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MEMORANDUM

December 14, 2012

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker LLP

Re: *White House/HHS Monthly Tribal Leaders ACA Update Call; HHS "FAQ" on Exchanges, Market Reforms, and Medicaid Expansion; Congressional Hearing on Exchanges and Medicaid Expansion Implementation; IHS Listening Session*

As you know, there has been a flurry of federal government activity related to health care and implementation of the Affordable Care Act (ACA) over the last few weeks. In this memorandum, we provide an overview of important updates from the White House/Department of Health and Human Services (HHS) monthly ACA update call; a Frequently Asked Questions (FAQ) document recently released by HHS on the Health Insurance Exchanges, Market Reforms under the ACA, and Medicaid Expansion; a recent Congressional hearing on implementation of the Exchanges and Medicaid Expansion; and the December 6, 2012 Indian Health Care Service (IHS) listening session.

I. White House/HHS Monthly Tribal Leaders ACA Update Call

On December 11, 2012, the White House and HHS held their monthly outreach call with Tribal Leaders on the ACA. Updates were provided from the White House Office of Health Reform, the IHS, and the Center for Consumer Information and Insurance Oversight (CCIIO) at the Center for Medicare & Medicaid Services (CMS).

Chiquita Brooks-LaSure, Director of Coverage Policy, Office of Health Reform, provided an update on the implementation of the new Health Insurance Exchanges under the ACA. She reported that HHS had recently announced conditional approval of state-based Exchange plans in six states: Colorado, Connecticut, Massachusetts, Maryland, Oregon, and Washington. These states received conditional approval because they are on track to meet all Exchange deadlines. HHS extended the deadline for states to submit State-based Exchange Blueprint Applications to Friday, December 14 and will approve or conditionally approve all applications by the statutory deadline of January 1, 2013. HHS also extended the deadline for states to submit a Declaration Letter and Blueprint Application for State Partnership Exchanges.

Along with its conditional approval announcements, HHS released an FAQ list, answering frequently asked questions related to Exchanges, market reforms, and Medicaid, which was sent to state governors with a letter from HHS Secretary Kathleen Sebelius. The letter and FAQ document is attached and discussed in further detail in the following section of this memorandum.

Ms. LaSure also noted that five proposed rules relating to setting up Exchanges in 2014 were issued in November. These rules relate to: (1) coverage of Essential Health Benefits; (2) insurance market rules and rate review; (3) wellness programs in group health plans; (4) benefit and payment parameters; and (5) rules for multi-state plans to be offered in Exchanges. We have reported on these proposed rules in previous memoranda. (See our Memorandum to Tribal Health Clients dated December 12 for a discussion of the EHB, market rules, and wellness program proposed rules, and our Memoranda to Tribal Health Clients dated December 10 for analysis of the benefit and payment parameters and multi-state plan proposed rules.)

Myra Alvarez, Director of Public Health, Office of Health Reform, also briefly highlighted several recent announcements related to implementation of the ACA. Among other updates, Ms. Alvarez reported that in mid-October, HHS announced that \$230 million was invested in the National Health Service Corps (NHSC) through 4,600 loan repayment and scholarship awards to clinicians and students serving at approved NHSC sites, as well as grants to 32 states to support state loan repayment programs. All IHS facilities are automatically considered approved NHSC service sites. Also, in November HHS announced that rates paid to primary care physicians serving Medicaid beneficiaries will be raised so that physicians will be paid the same for services to Medicare and Medicaid beneficiaries. The payment increase goes into effect in January of 2013.

Dr. Yvette Roubideaux, Director of the IHS, reviewed several recent IHS announcements. She noted that IHS has been consulting on budget priorities for 2014 as well as the budget and distribution formula for Contract Health Services, and will hear recommendations in February. She also said that IHS has been considering comments from the recent consultations on the IHS facilities construction process and the Draft Policy on Conferring with Urban Indian Organizations, reporting that IHS expects to complete the urban confer policy shortly. In addition, IHS expects that the Navajo Nation Medicaid Feasibility Study will be completed this year. With regard to the ongoing National Indian Health Outreach and Education Initiative, regional area coordinators from nine IHS areas and three national Tribal health organizations met in November to evaluate outcomes and progress to date. They plan to distribute materials they have been developing soon. More information about these announcements is available on the IHS website.

