Bobby Jindal
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State of Louisiana

Department of Health and Hospitals
Office of the Secretary

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Ave, SW
Washington, DC 20201

November 16, 2012

Dear Secretary Sebelius:

As you know, on March 23, 2011, the State of Louisiana announced that it would not assume the risk of building a health insurance Exchange as outlined by the Patient Protection and Affordable Care Act (PPACA). Given the fact that deadlines established in the guidance issued in the August 13, 2012 request of the United States Department of Health and Human Services (HHS) are not legally binding, the State of Louisiana will not be submitting a Declaration Letter; however, this letter serves as the state of Louisiana's position regarding critical components of the PPACA.

Since the PPACA was signed into law, the State of Louisiana has repeatedly stated that the law has severe legal problems, is bad policy, and is unworkable. Those beliefs remain unchanged. With the Supreme Court's decision in *National Federation of Independent Business v. Sebelius*, the Court agreed with the State of Louisiana that at least one of the over 450 provisions of the PPACA is unconstitutional and the provision requiring all individuals to have insurance coverage can only be upheld as a tax. Even after the Supreme Court's decision, there remain many questions about the legality of the PPACA involving issues fundamental to all Americans, including religious freedom and unjust taxation.

While the Supreme Court ruled on the Constitutionality of some parts of the PPACA, it was not an endorsement of its policy merits. In fact, Chief Justice Roberts underscored this fact when he wrote, "Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments." The PPACA remains a flawed piece of legislation that fails to fix the fundamental existing problems in the United States health care system, particularly the unsustainable rising costs faced by American families and small businesses. Instead, we are faced with a more tightly controlled federal-run health insurance market that will increase costs, undermine the private health care marketplace, and weaken private sector job creation.

The Supreme Court's decision also fails to resolve the fact that the PPACA is simply an unworkable piece of legislation. With incomplete regulations and unrealistic deadlines, States and the Federal government will struggle to have a health insurance Exchange ready for open enrollment on October 1, 2013 that is not beset with major complications for the insurance market and the respective residents of the States. The full extent of damage the PPACA causes to small businesses, the nation's economy, and the American health care system will only be revealed with time. The

State of Louisiana has no interest in being a party to this failure by implementing a state based exchange.

The PPACA's Legality

Louisiana was one of 26 States that filed suit against the federal government concerning the legality of the PPACA, specifically focusing on two parts: § 1501 (the individual mandate) and Title II (the mandatory expansion of the Medicaid eligible population to 133 percent of the federal poverty level). In June of this year, the Supreme Court agreed that the mandatory Medicaid expansion was unconstitutional. They also ruled that the individual mandate was unconstitutional under Congress's Commerce power, but upheld this provision as an example of Congress's taxing power, admitting that the purported penalty is actually a tax.

While the Supreme Court effectively rewrote the PPACA to uphold the individual mandate, they did not rule on the legality of the remainder of the law. In fact, the Supreme Court is aware that future challenges are likely to occur by its recent actions. With continuing questions about the PPACA's legality, we believe it is prudent to wait until these challenges are completely resolved. Provisions that the Court did not rule on that are still being challenged include:

The Employer Mandate

- The PPACA requires that all employers with fifty or more full-time employees provide adequate health care coverage to their employees. (§ 1513, §1514, and §10106). If they do not, these employers could face a tax of $2,000 or $3,000. [1]

Federally-Facilitated Exchange Subsidy

- In the PPACA, State-based health Exchanges are authorized to provide premium assistance subsidies to individuals from 100% to 400% of the Federal Poverty Level. However, the PPACA does not expressly authorize Federally-facilitated Exchanges to do the same. Subsequent regulations from the Internal Revenue Service have interpreted the law so that all Exchanges are able to provide premium assistance. The legality of these regulations is currently being challenged.[2]

Preventative Care Mandate

- Section 2713 of the PPACA allows for the Secretary to define preventive care services to be provided cost-free by all non-grandfathered insurance plans. In August 2011, the Secretary released a regulation that included contraceptive and some abortifacient services as preventative care. The regulation has been challenged by numerous groups and individuals (in over 35 lawsuits) who have religious objections to paying for health insurance that includes coverage for contraception and some abortifacient services. [3]

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[1] *Liberty University et al v. Geithner et al*, No. 6:10-cv-00015-nkm (W.D. Va.).

[2] *Oklahoma v. Sebelius*, No. CIV-11-030-RAW (E.D. Okla.).

