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MEMORANDUM

December 4, 2013

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker LLP

Re: *MMPC/TTAG Meetings November 19-21, 2013*

On November 19, 20 and 21, the Medicare Medicaid Policy Committee (MMPC) and the Tribal Technical Advisory Group (TTAG) held face-to-face meetings in Washington D.C. Following is a summary of the issues discussed at both meetings, organized for ease of reference by topic. Part I provides an overview of reports provided by Administration officials, and Part II provides an overview of MMPC and tribal activities. Please let us know if you have any questions or would like additional information about any of the topics discussed below. The next MMPC call will be held this Friday, December 6 to begin working on action items identified during the face-to-face meetings.

I. Reports from Administration Officials

1. *Report from OPM*

John O'Brien, Director of Health Care and Insurance at the Office of Personnel Management (OPM) provided an overview of the Federal Employee Health Benefits (FEHB) program which has been made available to tribes. Mr. O'Brien reported that the FEHB program currently has about 10,000 tribal employees in the program, but that OPM would like to expand the program to 15,000 tribal employees, which will allow them to reduce the monthly administrative costs from \$15 to \$10 per month. Mr. O'Brien asked for ways in which OPM could make the program more attractive to tribal employers.

Elliott Milhollin of our office responded by stating that in some cases tribes may not be getting accurate information about the program from their current insurance brokers, and may also be concerned that their health programs will not be included in the provider networks of the plans employees in FEHB select. He noted that several tribal health programs are having difficulty getting FEHB plans to agree to enter into in-network provider plans and as a result are reimbursing tribal health programs at lower rates. Mr. O'Brien stated that OPM is working to improve broad quality metrics and network adequacy issues for FEHB plans. He committed to working with tribes to ensure that the FEHB programs are entering into contracts with tribal health programs, and

asked for information from tribes about any FEHB programs that were not entering into network provider agreements with tribal health providers.

Mr. O'Brien also reported on the multi-state plans, which OPM administers. He said that there is currently a single multi-state plan available on the Exchanges, but OPM hopes to make more available in the future. According to Mr. O'Brien, the multi-state plan will vary considerably state-by-state, and that there is nothing special about a multi-state plan that makes it cheaper or more expensive than a QHP. He said OPM would consider using the Indian Addendum in the multi-state plan, but would not commit to making it a requirement.

Mr. O'Brien also announced that OPM is eager to meet with tribes to discuss the benefits of the FEHB program. He said that OPM has a limited travel budget, but that budget will allow them come to regional meetings where multiple tribes are present to discuss benefits/costs of FEHB with tribes.

2. *Discussion with IHS on October 24 Dear Tribal Leader Letter*

As previously reported, the IHS issued a dear tribal leader letter on October 24, 2013 in which IHS took the position that if a tribal health program wished to use federal funds to purchase health insurance for their beneficiaries pursuant to Section 402 of the Indian Health Care Improvement Act, the only factor they could use to limit participation is financial need. As we have reported, Section 402 of the IHCA allows tribes to use financial need as a factor to limit the number of individuals a Tribe purchases insurance for, but does not provide that financial need is the only factor which may be used.

The MMPC meeting provided tribal advocates with an opportunity to object the IHS letter. Elliott Milhollin of our office, along with a number of other tribal advocates, strenuously objected to the letter and requested that IHS either rescind it, or amend it so that it states that financial need is just one factor that may be used. Geoff Roth committed to looking into the issue and to having further consultation about it. We will be closely tracking this issue.

3. *CMS Report on CMS Tribal Affairs Reorganization*

Kitty Marx reported that the CMS Tribal Affairs Group had been reorganized within CMS. The Tribal Affairs Group used to be within the external affairs group to the Administrator, but CMS has decided to move Tribal Affairs to the intergovernmental and external affairs group within CMS.

