter, or who violates ~~any~~ *a* rule or order adopted or issued pursuant to this chapter, shall be liable for a civil penalty ~~not to exceed two thousand five hundred dollars ($2,500)~~ *not less than twenty-five thousand dollars ($25,000)* for each violation, which shall be assessed and recovered in a civil

action brought in the name of the people of the State of California by the director in any court of competent jurisdiction.

(2) A violation that is ongoing is subject to a civil penalty not less than twenty-five thousand dollars ($25,000) for each day that the violation continues, whether continuous or not.

(3) Each enrollee harmed by a violation of this chapter constitutes a separate and distinct violation subject to a civil penalty not less than twenty-five thousand dollars ($25,000).

(4) A civil penalty shall be computed by multiplying the number of enrollees affected by the number of days that the violation continues.

(b) Commencing January 1, 2024, and each January 1 thereafter, the amount specified in this section shall be adjusted annually based on the average rate of change in rates for the individual and group markets in the prior calendar year. For purposes of this subdivision, rates include premiums and cost sharing.

~~(b)~~

(c) As applied to the civil penalties for acts in violation of this chapter, the remedies provided by this section and by other sections of this chapter are not exclusive, and may be sought and employed in any combination to enforce this chapter.

~~(c) No action shall~~

(d) An action shall not be maintained to enforce any liability created under subdivision (a), unless brought before the expiration of four years after the act or transaction constituting the violation.

SECTION 4. Section 1388.5 is added to the Health and Safety Code, to read:

1388.5. (a) For violations occurring on or after January 1, 2023, the amounts of the civil and administrative penalties enumerated in Sections 1367.01, 1367.03, 1368, 1368.04, 1371.37, 1374.27, 1374.34, 1374.9, 1380, 1387, 1388, 1389.8, 1390, 1393.6, and any other section in this chapter that enumerates a specific penalty amount, shall be multiplied by four.

(b) For violations occurring on or after January 1, 2024, the amounts of the civil and administrative penalties in subdivision (a) shall also be subject to the annual adjustments described in subdivision (b) of Section 1387.

APPENDIX B COMPARISON OF BILL TEXT AND CURRENT REGULATIONS

Figure 1 provides a comparison of California Code of Regulations Title 28, Section 1300.86 and relevant provisions of SB 858, regarding the assessment of administrative penalties.

Figure 1. Comparison of Assessment of Administrative Penalties between California Code of Regulations and SB 858

California Code of Regulations, Title 28, Section 1300.86	SB 858
The nature, scope, and gravity of the violation	The nature, scope, and gravity of the violation
The good or bad faith of the plan	The good or bad faith of the plan
The plan's history of violations	The plan’s history of violations
The willfulness of the violation	The willfulness of the violation
The nature and extent to which the plan cooperated with the Department's investigation	The nature and extent to which the plan cooperated with the department’s investigation
The nature and extent to which the plan aggravated or mitigated any injury or damage caused by the violation	The nature and extent to which the plan aggravated or mitigated any injury or damage caused by the violation
The nature and extent to which the plan has taken corrective action to ensure the violation will not recur	The nature and extent to which the plan has taken corrective action to ensure the violation will not recur
Whether the violation is an isolated incident	Whether the violation is an isolated incident
The financial status of the plan	The financial status of the plan, including reserves, financial solvency, revenues in excess of expenditures and other factors relating to the financial status of the domestic corporation and any parent company, subsidiary, affiliate, or other financially connected entity
The financial cost of the health care service that was denied, delayed, or modified	The financial cost of the health care service that was denied, delayed, or modified, including whether the penalty is commensurate with or exceeds the avoided cost based on the number of enrollees estimated to be affected and the cost of the care denied, delayed or modified
The amount of the penalty necessary to deter similar violations in the future	The amount of the penalty shall also take into account one or more of the following: - The number of enrollees estimated to be affected - The frequency of the violation based on the number of days for a continuous violation or the estimated number of incidents with potential harm to enrollees - The severity of the potential harm in terms of loss of life, loss of health, or financial harm to the enrollee - The amount of the penalty necessary to deter similar violations in the future

Source: California Health Benefits Review Program, 2022.

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ABOUT CHBRP

The California Health Benefits Review Program (CHBRP) was established in 2002. As per its authorizing statute, CHBRP provides the California Legislature with independent analysis of the medical, financial, and public health impacts of proposed health insurance benefit-related legislation. The state funds CHBRP through an annual assessment on health plans and insurers in California.

A group of faculty, researchers, and staff complete the analysis that informs California Health Benefits Review Program (CHBRP) reports. The CHBRP **Faculty Task Force** comprises rotating senior faculty from University of California (UC) campuses. In addition to these representatives, there are other ongoing researchers and analysts who are **Task Force Contributors** to CHBRP from UC that conduct much of the analysis. The **CHBRP staff** works with Task Force members in preparing parts of the analysis, and manages external communications, including those with the California Legislature. As required by CHBRP's authorizing legislation, UC contracts with a certified actuary, **Milliman**, to assist in assessing the financial impact of each legislative proposal mandating or repealing a health insurance benefit. The **National Advisory Council** provides expert reviews of draft analyses and offers general guidance on the program to CHBRP staff and the Faculty Task Force. Information on CHBRP's analysis methodology, authorizing statute, as well as all CHBRP reports and other publications, are available at www.chbrp.org.

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CHBRP assumes full responsibility for the report and the accuracy of its contents. All CHBRP bill analyses and other publications are available at www.chbrp.org.

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Please direct any questions concerning this document to: California Health Benefits Review Program; MC 3116; Berkeley, CA 94720-3116, info@chbrp.org, or www.chbrp.org