

Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

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Delivered via electronic transmission

May 13, 2011

Dr. Donald Berwick, M.D.
Administrator
Centers for Medicare & Medicaid
Services Department of Health and
Human Services
Attention: CMS-9987-P
Room 445-G
Hubert Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Mr. J. Mark Iwry
Senior Advisor to the Secretary and
Deputy Assistant Secretary
Office of Benefits Tax Counsel
Attention: Waivers for State Innovation
Room 3050
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

**Subject: Application, Review, and Reporting Process for Waivers for State Innovation
(CMS-9987-P)**

Dear Administrator Berwick and Mr. Iwry:

Please find attached comments prepared by the Tribal Technical Advisory Group (TTAG)¹ to the Centers for Medicare and Medicaid Services (CMS), Department of Health and Human Services in response to the joint CMS and Department of the Treasury (Treasury) proposed rule on the Application, Review, and Reporting Process for Waivers for State Innovation (CMS-9987-P) pertaining to section 1332 of the Patient Protection and Affordable Care Act (Proposed Rule).

TTAG advises CMS on Indian health policy issues involving Medicare, Medicaid, the Children's Health Insurance Program, and any other health care program funded (in whole or in part) by the Centers for Medicare and Medicaid Services ("CMS").²

In summary, TTAG is recommending the following two modifications to the Proposed Rule.

- To ensure American Indians and Alaska Natives are not worse off under a State waiver, representations made by a State and determinations made by the Secretaries pertaining to a State satisfying the requirements for granting waivers

¹ Sec. 5006(e) of the American Recovery and Reinvestment Act codifies in statute, at sections 1902(a)(73) and 2107(e)(1)(C) of the Social Security Act, the requirement for the Secretary of Health and Human Services to maintain a Tribal Technical Advisory Group within CMS and the requirement that States seek advice from Tribes on a regular and ongoing basis where one or more Indian health program or urban Indian organization furnishes health care services.

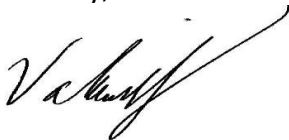
² http://www.cmsttag.org/docs/ttag_charter_final.pdf, January 28, 2011.

under sections 1332(b)(1)(A), (B) and (C) of the ACA need to consider the specific impact on American Indians and Alaska Natives and not limit the representations to the population as a whole.

- TTAG strongly supports § 33.112 of the Proposed Rule that highlights the requirement for States to undertake a process for meaningful consultation with Tribes but recommends that States be encouraged, in developing a waiver application under the Proposed Rule for ACA section 1332, to review and adapt procedures already established to satisfy tribal consultation requirements under a State's Medicaid program.

We appreciate your consideration of this TTAG analysis and recommendations. We urge CMS to take the actions requested, and we are available at any time to provide further clarification on these issues as may be needed.

Sincerely,

A handwritten signature in black ink, appearing to read 'Valerie Davidson', written in a cursive style.

Valerie Davidson, Chair

Cc: Kitty Marx, Director, CMS Tribal Affairs Group
Yvette Roubideaux, Director, Indian Health Service

Attachment: TTAG Analysis of Proposed Rule for Implementation of Section 1332 of the Affordable Care Act: Waiver for State Innovation

**TTAG Analysis of Proposed Rule for Implementation of
Section 1332 of the Affordable Care Act: Waiver for State Innovation³**

1. STATEMENT OF THE ISSUE.

The Centers for Medicare and Medicaid Services (CMS) of the Department of Health and Human Services (HHS) and the Department of the Treasury jointly issued a proposed rule on the Application, Review, and Reporting Process for Waivers for State Innovation (CMS-9987-P) (Proposed Rule) under section 1332 of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA).⁴ ACA section 1332 creates a new Waiver for State Innovation and provides authority to the Secretary of HHS or the Secretary of the Treasury (Secretaries) to waive any or all of the requirements under the following sections of the ACA for health insurance coverage within a State for plan years beginning on or after January 1, 2017.