Ms. Marx reported that the sequester has reduced the number of trainings CMS is able to hold due to travel restrictions. However, CMS can hold webinars by state along with a reduced number of face to face meetings. She stated CMS has face to face trainings scheduled in Baltimore in the new year, Dallas in May, Albuquerque at the Gathering of Nations, Billings in Montana the first week of April, as well as trainings in

Sacramento, Phoenix and Seattle. The topics included in the training sessions will include Medicare 101, Medicaid and CHIP 101, the ARRA protections under Medicaid, Social Security Administration, and the hardship exemption. They will also offer two week classes on ICD-9 coding, which allows students to become certified coders.

Ms. Marx also announced that the Tribal Affairs Group is continuing to provide additional materials for American Indians and Alaska Natives on the www.healthcare.gov/marketplace/ website. She also announced CMS is planning six all tribes calls as well as additional webinars. She also announced that they have some CHIPRA funding to reach Head Start grantees to get word out about Medicaid and CHIP so that Head Start employees can encourage Head Start participants to enroll in Medicaid and CHIP.

TTAG members expressed concern about the reorganization because it places the Tribal Affairs Group within CMCS, rather than having a direct line to the Administrator. One concern was that this would make it more difficult for Tribal Affairs to address concerns that are CMS-wide, including Medicare, instead of simply within an operating division of CMS.

4. *Report from Cindy Mann, Director CMCS*

Cyndi Mann, Director of CMCS, responded to concerns about the Tribal Affairs reorganization by stating her view that it places the Tribal Affairs Group in a position closer to CMS decision-makers. She stated that at CMS there are three main decision-making areas – Medicaid, Medicare and CCIIO. She stated that there is no one right answer to which of the centers Tribal Affairs should go into, but they felt it was important to put Tribal Affairs within one of those centers, rather than off to the side where it was not part of any decision-making group. She stated that TTAG does not have to go through Tribal Affairs and CMCS to get to Marilyn Tavenner, so it is an improvement. She stated that CMS is willing to revisit the decision and is willing to make adjustments if TTAG is not receiving better service from CMS after the reorganization.

Valerie Davidson, Chair of the TTAG, thanked Ms. Mann on behalf of the TTAG for her help with Medicaid Expansion, particularly with regard to ensuring tribal protections were included in the Arkansas waiver. She requested that Ms. Mann develop an internal policy to ensure that tribes are protected in all waivers to the same extent they were protected in the Arkansas waiver. Ms. Davidson also asked Ms. Mann to extend the uncompensated care waivers for I/T facilities in Arizona and California beyond 2013 and requested that Ms. Mann be open to uncompensated care waivers for tribal facilities in states that choose not to expand Medicaid.

Ms. Mann stated that CMS has pending requests to extend the Arizona and California waivers beyond 2013, and is considering extending those waivers. With

regard to uncompensated care waivers in states that are not choosing to expand Medicaid, she stated that CMS did not have such a waiver before it, and would consider one if one were provided. She said it would not be a decision solely made by CMCS, but noted that budget neutrality could be an issue in some states. Ms. Mann suggested a group might be formed to consider how to structure and extend waivers in States going forward. We will be participating in that group.

Ms. Davidson also asked whether there was anything CMS could do in States that refuse to Expand Medicaid, and refuse to work with tribes to submit an uncompensated care waiver to CMS. Ms. Mann stated that the problem is that the law was not designed with any failsafe for Medicaid expansion because the law was designed to make it mandatory. She stated she cannot take any action with regard to Medicaid if a State does not propose it. However, she noted that with regard to Medicaid eligible individuals, CMS wants to know that if the State is underfunding current programs to such an extent that the facilities can no longer provide certain services, because CMS can enforce current CMS rules.

5. *Report from the Administration on ACA Implementation*

Chiquita Brooks-LaSure, Deputy Center and Policy Director, Center for Consumer Information and Insurance Oversight (CCIIO) provided an overview of ACA implementation. She reiterated the Administration's commitment to fixing the website and announced a tribal consultation on Qualified Health Plans. She stated that CCIIO will be releasing a new copy of the letter to Qualified Health Plans seeking to become certified, and will hold Tribal consultation on that issue. She stated they will not alter portions of the letter that deal with the Indian Addendum and tribal sponsorship of premiums.

