



July 23, 2012

Honorable Kathleen Sebelius
The U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Secretary Sebelius:

On July 10th I wrote a letter on behalf of the 29 Republican governors asking 30 specific questions about the implementation of exchanges and the expansion of Medicaid. The July 13, 2012 letter from Acting Administrator Marilyn Tavenner was a cordial but vague response from the Obama Administration. With the challenging and detailed work ahead for our nation to address the issues of health care, the letter was wholly inadequate. The response was neither substantive nor serious and appeared to be more of a marketing tool than serious problem solving.

Three years ago, President Obama correctly told Senate Democrats that, “It is not sufficient for us to simply add more people to Medicare or Medicaid ...” and “... we can’t simply put more people into a broken system that doesn’t work.” He was right. Medicaid expansion without Medicaid reform is irresponsible. Nevertheless, that is exactly what the Administration now wants us to do. Unfortunately, the nation’s governors were largely excluded from the politicized process used to pass the Patient Protection and Affordable Care Act (PPACA). It is our responsibility to speak out against the flawed policies of PPACA and work towards real solutions to increase access and innovation and lower the cost of health care. We need to return to the original task to halt the corrosive effects of rising health care costs on federal, state, and family budgets.

As you may have seen from the reports from the National Governors Association meeting that I was honored to host in Williamsburg, Virginia, a majority of the nation’s governors are uncertain about the major decisions which must be made on what kinds of exchanges to

implement, whether to expand Medicaid, and how the vast new bureaucracies will be paid for and administered in a nation \$16 trillion in debt.

Therefore we need specific answers, not general platitude. If you don't know the answers, please tell us. Otherwise, please address the many serious questions we have on these issues, and please answer the NGA staff as well on the issues raised on behalf of **ALL** the nation's governors.

Last summer, the Republican Governors Public Policy Committee released *A New Medicaid: A Flexible, Innovative and Accountable Future*, a detailed outline of the problems we face and included 31 specific recommended solutions. They were forwarded to the Congress, the President and you, but have largely been ignored.

In light of the Supreme Court decision, we submitted a lengthy set of questions that must be answered if the Administration expects to implement PPACA nationwide. Let these be the starting point for meaningful discussions between us as partners in our exceptional system of federalism. We do not need yet another tour that promotes PPACA but ignores the realities of implementation of a more than 2000 page bill that few read.

I've taken the liberty of reattaching our list of questions. Specific, written responses to each question would be most beneficial to governors and our staffs. Hopefully, your administration is willing and able to cooperate with the nation's governors by answering each question thoroughly. I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink that reads "Robert F. McDonnell". The signature is written in a cursive style with a large initial 'R'.

Governor Bob McDonnell

CC: President Barack Obama
Acting Administrator Marilyn Tavenner

Questions from July 10, 2012 Letter

Healthcare Exchanges:

- 1) Please provide a complete list of regulations that will have to be reviewed, revised and re-opened for public comment prior to implementation as a result of the Supreme Court ruling (e.g., the Medicaid eligibility regulations, exchange regulations related to interface with Medicaid)? What is the schedule for re-issuing these regulations?
- 2) When will either additional guidance or actual rules be issued on essential health benefits, actuarial value and rating areas be issued?
- 3) The federal government has already extended deadlines for applying for Level 1 and Level 2 Exchange Establishment funding into 2014. Can we expect extensions of the deadlines for implementation given the uncertainty caused by the Supreme Court ruling and the linkage between Medicaid expansion and exchange eligibility and enrollment functions? In addition, will the deadlines change for states implementing a partnership exchange? Will the deadlines be extended for states implementing a federal exchange?
- 4) When will the details of the federal partnership options be available? These cannot be considered as an option without details including cost estimates. How will the long term funding of the federally-facilitated healthcare exchanges be sustained?
- 5) States considering a state-based exchange need to know whether there will be a charge and by how much to use the federal data hub, advance premium tax credit/cost-sharing reduction service, risk adjustment and transitional reinsurance programs.
- 6) When will states learn the details of the operational systems for a federal exchange? The procedural, technical, and architectural requirements for linking to the federal exchange have not been released. It is not feasible to know if a state-based exchange is better for our citizens until we know what the contents of a federal exchange will be. Taking grant money at this time for state exchange creation may be wasted if a federal exchange makes more sense for a particular state.
- 7) When will information from the establishment of a federal exchange be available for states to use if a state opts to build its own exchange? It is costly for each state to have to start from scratch and still not know how interfaces will work.
- 8) If states choose to build a state-based exchange, what dollars will the federal government contribute now and in the future? For the federal exchange states, when will the regulations regarding the imposition of taxes on a state's insurers be released?
- 9) It has been widely reported that Congressional leaders who have to appropriate money will seek to defund exchanges. Please explain how the enactment provisions of the law allow the Executive Branch to continue to fund exchanges without Congressional action to appropriate money.
- 10) What happens to a state that has taken exchange planning and implementation grants if their exchange is not financially viable after 2015? Can a state refuse to increase taxes on either its

residents or insurers, thus putting the financial underpinning of an exchange at risk? What penalties does the federal government envision in this case?