- Part I of subtitle D of Title I of the Affordable Care Act (relating to the establishment of qualified health plans);
- Part II of subtitle D of Title I of the Affordable Care Act (relating to consumer choices and insurance competition through health benefit exchanges);
- Section 1402 of the Affordable Care Act (relating to reduced cost sharing for individuals enrolling in qualified health plans); and
- Sections 36B (relating to refundable credits for coverage under a qualified health plan), 4980H (relating to shared responsibility for employers regarding health coverage), and 5000A (relating to the requirement to maintain minimum essential coverage) of the Internal Revenue Code.

These requirements may be waived, though, only after a determination by the Secretaries that the State plan:

- a. Will provide coverage that is at least as comprehensive as the coverage defined under the “essential health benefits” requirements in section 1302(b);
- b. Will provide coverage and cost sharing protections against excessive out-of-pocket spending that are at least as affordable as provided under the ACA;
- c. Will provide coverage to at least a comparable number of its residents; and
- d. Will not increase the Federal deficit.

TTAG is concerned that if the impacts on American Indian and Alaska Natives, as well as on the Indian Health Programs⁵ and urban Indian organizations that serve them, are not sufficiently considered

³ The Tribal Technical Advisory Group (TTAG) advises CMS on Indian health policy issues involving Medicare, Medicaid, the Children’s Health Insurance Program, and any other health care program funded (in whole or in part) by the Centers for Medicare and Medicaid Services (“CMS”).

⁴ The Affordable Care Act, pursuant to Section 10221 of the ACA, includes amendments made to the Indian Health Care Improvement Act (Public Law 94-437), as the ACA incorporated by reference S. 1790 as reported by the Committee of Indian Affairs of the Senate.

⁵ Indian Health Programs means programs operated by the Indian Health Service (IHS), an Indian Tribe, or tribal organization.

during the waiver development and review process, the broad authority to waive provisions of the ACA, along with the coordinated waiver process identified in section 1332(a)(5) involving waiver authorities that existed prior to enactment of the ACA, may result in reduced access to quality health care services for American Indians and Alaska Natives. An insufficient understanding of potentially adverse impacts on American Indians and Alaska Natives may occur, in particular, if the Secretaries make the above determinations for a State's population as a whole and not in regard specifically to American Indian and Alaska Native residents of the State.

In addition, there is an opportunity to encourage greater coordination on tribal consultation through the Proposed Rule.

2. PRINCIPAL FINDINGS.

The Affordable Care Act contains several critical Indian-specific provisions designed to increase the access of American Indians and Alaska Natives to quality, affordable health care services. The authority granted to the Secretaries under section 1332 to waive requirements of the ACA includes sections of the ACA containing some of these Indian-specific provisions. A State waiver changing Indian-specific and non-Indian specific provisions of the law may have a direct, and potentially negative impact on American Indians and Alaska Natives, Indian Health Programs, and urban Indian organizations. To ensure American Indians and Alaska Natives are not worse off under a State waiver, representations made by a State and determinations made by the Secretaries pertaining to a State satisfying the requirements for granting waivers under sections 1332(b)(1)(A), (B) and (C) of the ACA must consider the specific impact on American Indians and Alaska Natives and not limit the representations to the population as a whole. The Proposed Rule, in § 33.112, highlights the requirement for States to undertake a process for meaningful consultation with Tribes but does not encourage States to adapt procedures established to satisfy tribal consultation requirements under the State's Medicaid program. The discussion of each of these findings follows.

3. ANALYSIS.

3.1 Indian-Specific Provisions in the ACA. The Affordable Care Act contains several important Indian-specific provisions designed to increase the access of American Indians and Alaska Natives to quality, affordable health care services. Some of these provisions are within the waiver authority granted the Secretaries under section 1332 (and are indicated in paragraph 3.2 below.)

Other Indian-specific provisions were not included in the section 1332 waiver authority granted to the Secretaries. For example, a host of Indian-specific provisions were enacted under section 10221 of the ACA which amended and permanently reauthorized the Indian Health Care Improvement Act. These provisions are not included within the Secretaries' section 1332 waiver authority. Some of the Indian-specific provisions enacted under section 10221 of the ACA and outside the scope of the section 1332 waiver authority include:

1. The right of Indian Tribes and tribal organizations to recover from insurance companies and other liable third parties reasonable charges or the highest amount the payor would pay a non-governmental provider for health care services provided (section 206 of the IHCA⁶);
2. The ability of certain Tribes and tribal organizations and urban Indian organizations to purchase health and life insurance through the Federal Employees Health Benefits Program

⁶ Indian Health Care Improvement Act, as amended by Public Law 111-148.