Ms. Brooks-LaSure reiterated CCIIO's commitment to designing electronic data connections, but noted that the staff that is working on the website is also responsible for the electronic data connections. She stated that CCIIO was committed to having someone in every facility who can assist with enrollment. She stated that CCIIO was aware of tribal concerns with the training regarding the certified application counselors.

Valerie Davidson asked what CCIIO's process will be for documenting Indian status. Ms. Brooks-LaSure stated that for the exemption, CCIIO has developed an application will be finalized in December, and it will be a paper, manual process. TTAG members asked that the application process be finalized sooner, because individuals need to know now whether they qualify for the exemption so they can decide whether they need to buy insurance on the Exchange. Ms. Brook-LaSure stated that the exemption application will be ready by December 15, 2013 and that individuals will be able to begin applying for the exemption at that time.

Jim Crouch asked about how the contracting firm CIRCO will review documentation of Indian status, when documentation varies significantly between tribes

and will take many forms. Ms. Brooks-LaSure stated that the contractors will have training materials, and Mr. Crouch asked that the TTAG be included in the training process. TTAG members reiterated that tribes use a wide variety of forms of documentation to demonstrate membership, and are concerned that CCIIO's contractors will not accept some forms of documentation when reviewing them. One specific example given was a recent statement by CCIIO staff that an Alaska Native Shareholder certificate will not be accepted as proof of documentation. Ms. Brooks-LaSure stated that they are aware of this issue and are reviewing it.

Dena Greenblum, CMCS provided an overview of the Streamlined Online Exchange/Medicaid application. TTAG members expressed significant concern about the way in which the application asks questions about sources of income. The main concern is that the site is designed to collect all forms of income – including non-taxable income – and then subtract out income that is designated not to count for the purpose of Medicaid income eligibility. Another concern is that the website summarizes and paraphrases some tribal rights in a manner that may lead AI/AN to include income they are eligible not to include by law for purposes of Medicaid income eligibility. TTAG members noted that Tribes commented extensively on the application, but it does not appear that CCIIO accepted any of the tribal comments in the final application.

6. *IHS Report*

Raho Ortiz, IHS, provided an overview of a draft IHS Guidance that will go to IHS CEOs and Service Unit Directors that will provide direction based on the Indian Addendum as to what provisions IHS facilities can agree to when entering into network provider agreements.

Geoff Roth reported that CCIIO asked IHS how CCIIO could determine that an AI/AN who has income over 300% of FPL has a legitimate CHS referral. This is important because Indians with incomes above 300% of who have a CHS referral have no cost-sharing. CCIIO wants to know how they can tell that the CHS referral is legitimate. CCIIO wants to use a single form, but IHS recognizes that not all tribes use the same type of CHS referral and has reached out to tribes before responding to CCIIO on this issue.

II. Overview of Reports from MMPC/Tribal Advocates

1. *Overview of Regulatory Priorities*

Doneg McDonough, a technical advisor to the TTAG, has been tasked with tracking all of the regulations the Administration is issuing to implement the Affordable Care Act. In the coming months, he reported that the Administration will need to develop three major sets of regulations. These include: (1) new regulations to implement the one-year delay for employers to implement the "employer mandate" to provide insurance to all full time employees and to finalize those rules; (2) new regulations to implement the Administration's recent decision to suspend the rules that

would have caused some types of insurance plans to be dropped by insurers; and (3) new regulations relating to hardship exemptions for individuals who don't enroll in the Exchanges until March 31, 2013 and may not have coverage until May 2013. We will be monitoring and will report on these regulations as they are developed.

The MMPC has identified a number of regulations in which CMS indicated it was willing and/or expecting to discuss comments made by Tribes in the future as it developed new regulations. MMPC is planning to reengage with CMS on these outstanding issues.