[3] *Belmont Abbey College v. Sebelius*, No. 1:11-cv-01989-JEB (D.D.C); *Colorado Christian University v. Sebelius*, No. 11-cv-03350 (D. Colo.); *EWTN v. Sebelius*, No. 2:12-cv-00501 (N.D. Ala.); *Priests for Live v. Sebelius*, No. 1:12-cv-00753 (E.D.N.Y); *Louisiana College v. Sebelius*, No. 1:12-cv-00463 (W.D. La.); *Ave Maria v. Sebelius*, No. 2:12-cv-00088 (M.D. Fla); *Geneva College v. Sebelius*, No. 2:12-cv-00207 (W.D. Pa); *Nebraska v. HHS*, No. 4:12-cv-03035 (D. Neb.); *Archdiocese of St. Louis v. Sebelius*, No. 4:12-cv-924 (E.D. Mo.); *Newland v. Sebelius*, No. 1:12-cv-01123 (D. Colo.); *Legatus v. Sebelius*, 2:12-cv-12061 (E.D. Mich); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 1:12-cv-815 (D.D.C.); *Roman Catholic Archdiocese of NY v. Sebelius*, No. 1:12-cv-2542 (E.D.N.Y.); *Rev. Donald W. Trautman v. Sebelius*, No. 1:12-cv-123 (W.D.Pa.), *Most Rev. David*

Maintenance of Effort

- The Supreme Court's decision invalidated the provision of the PPACA which coerced States to expand their Medicaid program by threatening existing Medicaid funding. Questions remain whether this applies to the maintenance of effort (MOE) requirement, requiring States to maintain their existing Medicaid eligibility until 2014.[4]

Origination Clause

- The Supreme Court decision made it clear that the individual mandate is a tax, not a penalty as claimed by the administration. The PPACA originated in the Senate. The Constitution (Article I, Section 7, Clause 1) is clear that all taxes are to originate in the House, and thus the individual mandate has been contested as an unconstitutional tax. [5]

Independent Payment Advisory Board (IPAB)

- Sections 3403 and 10320 of the PPACA created this 15-member federal board that is granted the authority to make payment changes for the Medicare program without approval from Congress. There are also no administrative or judicial reviews of these decisions.[6]

Legality of Rulemaking/Guidance

- With many of the provisions of the PPACA, formal rules and regulations have been delayed or even non-existent. There are serious questions about the legality of this procedure in light of the Administrative Procedures Act.

<u>Bad Policy</u>

While HHS has repeatedly said that the States serve as incubators of innovation, the PPACA robs States of this ability by limiting their opportunities to enact meaningful state-led health care reform. For example, the concept for an Exchange originated as a free market idea meant to lower the cost of health insurance for those who decide to purchase such insurance. In theory, an increased pool for those deciding to purchase health insurance is a good idea. It provides individuals the ability to select the insurance coverage that they want at a lower cost. If this were truly the framework for the Exchange model outlined in PPACA, the State of Louisiana would be glad to evaluate it as an option, adopting it to our State's needs. However, the PPACA Exchange is only masquerading as free market idea, and instead creates a vehicle for the Federal government to tightly control the coverage options available to consumers, raising costs and limiting choice. Many employers will drop

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A. Zubik v. Sebelius, No. 2:12-cv-676 (W.D. Pa.); *Roman Catholic Diocese of Dallas v. Sebelius*, No. 3:12-cv-1589 (N.D. Tex.); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex); *Franciscan Univ. of Stubenville v. Sebelius*, No. 2:12-cv-440 (S.D. Ohio); *Roman Catholic Diocese of Biloxi v. Sebelius*, No. 1:12-cv-158 (S.D. Miss.); *Univ. of Notre Dame v. Sebelius*, No. 3:12-cv-00253 (N.D. Ind.); *Grace Coll. V. Sebelius*, No. 3:12-cv-00459 (N.D. Ind.); *O'Brien v. HHS*, No. 4:12-cv-00476 (E.D. Mo.); *Conlon v. Sebelius*, No. 1:12-cv-3932 (N.D. Ill.); *Triune Health Group v. Sebelius*, No. 1:12-cv-6756 (N.D. Ill.); *Catholic Diocese of Nashville v. Sebelius*, No. 3:12-cv-00934 (M.D. Tn.); *Hobby Lobby v. Sebelius*, No. 12-cv-1000 (W.D. Okla.); *College of the Ozarks v. Sebelius*, No. 6:12-cv-03428 (W.D. Mo.); *Tyndale House v. Sebelius*, No. 1:12-cv-815 (D.D.C. filed May 12, 2012); *Roman Catholic Archdiocese of Atlanta v. Sebelius*, No. 1:12-cv-3489 (N.D. Ga.); *Autocam Corp. v. Sebelius*, No. 1:12-cv-01096 (W.D. Mich.); *Korte & Luitjohan Contractos v. Sebelius*, No. 3:12-cv-01072 (S.D. Ill.); *East Texas Baptist University & Houston Baptist University v. Sebelius*, No. 4:12-cv-03009 (S.D. Tx); *Roman Catholic Archdiocese of Miami v. Sebelius*, No. 1:12-cv-23820 (S.D. Fl.); *Grote Industries v. Sebelius*, No. 4:12-cv-00134 (S.D. In.); *Criswell College v. Sebelius*, No. 3:12-cv-04409 (N.D. Tx); and *Annex Medical v. Sebelius*, No. 0:12-cv-02804 (D. Minn).