11) What happens if a state accepts grant money now to begin to build a state exchange, and subsequently determines that a federal exchange may be better? Will the federal government claw back these grant dollars from the states?

12) What impact will changes to the Medicaid expansion have on exchange implementation? The federal exchange is currently structured to provide Medicaid eligibility determination. How will this work if some states participate and others do not?

13) Last month the Congressional Budget Office (CBO) pointed out a provision in the law that reduces exchange subsidies after 2018, which means fewer and fewer people will qualify for subsidies, and the people who do qualify will get a smaller and smaller subsidy. Does the Administration support that change, and if so, how would you pay for it? If you do not, why do you think people should be forced to buy insurance if federal subsidies are shrinking?

14) CMS has released 90/10 funding under ARRA and HITECH in order for states to improve their eligibility systems for Medicaid and other social service programs. Will that funding continue?

15) Alongside the considerable challenge of greatly expanding the Medicaid program, states are charged by the PPACA with creating a single, seamless point of entry for all of the insurance affordability programs affected by the Act--Medicaid, the Children's Health Insurance Program (CHIP), the Basic Health Plan (where offered), advance tax credits for individual and Small Business Health Options Program (SHOP) exchange enrollees. This leaves another major question on the table. What about all of the other social service programs? Will states still be able to create an eligibility system for all social service programs under the 90/10 funding mechanism?

16) In order to minimize disruptions to a state's insurance market, The Office of Personnel Management (OPM) is required to certify multi-state plans that must be included in every exchange, when will the rules be released detailing the requirements and timeline for multi-state plans. How OPM structures these rules can be very disruptive to a state's insurance market.

17) Does the federal government intend to maintain high risk pools and how will they be financed? What actions will they take in a state that has opted not to operate a high risk pool or an exchange?

Medicaid

1) When can we expect to receive updated guidance on Medicaid expansion and related topics?

2) Is there a deadline for letting the federal government know if a state will be participating in the Medicaid expansion? How does that relate to the exchange declaration deadline? The two programs are currently scheduled to be implemented simultaneously in January 2014.

3) Will states that expand Medicaid coverage up to a level below 138% of the federal poverty level (FPL), for example up to 100% of FPL, still receive the enhanced federal medical assistance percentage (FMAP) available for —newly covered populations?

- 4) Will states be allowed to phase in Medicaid coverage up to 138% of FPL (or 100% FPL) years after 2013 and still receive the enhanced FMAP?
- 5) Does the MOE requirement apply to the expansion population or does it apply only to the current Medicaid population? If a state accepts the expansion, but the federal match goes away, can we drop out of the expansion program? Will you waive the MOE under your 1115 waiver authority? What will be the penalties for failure to comply with MOE requirements? Since the MOE was a direct result of the expansion funding, if a state chooses not to expand is the MOE no longer effective?
- 6) Regarding the two year increase in Medicaid reimbursement for primary care codes, are you going to extend it? If so, how are you going to pay for it? Congressional Republicans have expressed opposition to any funded for PPACA.
- 7) Will states still be required to convert their income counting methodology to MAGI for purposes of determining eligibility regardless of whether they expand to the optional adult group? If so, how do states link the categorical eligibility criteria to the MAGI? How will the federal exchanges utilize the state's criteria?
- 8) If a state expanded Medicaid through a waiver prior to enactment of the PPACA, but then chooses not to expand coverage further, are they still eligible for the 75% to 90% enhanced FMAP for the previously expanded population?
- 9) Will the federal government support options for the Medicaid expansion population that encourage personal responsibility – cost sharing or accountability provisions, the use of high deductible plans such as Health Savings Accounts, and other options at the state's choice?
- 10) What specific plans and timeline do you have for enacting the reforms and flexibility options for Medicaid that you spoke of in 2009? When can states give further input on the needed reforms?
- 11) You have stated that you will not deport undocumented aliens who have not committed a crime. You have also said that these undocumented aliens will be exempt from the individual mandate. How will the state be reimbursed for medical services given to these individuals?
- 12) Will CMS approve global waivers with an aggregate allotment, state flexibility, and accountability if states are willing to initiate a portion of the expansion?
- 13) The Disproportionate Share allotments will be reduced every year with a methodology based in the reduction in the number of uninsured. One, when will HHS issue the regulations and methodology for this reduction? Two, for a state that does not see a decrease in its uninsured population will the remaining state absorb the full reduction? In addition, can a state implement a new DSH Diversion program as part of the optional expansion? Can a state implement new DSH Diversion programs for services to the uninsured/uncompensated care services?