2. *Concerns with CCIIO Consultation*

There was a great deal of discussion among tribal advocates at the MMPC meeting about the lack of tribal consultation from CCIIO, which is the center within CMS that is responsible for implementing the Health Insurance Exchanges in the Affordable Care Act. Unlike the Medicaid side of CMS, CCIIO has recently taken a number of actions and issued several FAQs and guidance documents that could adversely affect tribal health programs without consulting with Tribes. For example, CCIIO recently issued a set of FAQs that provided closed panel plans instructions on how to design their plans to avoid cost-sharing exemptions for American Indians and Alaska Natives. Another recent example occurred on a call in which CCIIO staff took the position that an ANSCA shareholder certificate will not be sufficient documentation to demonstrate tribal membership for purposes of the Federally Facilitated Marketplace and the tax exemption for members of Indian tribes and ANSCA village and regional shareholders. These decisions appear to have been made at the staff level, but raise the concern that CCIIO leadership is not doing enough to ensure that tribes are consulted before staff make any Indian-specific policy decisions. MMPC members expressed concern that CCIIO does not have a tribal liaison, and there is no one remaining at CCIIO with expertise in Indian issues as CCIIO works to improve the website and issue guidance and FAQs. MMPC will be issuing a letter to CCIIO and the Secretary of HHS requesting that it not issue any guidance and/or FAQs that affect Indian country without consulting with MMPC/TTAG and IHS beforehand.

3. *IHS Update on Medicare-Like Rates*

Geoff Roth, IHS, announced that IHS was actively considering whether it could achieve a Medicare-Like Rate fix by issuing regulations, rather than seeking a legislative fix. He said that IHS would be issuing a dear tribal leader letter announcing that consultation on that issue shortly. We expressed some concern about whether such a fix would work and asked to be included in any such consultation. We will keep you informed about any developments on that front.

Separately, we are continuing to seek a legislative fix that would expand the Medicare-Like Rate Cap to all non-hospital providers and suppliers and have been

meeting with congressional offices to achieve that goal. We will keep you apprised of that effort as well.

4. *Update on Health Insurance Marketplaces*

Mim Dixon provided a report on the Administration's implementation of the federal Health Insurance Marketplaces. She expressed concern that many of the training materials associated with the Marketplaces do not contain correct or complete information about the benefits and protections afforded to AI/ANs in the Exchanges. MMPC and TTAG will be developing a list of all of the Indian-specific issues that should be part of CCIIO and CMS training materials on the Exchanges to ensure that call center staff have obtained appropriate training. Currently, call center staff have not received proper training on Indian specific issues, and as a result AI/ANs who call into the call center are getting improper information. Our attorneys will be assisting in that effort.

5. *Update on Implementing the Hardship Exemption*

As previously reported, HHS has provided a mechanism for IHS-eligible individuals who are not members of Indian tribes to obtain a hardship exemption from the tax penalty for failing to obtain insurance coverage. Doneg McDonough provided an overview of the hardship exemption process for IHS-eligible individuals who are not members of Indian tribes. He noted that currently, HHS and IRS are taking the position that someone who is eligible for the hardship exemption for IHS-eligible individuals may only obtain that exemption by going online on the Health Insurance Exchange and obtaining a certificate. They cannot claim the exemption simply by filing a tax form. They will first have to obtain a certificate from the Exchange and then use that number when filing their taxes. This is overly burdensome, and the MMPC is going to formally ask that HHS delegate its authority issue hardship exemptions for IHS-eligible Indians to the IRS so that IHS-eligible individuals may claim the exemption without first going through the Exchanges.

6. *MMPC Outreach and Education Report*

Melissa Gower reported that the ACA policy subcommittee has asked for information about the tribal training modules for certified application counselors, but CMS has not yet provided it. She also noted that the ACA policy committee requested information about training for the Native American Contacts (NACs) for the Exchanges, but have heard that the NACs have not yet received such training. Jennifer Cooper reported on an NIHB initiative designed to assess training to date in Indian country on the efficacy of training on the new marketplaces.

Conclusion

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If you have questions about this effort, please contact Elliott Milhollin at (202)822-8282 or emilhollin@hobbsstrauss.com; or Geoff Strommer at (503)242-1745 or gstrommer@hobbsstrauss.com.