[4] *Mayhew v. Sebelius*, No. 12-2058 (1st Cir).

[5] *Sissel v. HHS*, No. 1:10-cv-01263-BAH (D.D.C.).

[6] *Coons v. Geithner*, No. CV-10-1714-PHX-GMS (D. Ariz).

the health insurance coverage they currently provide to employees, leaving individual health care needs to the federal government. Specifically, the consequences of the PPACA Exchange and associated insurance changes include:

Lack of Consumer Choice

- When the PPACA was proposed, the President promised that if individuals liked their current health care insurance, they could keep it. However, the PPACA model will actually force individuals into the broken, government-run Medicaid system and into heavily-regulated, government-run health care plans (deemed "minimal essential coverage" by the Federal government).

  Individuals should have the right to select what health care plan is best for them, and not be limited to a one-size-fits-all product that a political process deems is "essential". By mandating that certain benefits be provided in all insurance plans, the price of premiums will increase, leaving individuals unable to continue the coverage they like and a price they can afford

Increased Taxes

- The PPACA requires that all Exchanges be financially self-sufficient by 2015. This will require the Exchange to generate revenue, either by instituting user fees in the Exchange market or in the entire insurance market— essentially a tax on all insurance plans purchased. This will only further drive up the costs of premiums in the Exchange market for consumers and for individuals who will have to pay the premium assistance through their taxes.

- The PPACA also includes a tax on insurance premiums which are proposed to be paid for by "the industry." It is troubling that these same taxes will affect managed care organizations, proven mechanisms for more effectively controlling cost for Medicaid and Medicare, especially needed for States with limited financial resources.

Impact on Employers and Employees

- The employer mandate, a tax on employers with fifty or more employees who decide not to provide "adequate" health insurance coverage to their employees, is a disincentive to provide coverage. Already, businesses are attempting to modify their business structure to avoid the law's mandates (either by laying off employees or reducing the number of hours these employees work). Even those employers who provide coverage can be taxed an additional $3,000 if that employee is eligible and enrolls in coverage on the health insurance Exchange. So instead of building upon the existing insurance market, the PPACA is undermining it.

<u>Unworkable</u>

The deadline for all Exchanges (both State and federally-facilitated) to be ready for open enrollment is October 1, 2013. However, it is likely many exchanges will not be ready by that point, even in those States that are supportive of the PPACA. The guidance received from the Federal government is often delayed or non-existent. For a project as large and complicated as health care reform, this is an insurmountable hurdle for the States to overcome. There are numerous unanswered questions and major problems remaining about Exchanges and the provisions of the PPACA entangled with them. Continuing issues include:

Exchanges in General

- In order for an Exchange to be ready for open enrollment on October 1, 2013, it must be approved or conditionally approved by January 1, 2013. However, there have been no formal regulations regarding what guidelines HHS will use to determine if an Exchange is conditionally approved or not.

- It has been continuously promised by officials at HHS that there will be cost comparisons between the Federally-facilitated Exchange, the State-based Exchange, and the partnership Exchanges. These cost estimates have not yet been made public.

Federally-facilitated Exchanges

- To date, in addition to the incomplete final rule for health insurance Exchanges, there has been no rulemaking regarding the Federally-facilitated Exchanges and their interactions with the respective States' eligibility systems. Promised in the March 2012 final Exchange regulation was further guidance regarding the Federally-facilitated Exchange. Since that point, only a questions and answers document has been released.

- Numerous contracts have been signed for the development of the Federally-facilitated Exchange, but these documents have not been made public. The State of Louisiana filed a Freedom of Information Act request within the last month for these contracts and has still not received these documents. Senator Orrin Hatch of Utah requested similar documents in his role as Ranking Member on the U.S. Senate Committee on Finance and has not received a response. It is necessary for these documents to be made public so that States can make informed decisions concerning Exchanges.

Partnership Exchange

- A partnership Exchange will be a Federally-facilitated Exchange with certain functions run by the State. It is an option first introduced by a power point presentation and further expanded by a document entitled "General Guidance on Federally-facilitated Exchanges," but has yet to be defined in federal regulations. The final Exchange rule proposed no regulations regarding this option.

