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MEMORANDUM

October 21, 2013

To: Tribal Health Clients

From: Hobbs, Straus, Dean & Walker LLP

Re: *Senators Introduce Fix to Definition of "Indian" under Affordable Care Act*

On October 16, 2013, Senators Mark Begich (D-AK), Max Baucus (D-MT), Tom Udall (D-NM), Brian Schatz (D-HI), and Al Franken (D-MN) introduced S. 1575, legislation to ensure that the Affordable Care Act (ACA) uses the same definition of "Indian" to define eligibility of Indians for federal services. The proposed change will not affect eligibility for IHS coverage. It is designed to ensure that everyone who is eligible for IHS services will be eligible for the Indian-specific benefits and protections in the ACA. The bill was referred to the Finance Committee.

The ACA contains a number of special benefits and protections for American Indians and Alaska Natives. For example, American Indians and Alaska Natives are eligible for cost-sharing protections when they enroll in health insurance coverage through the new Health Insurance Exchanges, and also qualify for open enrollment on those Exchanges. In addition, the Act exempts members of Indian tribes from the tax penalties associated with not having minimum essential health insurance coverage. The issue is that ACA definition of Indian only includes members of federally recognized tribes or Alaska Native Claims Settlement Act (ANCSA) corporations, and does not include Indians and Alaska Natives who are eligible for IHS services but who are not members of tribes (such as certain children and descendants). The IHS serves more than just tribal members, and includes "Eskimo or Aleut or other Alaska Natives;" a person "considered by the Secretary of Interior to be an Indian for any purpose;" a person determined to be Indian under HHS regulations; individuals who are members of organized groups of Indians, including state-recognized tribes or tribes terminated since 1940, or their first or second degree descendants; California Indians as defined by 25 U.S.C. § 1679; and urban Indians meeting these criteria.

Without the Indian definition amendment proposed by S. 1575, many Native people such as California Indians and tens of thousands of Alaska Natives may not be eligible for the ACA benefits provided to others. Currently, the HHS has only been able

to use regulatory means to exempt the wider group of Native people from the tax penalty, though even that is a short-term fix. This legislative proposal is intended to be a permanent solution to the problem of disparate definitions.

The legislation is attached to this memo. It is still in its nascent stages, so it must advance through the full legislative process to become law. It remains to be seen if the sponsors intend to attach this to a technical correction bill or other moving legislation.

If you have any questions, please do not hesitate to contact Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745), Elliott Milhollin (emilhollin@hobbsstrauss.com or 202-822-8282), Karen J. Funk (kfunk@hobbsstrauss.com or 202-822-8282), or Adam Bailey (abailey@hobbsstrauss.com or 916-442-9444).

113TH CONGRESS
1ST SESSION

S. _____

To correct in inconsistencies in the definitions relating to Native Americans
in the Patient Protection and Affordable Care Act.

IN THE SENATE OF THE UNITED STATES

Mr. BEGICH introduced the following bill; which was read twice and referred
to the Committee on _____

A BILL

To correct in inconsistencies in the definitions relating to
Native Americans in the Patient Protection and Afford-
able Care Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. TECHNICAL CORRECTIONS TO PPACA.**

4 (a) DEFINITION OF INDIAN.—Section 1304 of the
5 Patient Protection and Affordable Care Act (42 U.S.C.
6 18024) is amended by adding at the end the following:

7 “(f) INDIAN.—

8 “(1) IN GENERAL.—In this title, the term ‘In-
9 dian’ means any individual—

1 “(A) described in paragraph (13) or (28)
2 of section 4 of the Indian Health Care Improve-
3 ment Act (25 U.S.C. 1603);

4 “(B) who is eligible for health services pro-
5 vided by the Indian Health Service under sec-
6 tion 809 of the Indian Health Care Improve-
7 ment Act (25 U.S.C. 1679);

8 “(C) who is of Indian descent and belongs
9 to the Indian community served by the local fa-
10 cilities and program of the Indian Health Serv-
11 ice; or

12 “(D) who is described in paragraph (2).

13 “(2) INCLUDED INDIVIDUALS.—The following
14 individuals shall be considered to be an ‘Indian’:

15 “(A) A member of a Federally-recognized
16 Indian tribe.

17 “(B) A resident of an urban center who
18 meets 1 or more of the following 4 criteria:

19 “(i) Membership in a tribe, band, or
20 other organized group of Indians, including
21 those tribes, bands, or groups terminated
22 since 1940 and those recognized now or in
23 the future by the State in which they re-
24 side, or being a descendant, in the first or
25 second degree, of any such member.

1 “(ii) Is an Eskimo or Aleut or other
2 Alaska Native.

3 “(iii) Is considered by the Secretary of
4 the Interior to be an Indian for any pur-
5 pose.

6 “(iv) Is determined to be an Indian
7 under regulations promulgated by the Sec-
8 retary.

9 “(C) An individual who is considered by
10 the Secretary of the Interior to be an Indian for
11 any purpose.

12 “(D) An individual who is considered by
13 the Secretary to be an Indian for purposes of
14 eligibility for Indian health care services, includ-
15 ing as a California Indian, Eskimo, Aleut, or
16 other Alaska Native.”.

17 (b) CONFORMING AMENDMENTS.—

18 (1) AFFORDABLE CHOICES HEALTH BENEFIT
19 PLANS.—Section 1311(c)(6)(D) of the Patient Pro-
20 tection and Affordable Care Act (42 U.S.C.
21 18031(c)(6)(D)) is amended by striking “section 4
22 of the Indian Health Care Improvement Act” and
23 inserting “section 1304(f)”.

24 (2) REDUCED COST-SHARING FOR INDIVIDUALS
25 ENROLLING IN QUALIFIED HEALTH PLANS.—Section

1 1402(d) of the Patient Protection and Affordable
2 Care Act (42 U.S.C. 18071(d)) is amended—

3 (A) in paragraph(1), in the matter pre-
4 ceding subparagraph (A), by striking “section
5 4(d) of the Indian Self-Determination and Edu-
6 cation Assistance Act (25 U.S.C. 450b(d))” and
7 inserting “section 1304(f)”; and

8 (B) in paragraph (2), in the matter pre-
9 ceding subparagraph (A), by striking “(as so
10 defined)” and inserting “(as defined in section
11 1304(f))”.

12 (3) EXEMPTION FROM PENALTY FOR NOT
13 MAINTAINING MINIMUM ESSENTIAL COVERAGE.—
14 Section 5000A(e) of the Internal Revenue Code of
15 1986 is amended by striking paragraph (3) and in-
16 serting the following:

17 “(3) INDIANS.—Any applicable individual who
18 is an Indian (as defined in section 1304(f) of the
19 Patient Protection and Affordable Care Act).”.