(section 409 of the IHCA); and

3. The requirement for the Departments of Defense (DoD) and Veterans Affairs (VA) to reimburse the Indian Health Service and tribal health programs for services provided to beneficiaries of DoD or VA (section 405 of the IHCA).

Other Indian-specific provisions are contained in sections throughout the Affordable Care Act.

3.2 Indian-Specific Provisions within the Section 1332 Waiver Authority of the Secretaries.

The authority granted to the Secretaries under section 1332 to waive requirements of the ACA includes sections of the ACA containing some of the Indian-specific provisions. These include:

- Under Part II of subtitle D of Title I of the Affordable Care Act (relating to consumer choices and insurance competition through health benefit exchanges) –
 - Special monthly enrollment period for Indians provided under section 1311(c)(6)(D).
 - Required inclusion in health insurance plan networks of “essential community providers that serve predominantly low-income, medically-underserved individuals” as called for under section 1311(c)(1)(C). Essential community providers include certain Indian Health Program and urban Indian organization providers as these providers meet the stated definition and, moreover, are largely included in the examples of essential community providers cited in the same section of the ACA, which are health care providers defined in section 340B(a)(4) of the Public Health Service Act and providers described in section 1927(c)(1)(D)(i)(IV) of the Social Security Act.⁷
- Under Section 1402 of the Affordable Care Act (relating to reduced cost sharing for individuals enrolling in qualified health plans) –
 - The issuer of a qualified health plan offered in the individual market in a health insurance exchange (Exchange) shall eliminate any cost-sharing under the plan for an Indian whose household income is not more than 300 percent of the poverty line for a family of the size involved (section 1402(d)(1)).
 - If an Indian enrolled in a qualified health plan is furnished an item or service by the Indian Health Service, an Indian Tribe, tribal organization, or urban Indian organization or through referral under contract health services, (a) no cost-sharing under the plan shall be imposed under the plan for such item or service and (b) the issuer of the health plan shall not reduce the payment to the provider of such item or service by the amount of any cost-sharing that would be due from the Indian but for (a) (section 1402(d)(2)).⁸
- Under sections 36B (relating to refundable credits for coverage under a qualified health plan), 4980H (relating to shared responsibility for employers regarding health coverage), and 5000A (relating to the requirement to maintain minimum essential coverage) of the Internal Revenue Code –
 - No penalty for failure to maintain minimum essential coverage shall be imposed on members of Indian Tribes, pursuant to section 500A of the Internal Revenue Code as established under section 1501(e)(3) of the ACA.

⁷ See TTAG Issue Paper: I/T/U Are Essential Community Providers, February 23, 2011.

⁸ The HHS Secretary is to pay to the issuer of the qualified health plan the amount necessary to reflect the increase in actuarial value of the plan required by reason of the elimination of the cost-sharing and the adjustment in the payment made by the plan to the provider to compensate for the elimination of the cost-sharing.

3.3 Potential Impact on American Indians and Alaska Natives from Changes to Indian-Specific and Non-Indian Specific Provisions. A State waiver may have a direct impact on American Indians and Alaska Natives, Indian Health Programs, and urban Indian organizations from changes in Indian-specific and non-Indian specific provisions of the law.

For instance, with regard to modifications to Indian-specific provisions of the ACA under a State section 1332 waiver, there could be a significant impact on American Indians and Alaska Natives (AI/AN) if the exemption from penalties for AI/AN under section 5000A of the Internal Revenue Code for failing to maintain minimum essential coverage were altered.

