National Indian Health Board

Submitted via electronically

September 7, 2012

Mr. Gary Cohen, Deputy Administrator and Director
Center for Consumer Information and Insurance Oversight (CCIIO)
Center for Medicare and Medicaid Services
Department of Health and Human Services
P.O. Box 8010
Baltimore, MD 21244-08010

RE: Tribal Consultation in State Exchange and Partnership Planning

Dear Mr. Cohen:

I am writing on behalf of the National Indian Health Board (NIHB)[1] to let you know that we look forward to working with you in your new role as Director of the Center for Consumer Information and Insurance Oversight (CCIIO). Your tenure in this position began after the most recent Tribal Consultation sessions held on July 26, August 7 and August 9 regarding Federally-facilitated Exchanges, Partnerships and Medicaid Expansion. We believe that CCIIO is making a good faith effort to work with Tribal governments to resolve some very difficult issues through the Affordable Care Act (ACA) Policy Workgroup formed by the Tribal Technical Advisory Group (TTAG) to CMS. We particularly appreciate the efforts by Pete Nakahata to listen to Tribal issues and work collaboratively to find solutions.

At the same time, we are troubled by hearing CCIIO staff talk about Tribes as "stakeholders." Many in CCIIO do not seem to understand the legal and historic basis for the government-to-government relationship between Tribes and the Federal government, and instead relegate communications with Tribes to the realm of "stakeholder management." This is not just a semantic issue – it creates barriers to finding the best solutions to problems because some CCIIO

[1] Established 40 years ago, NIHB is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives. NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service ("IHS") Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act ("ISDEAA"), or continue to also rely on IHS for delivery of some, or even most, of their health care, NIHB is their advocate

staff seem to believe "if we did this for Tribes, it would open the door to doing it for all stakeholders." There seems to be a lack of recognition of the Federal government's role in Indian health care as different from that of insurance companies and other organizations outside the Federal government. As a person who has been closely involved with Medicaid programs and is knowledgeable about public health policy, we hope you will use your leadership role in CCIIO to correct these attitudes and misperceptions.

Another disturbing trend that we are observing is the hesitancy of CCIIO to enforce the letter from Secretary Sebelius to all State Governors sent on September 14, 2011. The Secretary's letter addresses the responsibility of States to consult with Tribes in the development of Health Insurance Exchanges. The letter states that "Tribes should be considered full partners by States during the design and implementation of programs . . ." and urges States to "proactively include and partner with Tribes during the planning stages."

It is our understanding that a condition of the Establishment Grants is that States develop Tribal Consultation policies for the Exchange planning work that they are doing. However, we learned at the July 26 Tribal Consultation that the States were not going to be required to submit their Tribal Consultation policies to CCIIO until they applied for certification in March 2013, at which time the planning process is essentially complete.

A few States that are planning State Exchanges are consulting with Tribes, including Oregon, Washington and Minnesota. In many other States, however, health insurance commissioners who are charged with the planning process for Exchanges in their States are not knowledgeable about Indian health care providers and have not been responsive to Tribes. In addition, a survey of States that we have conducted indicates that many States believe that if they are not planning a State Exchange, then they do not need to have a Tribal Consultation policy at all.

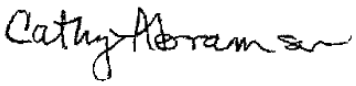
This is disturbing to us because CCIIO is reaching out to engage States that do not have Tribal Consultation policies to participate in Partnership Models. In the recent CCIIO Tribal Consultation sessions and the General Guidance on Federally-facilitated Exchanges issued by CCIIO on May 16, 2012, some of the State functions envisioned in the Partnership Model give States authority in areas that are very important to Tribes, including network adequacy, plan marketing oversight, essential health benefit standards, navigator programs and other in-person assistance.

For example, at least 20 States have formed a workgroup on essential health benefits (EHB) including 7 States with Tribes, while 3 States with Tribes have already enacted benchmark plan types, and others have already conducted an assessment of benchmark plan options. Tribes need to be involved with these discussions and decisions because significant issues are at stake, including mental health parity, limitation in number of visits, and having a separate plan for pediatric oral and vision services. However, only a handful of States are including Tribes in these planning activities. CCIIO provided a list of contacts for each State for Exchange planning activities for Tribes to use to initiate this process. An effort by TSGAC to contact State representatives on this list showed that many of the people have moved to other positions and others were completely unresponsive. <u>A necessary first step for CCIIO is to update this list and distribute it to Tribes.</u>

Even more important, CCIIO must demand that all States that received Establishment Grants submit their Tribal Consultation policies now. They have had a year since the Secretary's letter of September 14, 2011, to work with Tribes to develop these policies. We strongly believe CCIIO should not enter into Partnership agreements with States that have not consulted with Tribes in the development of each function in the agreement.

If CCIIO does not take these actions immediately, critical opportunities will be missed for meaningful Tribal Consultation at the State level. Failure to act will render the Secretary's letter impotent and undermine the CMS and HHS Tribal Consultation policies. We respectfully request your timely attention to this urgent matter. If you have any questions, you can reach me Jennifer Cooper at jcooper@nihb.org.

Sincerely Yours,



Cathy Abramson
Chairman, National Indian Health Board

Attachment: Letter from HHS Secretary Sebelius, September 14, 2011

cc: TSGAC Members/Technical Workgroup
Kathleen Sebelius, Secretary HHS
Valerie Davidson, Chair, TTAG
Dr. Yvette Roubideaux, Director, IHS
Stacy Bohlen, Executive Director, NIHB
Jennifer Cooper, Legislative Director, NIHB
Marilyn Tavenner, Acting Administrator, CMS
Kitty Marx, Director of Tribal Affairs, CMS