Dr. Roubideaux also briefly discussed the national agreement for reimbursement for direct health care services that was finalized between the IHS and the Department of Veterans Affairs (VA) on December 5. The final agreement is attached to this Memorandum. She said that the agreement will be implemented at federal facilities

through a phased approach. With regard to tribally-run facilities, tribes may negotiate individual agreements with the VA at any time. Dr. Roubideaux highlighted the fact that, under the final agreement, veterans receiving services at IHS will not be responsible for copays normally required by the VA. Additionally, the final agreement provides for reimbursement at the IHS all-inclusive rate rather than the Medicare FQHC rate. Dr. Roubideaux noted that although the model IHS-VA agreement does not currently address reimbursement for Contract Health Services, IHS is beginning negotiations on that issue with the VA.

Lisa Wilson, Senior Advisor for CCIIO, ended the call with a reminder that on November 19, 2012, HHS and CMS released a draft Model Qualified Health Plan (QHP) addendum for use with plans offered through the new Health Insurance Exchanges, along with a Dear Tribal Leader letter seeking comments on the draft. The addendum was drafted as a result of comments received in tribal consultations and was developed with input from the CMS Tribal Technical Advisory Group (TTAG) and IHS. It is largely modeled after the existing Medicare Part D Indian Addendum and is intended to facilitate contracting by Qualified Health Plans with Indian health care providers. Ms. Wilson stated that QHPs are not required to contract with Indian health care providers, but that CMS will strongly encourage it.

We reported on the QHP addendum in an email notification dated November 20, 2012, and in our Memorandum to Tribal Health Clients dated November 29, 2012. Comments on the draft addendum are due on December 19, 2012. We have prepared draft comments for the TTAG to submit to CMS.

II. HHS "Frequently Asked Questions" Paper on Exchanges, Market Reforms and Medicaid Expansion.

On December 10, 2012, Secretary Sebelius wrote a letter to state Governors, attaching a 17-page document responding to frequently asked question on Exchanges, Market Reforms, and Medicaid. We attach the letter and its accompanying document.

With regard to Medicaid, the FAQ clarifies that there is no deadline for states to inform the federal government of its intention to expand Medicaid coverage to take advantage of increased federal matching. Under the ACA the federal government will pay 100 percent of Medicaid costs for newly eligible residents for three years beginning in 2014 in states that expand Medicaid eligibility up to 133 percent of the federal poverty level (FPL). The federal match will be 95 percent in 2018, 93 percent in 2019, and 90 percent in 2010, after which time it will remain at 90 percent.

A number of governors had asked the Secretary if they could expand Medicaid, but not up to the ACA's 133 percent FPL, and still receive the enhanced federal match. The Secretary's response is no, the enhanced federal match will not be available unless the Medicaid coverage is expanded fully to 133 FPL. However, states may propose a

partial expansion at the regular federal matching rate. In addition, HHS will consider section 1115 Medicaid demonstrations with enhanced federal matching rates in conjunction with State Innovation Waivers after 2017, when the 100 percent federal funding is slightly reduced. The FAQ also clarifies that, due to the Supreme Court's decision on the Affordable Care Act, HHS no longer supports the Medicaid blended FMAP proposed in the HHS budget.

III. Congressional Hearing on Implementation of the Health Insurance Exchanges and Medicaid Expansion

On December 13, 2012 the House Energy & Commerce Subcommittee on Health conducted a *Hearing on "State of Uncertainty: Implementation of PPACA's Exchanges and Medicaid Expansion."*

Gary Cohen, Director of the Center for Consumer Information and Insurance Oversight, opened his testimony by stating that he is confident that both the federal government and State governments will be ready in 10 months for implementation. He added that in October of 2013 consumers and employers in every state will be able to shop for affordable healthcare. Responding to Committee member assertions that the Department of Health and Human Services hasn't communicated with States to give implementation guidance, Mr. Cohen asserted that States have all the information they need to either establish their own health insurance exchanges, a state partnership exchange, or choosing to participate in a Federally-Facilitated Exchange. Mr. Cohen noted that six states have conditional approval for their State-Based Exchanges. He added that these six states, including Maryland, are on track to implement a plan that will meet all deadlines. Mr. Cohen said at this point State governments need to take the lead. He explained that implementation guidance was issued over two years ago, and regulations for implementing Exchanges have been issued as well.