- There has been no answer from the Federal government concerning whether the Federal government or the States will be responsible to pay for the state-run functions of a partnership Exchange.

The Workings of an Exchange

- The Exchange is required to provide premium tax credits to those between 100% and 400% of the federal poverty line. Originally projected to cost the federal government $462 billion between 2012 and 2019, these subsidies are now projected to be $574 billion during the same period by the Congressional Budget Office. Already, Medicare funding will be cut by $700 billion to pay for these premium tax credits. There is discussion that because these levels of subsidies are unsustainable, the number of Americans eligible for premium assistance subsidies will be reduced in number.

Essential Health Benefits and Actuarial Values

- All plans in the individual and small group markets (including plans sold on the respective State Exchanges) must meet "essential health benefits," benefits not yet defined by the

Secretary of HHS in formal rulemaking. Initial informal guidance suggests that these benefits will be based off of the most popular small group plans in each State in addition to benefits specified by the PPPACA. The States, insurance companies, and other stakeholders are awaiting formal regulations about essential health benefits.

- The States are awaiting a promised "actuarial value calculator" to accurately determine actuarial values for plans sold on the Exchange. This still has not been delivered and numerous questions remain about how actuarial value of health insurance plans will be determined.

Reforms Needed

It is most disappointing that the PPACA failed to offer sustainable reform of the nation's health care system. Instead of strengthening the market to lower costs and increase consumer choice, the PPACA created a big government "solution"— the type of solution history tells us will only create debt and worry for future generations of Americans. Health care reform should focus on improving the value of health care in America by bringing down costs and improving quality.

There are several ways to do this. Transparency in health care is essential for individuals to be better consumers of care. The cost and success rates of different procedures can be made publically available to help individuals make decisions about their care. Increased competition through individuals being allowed to purchase insurance across State lines can create greater competition and lower costs.

Similarly, just as individuals should have more investment in their health care choices, States should have greater ability to design programs that meet the needs of their people. States know how to take care of their residents more than the bureaucrats in Washington, distant both in geography and in experience. Louisiana, for example, has been able to make remarkable progress in its care of the Medicaid population through an innovative model of managed care, saving money and improving the quality of care. However, constrained by the federal requirements for Medicaid, Louisiana can only do so much. It is time to give the States the option to administer this program through block grants to save both the Federal and State taxpayers money and eliminate the perverse incentives created by federal rules and funding streams.

States need to be given the tools to solve these problems. The PPACA should either be repealed or replaced with a system giving States the ability to truly innovate. At the very least, we ask that you give the States flexibility through waivers exempting States from the burdensome requirements of the PPACA while providing the care their populations need and want in the way the States know best how to deliver.

In addition to these needed reforms, the State of Louisiana fully expects HHS to coordinate its efforts regarding implementation of a Federally-facilitated Exchange in an effort to mitigate the negative impact on either our private insurance market or the Medicaid program. The State expects that the Federal government will adhere to the four guiding principles included in the "General Guidance on Federally-facilitated Exchanges" and intends to hold the Federal government accountable to these principles. Additionally, the impact on our State's budget is a significant concern. In this light we expect that HHS will:

- Provide a full and complete briefing to the State officials regarding on-going implementation efforts;
- Schedule routine meetings to update State officials on the implementation status;
- Notify the State when all stakeholder, consumer, or any other public meetings or public outreach activities are scheduled;
- Work with the State on memorandums of understanding and/or contracts if the Federal-facilitated Exchange expects any support or assistance of the State so that the State is fairly and equitably compensated, including for the use of any State data used by the Federally-facilitated Exchange to verify income;
- Provide the names of all contractors who will be working in the State on the Federally-facilitated Exchange and the details about what activities these contractors will be involved in, including copies of all contracts;
- After the establishment of the Exchange, provide regular (at least semi-annual) updates on its utilization, cost (including long-term financial health), and its impact on the State's insurance market, including, but not limited to the information that must be provided pursuant to §1311(d)(7) of the PPACA;
- If any changes to the Federally-facilitated Exchange model are anticipated, the State is notified immediately; and
- Inform the State of any navigator grant recipients and provide copies of memorandums of understanding between navigators and the Federally-facilitated Exchange.

All further correspondence regarding the PPACA and health insurance Exchange issues is to be directed to the Louisiana Department of Health and Hospitals (Bruce Greenstein, Secretary), the official agency authorized to collaborate with HHS on issues concerning the PPACA in Louisiana. The State of Louisiana hopes that HHS will listen to its concerns and give the States actual flexibility to improve health care for all Americans.

Sincerely,

Bruce D. Greenstein
Secretary
Louisiana Department of Health and Hospitals