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MEMORANDUM

July 23, 2013

To: Tribal Health Clients
From: Hobbs, Straus, Dean & Walker LLP
Re: *IRS Issues Notice Delaying ACA "Employer Mandate"; CMS Holds All Tribes' Call on Medicaid and CHIP State Plan Amendment Process*

IRS Issues Notice Formally Delaying ACA "Employer Mandate" Until 2015

As previously reported, the Internal Revenue Service ("IRS") announced that it will not be enforcing the requirement that all large employers provide health insurance coverage to their full time employees (the "employer mandate") until 2015. On July 9, the IRS issued a guidance notice formalizing this announcement.

IRS Notice 2013-45 provides one year of "transition relief" from certain employer and insurer reporting requirements and tax penalties, including the "employer mandate," that were scheduled to take effect in 2014. The IRS guidance states that the delay "will provide additional time for input from employers and other reporting entities in an effort to simplify information reporting consistent with effective implementation of the law."

The ACA "employer mandate" requires large employers (those with 50 or more full-time employees) to provide a minimum level of health coverage to their employees, or be subject to a "shared responsibility payment," or tax penalty. The IRS issued a proposed rule setting out those requirements earlier this year, which we summarized in our memorandum to Tribal Health Clients dated February 13, 2013. The IRS announced in its recent Notice that it intends to issue another proposed rule to implement the shared responsibility payment provisions sometime this summer.

According to the Notice, those proposed regulations will reflect an implementation date of 2015. Since assessment of the shared responsibility payment is based in part on information provided under the reporting requirements, the Notice states that no shared responsibility payments (i.e., tax penalties) will be assessed in 2014. However, employers are "encouraged to voluntarily comply" with the reporting provisions even during the transition relief period.

CMS All Tribes' Call on Medicaid and CHIP State Plan Amendments Process

The Tribal Affairs Group at the Centers for Medicare & Medicaid Services (CMS) hosted an All Tribes' Call on July 12, 2013, to discuss Medicaid and Children's Health Insurance Program (CHIP) State Plan Amendments (SPA). States are required to submit their SPA to CMS to implement changes required by the Affordable Care Act (ACA) going into effect in the coming months. States are required by Section 5006 of the American Recovery and Reinvestment Act to solicit advice from tribes prior to submission of any plan amendments likely to have a direct effect on Indians, Indian Health Programs, or Urban Indian organizations. The purpose of the CMS call was to provide tribal leaders with background on some of the changes states will be required to make in their SPA so that tribes are prepared to consider these issues and respond when states seek their advice. CMS representatives on the call said that CMS is committed to ensuring that states engage in meaningful consultation with the tribes, even though CMS has promised states that it will review SPA submissions on an expedited basis.

CMS representatives began the call by providing background information on major changes to the Medicaid program under the ACA that will be going into effect in 2014, including Medicaid Expansion and other changes in Medicaid program operation. Under the ACA, starting in 2014 the Federal government will provide 100% Federal Medical Assistance Percentage (FMAP) funding for states that extend Medicaid eligibility to all adults up to 138% of the federal poverty level (FPL) for three years. After the first three years, the FMAP decreases, but never below 90%. Medicaid Expansion was meant to be mandatory in all states, but as a result of the Supreme Court's ruling on the ACA the Expansion is now optional. CMS representatives noted that states that do not choose to participate in the Medicaid Expansion in 2014 may join at any future date, and that states may also withdraw from participation at a later date. They reported that 23 states have already elected to participate but that others have not yet done so. If a state decides to participate in Medicaid Expansion, its SPA will need to reflect that change, and tribes should be consulted about that aspect of the SPA.

Also in 2014, a provision of the ACA requiring states to maintain Medicaid and CHIP eligibility standards at a consistent level – referred to as the Maintenance of Effort (MOE) provision – will expire. Expiration of the MOE provision will permit states to reduce Medicaid and CHIP eligibility, which could result in individuals currently eligible losing their coverage. CMS representatives reported that they do not expect many states to restrict eligibility, but that it is a possibility. If states make that choice, it must be reflected in the state's SPA, and tribes may be particularly interested in advising their states with respect to this policy choice.

Certain other changes to the Medicaid program will go into effect in every state, regardless of that state's decisions regarding Medicaid expansion or MOE. One of those changes is that states will be required to use a single "streamlined" application to

determine eligibility for Medicaid, CHIP, and enrollment in Qualified Health Plans through the Exchanges. States may use the model application developed by CMS (which solicited input from tribes in designing the application), or seek approval from CMS to use their own application. Other changes that will need to be reflected in a state's SPA include: how the state will establish Modified Adjusted Gross Income (MAGI)-based eligibility levels and implement the new MAGI income methodology; how the state will affirm residency regulations and address issues like temporary absence from the state; and how a state will comply with newly released regulations relating to Alternative Benefit Plans. Prior to the call, CMS distributed a list of SPA groups which includes those previously listed as well as several others. The list, which is attached to this memorandum, includes asterisks marking "key policy decisions" that the states must make. CMS recommends that tribes review the list and identify those issues likely to be most important to them when the state consults with the tribe about the SPA.

Any of these changes could have a significant impact on Tribal health programs. Therefore, it is critical to ensure that the States consult with you prior to submitting their SPAs to CMS. Please let us know if we may be of assistance in reviewing any changes to your State's Medicaid program through this process.

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; Geoff Strommer at (503)242-1745 or gstrommer@hobbsstrauss.com; or Caroline Mayhew at (202)822-8282 or cmayhew@hobbsstrauss.com.