Ms. Cindy Mann, Deputy Administrator/Director, Center for Medicaid and CHIP Services at CMS, testified as to ongoing activity within CMS. Ms. Mann emphasized that the ACA establishes a coordinated and simple application and eligibility determination process for Medicaid. She stated that in April of 2011 a final rule was promulgated for the development of State Medicaid implementation plans. Ms. Mann highlighted that Guidance has already been issued on implementation of Medicaid expansion, and that it explained the flexibility available to all States. As far as State outreach and assistance, Mr. Cohen and Ms. Mann recapped that HHS has conducted: 119 events encompassing over 215 hours, including 59 webinars, 48 teleconferences, 2 in-person conferences (each having 1,000+ attendees), and that HHS/CMS staff are on the phone everyday with State governments. Ms. Mann added that the vast majority of States have been active participants in dozens of ACA implementation workgroups. She also stated that she is confident every state can be ready by the implementation deadline. Overall, Mann characterized the HHS/CMS - State outreach as "very aggressive." Corroborating her testimony was Joshua M. Sharfstein, Secretary, Department of Health & Mental Hygiene for the State of Maryland. He indicated that Maryland and the federal

government have been involved in regular consultation and interaction since "day one." Mr. Sharfstein added that the "feds are very responsive and cooperative and have allowed Maryland to customize implementation to meet Maryland needs."

Chairman Burgess (R-TX) asked Mr. Cohen why the rules relating to "Essential Health Benefits were approved on August 1, 2012 but were not promulgated until two weeks ago, asking "why the delay of three months?" He asked Cohen if he thought four weeks during the holidays was sufficient time for the public to review and comment on those regulations. Cohen answered that a *guidance* bulletin was released "quite some time ago" so there was ample opportunity to comment on EHB, especially considering the rule was largely unchanged. There seemed to be no agreement on what the EHB package actually consists of, and no explanation was given. Chairman Cohen asked whether the regulation was delayed so as not to interfere with the Presidential election, suggesting that this crucial regulation was delayed for political reasons. Cohen responded with "I don't know."

Representatives from four State governments (Wisconsin, Louisiana, Pennsylvania, and Maryland) testified as well. The witnesses from Wisconsin, Louisiana, and Pennsylvania testified in opposition to implementation, objecting to the federal control imposed by the law, the cost to states and policy holders, and the complex and expansive nature of the law. They cited a lack of timely guidance from the Administration and the many unanswered questions, and said that their states were not ready for implementation within the timelines required by the law. Mr. Sharfstein from Maryland testified that Maryland is ready for implementation and shared generally that his experience with the federal government has been favorable.

IV. Indian Health Service Listening Session

The Indian Health Service held a listening session with tribal leaders on December 6, 2012, in Washington, DC. The session was chaired by IHS Director Yvette Roubideaux. Attendance by tribal leaders, who were primarily in DC to attend the previous days' White House tribal leaders summit, was sparse. Much of the session focused on the implementation of the Contract Support Costs (CSC) decision. Other topics covered included the IHS/VA reimbursement national agreement, ACA health insurance exchanges, and the Special Diabetes Program for Indians (SDPI) reauthorization.

Budget. Dr. Roubideaux opened the session by noting recent funding increases in some areas of the IHS budget. She does not know what will happen in Congress concerning the fiscal cliff and possible sequestration of IHS FY 2013 funds. The Office of Management and Budget (OMB) is handling all sequestration questions, and right now OMB wants federal agencies to operate as normal. She said that the Administration's proposed FY 2014 budget is in the final stages of development and that information on it is embargoed. The budget will be submitted to Congress in February 2013.

