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September 24, 2012

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Secretary Sebelius:

I write to express concern regarding the lack of transparency the Department of Health and Human Service (HHS) has provided in the establishment of the Federally-facilitated Exchange (FFE). With the impending deadline of November 16, 2012, for states to determine whether to establish a state-based exchange, partnership exchange or have an FFE, it is not only common-sense, but necessary, that states receive full and detailed information about how an FFE will be implemented.

On March 27, 2012 your Department published final regulations implementing the establishment of exchanges.ⁱ The 167 pages of regulations omitted scores of necessary information to answer questions facing states still considering their options in establishing a state-based exchange. In fact, the final regulations include 30 different references to issues that will be addressed in future regulations or rulemaking and it includes 64 additional references to future guidance on issues not addressed in the final rule, including details on the Federally-facilitated Exchange (FFE).

It is concerning that the Administration has set a deadline for states to notify the Department of their intentions related to exchanges without providing any details of what the FFE will require of states. The *Blueprint for Approval of Affordable State-based and State Partnership Insurance Exchanges* provides states with a basic chart that tries to simplify the decision.ⁱⁱ With the complexities and conflicts of a new federal regulatory regime on top of an industry already regulated by the states, a determination regarding intentions for exchanges is not a simple answer that can be answered by reading a simplistic chart providing three options that fail to capture the full consequences of the decision.

The only information shared by the Administration is through the media while requests for details by the nation's Governors, to date, have been ignored. A recent article indicated that the Center for Consumer Information and Insurance Oversight (CCIIO) will be publishing guidance on the implementation of the FFE, but noted that such guidance will not include a cost estimate.ⁱⁱⁱ

The National Association of Insurance Commissioners (NAIC) has highlighted that many states have asked for cost estimates to use to determine their intentions. Without specific details provided through the rulemaking process with cost estimates and a clear understanding of the roles and responsibilities of the states and the federal government, states are not in a position to make an informed decision.

For instance, the guidance on FFEs alludes to the establishment of more than one FFE, but it is unclear if there will be an individual FFE in each state that decides not to establish its own exchange. The guidance describes how each FFE will have flexibility and discretion in designing processes and procedures that reflect local market dynamics. This makes it seem as if each state will need its own FFE. The guidance also states that HHS is in the process of developing a unified administrative framework that can support all FFEs and address a wide range of state needs. Additionally, one of the guiding principles for establishing the FFEs is that HHS will utilize existing state policies, capabilities, and infrastructure to assist in implementing the FFE. This language implies that various FFEs will be established due to the range of needs and capacities of various states. As such, clarity as to the specifics of how the FFEs will operate is essential for states to make informed decisions by the November deadline.

While some insight has been provided, such as the comment from a "key CCIIO official" that HHS will reimburse states for administering plan management and consumer assistance under the exchange partnership model,^{iv} more detail is needed. Such details should be spelled out through the regulatory process so that states may make decisions based on binding laws, not anecdotes in news articles. Without this information states are asked to make costly and risky decisions that could later turn out to be in conflict with federal regulations.

The President promised "an unmatched level of transparency, participation, and accountability across the entire Administration," yet the details of his single policy achievement have been hidden from the public and the very people who will be required to implement the President's idea of health reform. I respectfully request that the politicization by the Administration of the President's health law end and that the transparency promised by the President be shown by offering the states a complete understanding of their choices and the cost associated with such choices.

Thank you for your prompt attention to this issue and I look forward to receiving a response from you by October 19, 2012, detailing how you intend to address these concerns. If you have any questions, please contact Hayden Rhudy or Kim Brandt of my office at 202/224-4515.

Sincerely,



Orrin G. Hatch
Ranking Member

ⁱ CMS-9989-F: Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers.

ⁱⁱ Blueprint for Approval of Affordable State-based and State Partnership Insurance Exchanges. CCIIO. August 14, 2012.

ⁱⁱⁱ CCIIO Official: Fed Exchange Testing Underway, More Guides Expected. InsideHealthPolicy. August 2, 2012.

^{iv} CCIIO: Feds To Reimburse States For Partnership Exchange Functions. InsideHealthPolicy. August 23, 2012.