



COMMONWEALTH OF PENNSYLVANIA  
INSURANCE DEPARTMENT  
HARRISBURG

THE COMMISSIONER

September 26, 2012

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

Dear Secretary Sebelius,

On August 23, 2012, I sent correspondence to you regarding the delayed pace of detailed and necessary information from the Department of Health and Human Services ("HHS"). The information sought pertains to key issues affecting health insurance exchanges and other Patient Protection and Affordable Care Act ("PPACA") related issues.

Without this information, the Commonwealth of Pennsylvania finds itself unable to make informed decisions about exchanges, including possible selection of "essential health benefits" (EHB). Therefore, in order for me to advise Governor Corbett and provide information to the Pennsylvania Legislature and Pennsylvania consumers, I am again asking for detailed responses to my questions posed to you on August 23. To date, no response has been provided. While we would appreciate written guidance, in the interim we would be happy to sit down with HHS representatives with decision-making authority if it would allow us to get information on which we can rely in the near term.

As you are aware, the PPACA clearly states that the Secretary of HHS is to define the EHB package for policies offered both inside and outside of health insurance exchanges. While the language in PPACA was plain that this statutory responsibility fell on HHS, in December of last year HHS issued guidance preliminarily indicating states must select a benchmark design, with HHS potentially acting as final arbiter or decision maker of that selection. The Commonwealth of Pennsylvania has already asked for clarity on this selection process. We appreciate that HHS believed this approach provides states with greater flexibility, but in reality the guidance placed additional restrictions on the EHB selection rather than flexibility. HHS guidance appears to render the states' ability to innovate and to make an independent choice illusory.

Additionally, as I noted in my August 23 letter to you, HHS to date has not issued any form of rulemaking (final or proposed) addressing EHBs, although prior guidance from HHS notes there are a number of outstanding issues (including dental and vision coverages) that HHS must still

resolve. As a former Governor and State Insurance Commissioner, I believe you can appreciate the concern of making decisions in a vacuum.

Despite the lack of clarity, Pennsylvania has not simply sat idly by. Over the past several months, while we have been awaiting additional guidance from HHS on EHBs, the Pennsylvania Insurance Department conducted an analysis of the ten options that, according to the preliminary guidance, could potentially serve as the EHB benchmark in our state. A copy of that study is attached for your review. Of course, the study could only go as far as the guidance issued thus far by HHS. Yet, HHS recently has directed states that they must identify their EHB benchmark by September 30<sup>th</sup>. Some communications from your agency indicate that this is a suggested response date while others indicate that it is a deadline of some sort. We again are asking for clarity on the process and timing for decision making at both the state and federal levels.

Without issuing any rulemaking, HHS has indicated that any selection by the states will be subject to additional review, but we have no definitive guidance as to what, if any, weight will be given to a state's selection. The minimum amount of information provided to date invites concern that your agency will alter or override a state's submission (perhaps based upon public comment, or perhaps based on your own discretion), raising serious questions as to whether states have any meaningful ability to make a definitive selection of an EHB benchmark.

Given what we believe to be the clear statutory obligation on HHS to define EHBs and the lack of any rulemakings that would allow Pennsylvania to make even an informed and consequential recommendation by September 30<sup>th</sup>, we are simply providing the study conducted by the Commonwealth at this time. We hope, however, that the attached study of the options currently available in the Pennsylvania marketplace will be of value to you and your staff as you carry out your statutory responsibility of defining EHBs or at least as you more clearly define the process. Additionally, we will be directing interested parties to submit their comments and recommendations to you for your consideration as you continue your deliberations. To the extent we receive additional guidance on the issues we've raised related to the EHB package, we may be in a position to provide you with a more informed recommendation on an appropriate benchmark for Pennsylvania.

Time is, however, of the essence and I would urge you to act promptly in resolving the outstanding EHB benchmark issues so as to allow the marketplace ample time to undertake the regulatory, operational, and IT planning that will be necessary to implement the EHB package into product designs. Having clarity for regulated entities and especially for consumers, should be of paramount importance.

Sincerely,



Michael F. Considine  
Insurance Commissioner