Contract Support Costs. Dr. Roubideaux, in her opening remarks and in response to comments/questions from tribal leaders, talked about the Supreme Court's Contract Support Costs decision earlier this year in the Ramah case. She said that there are a lot of rumors about IHS intentions with regard to its implementation. She repeatedly said that it is a matter of "how" not "if" IHS will implement it. She said it is not the case that the IHS is stalling on the implementation of the ruling and further, that the IHS is not taking a much different approach to the implementation than is the BIA. She emphasized that the implementation will be an Administration-wide approach. A tribal official complained that IHS's stated intention of using past year audits and other measures of costs "incurred" to limit compensation is not right – it would be very expensive for both sides.

Dr. Roubideaux stated that she could not talk publicly about strategy and is limited to expressing the Administration's talking points. She said that the implications are huge due to potential costs and that they are looking for an "efficient" approach to implementation of the CSC ruling.

Dr. Roubideaux said that the IHS has asked for an attorneys meeting in January, 2013, on the CSC claims. The tentative date for the meeting is January 17, 2013 in Washington, DC.

Indian Health Service/Veterans Administration Reimbursement Agreement. The VA/IHS Agreement on Reimbursement for Direct Health Care Services (VA reimbursement to the IHS) was signed December 5, 2012, and it includes, as tribes had wanted, the outpatient all-inclusive rate. We attach the agreement. Dr. Roubideaux said that the tribal consultation on this agreement was important and helpful. The IHS negotiates with the VA regarding its facilities, while tribes can individually negotiate with the VA *or* use the newly signed national agreement. Dr. Roubideaux asked people to be patient with the VA on the reimbursement issue, as it is new for them and initially will they will have to utilize a paper process.

Medicaid Expansion/Insurance Exchanges. Regarding health insurance exchanges and Medicaid expansion, Dr. Roubideaux noted that that every facility will need a plan for 2014 which is to include the numbers of people who will purchase insurance on an Exchange and that will receive expanded Medicaid benefits. There will need to be assistance for eligibility determinations.

With regard to enrollment in the federal exchanges, tribal representatives asked for technical assistance to train staff to help with this. Dr. Roubideaux said that Alaska Native Health Board has some funding for this purpose and that the CMS will be the lead agency for outreach on exchange enrollment.

Federal Employee Health Benefits. A large tribe has recently signed up for the Federal Employee Health Benefits (FEHB) program, bringing the number of American Indians/Alaska Natives utilizing that program to 10,000. That number is expected to

continue growing. There was a discussion of getting the FEHB dental, vision, and long-term care programs to be available for tribal employees.

Joint Venture Projects. In response to a question of when the next round of IHS joint venture funding will be announced, Dr. Roubideaux said that the IHS has gotten behind on funding staffing packages, due primarily to poor 2011 funding for this purpose. The agency does not want to accept applications for new joint venture projects while they still have pending need for staffing money in existing joint venture project. (In other words, don't expect any joint venture funding in the Administration's proposed FY 2014 budget).

IHS Area Investigations. The IHS continues to implement the Senate Committee on Indian Affairs' recommendations with regard to the Aberdeen Area. IHS investigations are now complete on 11 of the 12 IHS Areas.

Contract Health Services (CHS). The CHS workgroup will meet again in January 2013 regarding funding distribution issues and whether the distribution system should change.

HIV/AIDS. There were comments that American Indians have a shorter life after getting AIDS than other groups, despite treatments that now allow people to live long lives with this disease. One person reported that a friend went to an IHS facility and asked to be tested for HIV/AIDS and was turned down because he did not have symptoms of HIV/AIDS. Dr. Roubideaux said that this should not have happened and she would look into this situation. The IHS HIV/AIDS coordinator is Lisa Neal.

National Health Service Corps (NHSC). Dr. Roubideaux noted the large increase in the number National Health Service Corps Officers in IHS (currently 277) with over 500 IHS/tribal sites approved for NHSC officers. She encouraged tribes to take advantage of the NHSC.

V. Conclusion

If you would like any assistance or further information regarding the topics discussed in this memorandum, please contact Elliott Milhollin at (202)822-8282 or emilhollin@hobbsstrauss.com or Geoff Strommer at (503)242-1745 or gstrommer@hobbsstrauss.com.