Likewise, modifications to non-Indian specific provisions could also have a direct impact – favorable or adverse – on American Indians and Alaska Natives. For example, it is estimated there are about 472,000 AI/AN without health insurance living in households with incomes between 133% and 300% of poverty.⁹ If eligible for enrollment in the individual market in an Exchange, and if subsequently enrolled in an Exchange plan in the individual market, these American Indians and Alaska Natives would then receive services without cost-sharing requirements.¹⁰ Any change that has the effect of altering who is eligible and/or able to enroll in a plan through the individual market in an Exchange could have a more concentrated impact American Indians and Alaska Natives.

Another example whereby a modification to a non-Indian specific provision under a State waiver application may then impact an Indian-specific provision, and subsequently result in a direct, and potentially adverse, impact on American Indians and Alaska Natives, involves potential changes to the health care benefits package. Under §155.1308(a)(2)(iv)(C)(4)(i) of the Proposed Rule, a State is to provide the data necessary to determine that the State’s proposed waiver will “provide coverage that is at least as comprehensive as the coverage defined in section 1302(b) of the Affordable Care Act” and under § 155.1308(a)(2)(iv)(C)(4)(ii) will “provide coverage and cost sharing protections against excessive out-of-pocket spending that are at least as affordable...” Under one such scenario, a proposed State plan change may alter the scope of services covered by the plan and adjust the percentage of the costs covered by the plan for the remaining covered services. Such a change could be allowable under a Waiver for State Innovation if it were considered “at least as comprehensive” and “at least as affordable” for the population at large. But the impact on American Indians and Alaska Natives could very well be negative. This could be the case in this instance if the value of the Indian-specific cost-sharing protections for those (remaining) covered services was effectively lessened and an American Indian and Alaska Native ended up paying the full costs for services that are no longer covered by the plan.

3.4 Need for Indian-Specific Assessment of the Impact of a Proposed Waiver. To ensure American Indians and Alaska Natives are not worse off under a State waiver, representations made by a State and determinations made by the Secretaries pertaining to a State satisfying the requirements for granting waivers under sections 1332(b)(1)(A), (B) and (C) of the ACA (§155.1308(a)(2)(iv)(C)(4)(i), (ii), and (iii) of the Proposed Rule) need to consider the specific impact on American Indians and Alaska Natives and not limit the analysis, representations and determinations to the population as a whole. This could be

⁹ Carol Korenbrot and James Crouch, California Rural Indian Health Board, “Uninsured American Indians and Alaska Natives with Incomes 133% to 300% of Poverty: Data for Health Insurance Exchange Outreach”, November 2010.

¹⁰ It is estimated that an additional 185,000 – 380,000 uninsured AI/AN who report some access to Indian health program providers will be eligible for Medicaid under the expansion provided for under section 2001 of the ACA.¹⁰ If these projections are realized, this could represent as much as an 80 percent increase in the number of AI/AN with Medicaid coverage. Source: National Indian Health Board, “Medicaid Expansion under ACA for American Indians and Alaska Natives”, April 14, 2011.

achieved by adding language to the Proposed Rule to indicate that, in States with one or more Indian Health Program(s) or urban Indian organization(s) operating, the information required to be provided under §155.1308(a)(2)(iv)(C)(4) needs to be sufficient to make such a determination for American Indian and Alaska Native residents of the State.

3.5 Ensuring Adequate and Efficient Consultation with Tribes and Input from Urban Indian Organizations. The Proposed Rule, at § 33.112, highlights the requirement for States to undertake a process for meaningful consultation with Tribes. The provision requires a State, prior to submitting an application for a new section 1332 waiver, to provide a public notice and comment period and “such public notice and comment period shall include, for a State with one or more federally-recognized Indian tribes within its borders, a separate process for meaningful consultation with such tribes.” TTAG is in strong support of the inclusion of this provision.

The tribal consultation provision, though, could be improved by encouraging better coordination with other existing tribal consultation requirements. These requirements include Presidential Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” as well as the HHS tribal consultation policies.

This improved coordination could be achieved by encouraging States, in developing a waiver application under the Proposed Rule for ACA section 1332 to review and adapt procedures already established to satisfy tribal consultation requirements under a State’s Medicaid program.

The need for coordination with existing tribal consultation requirements, and the potential use by a State of the tribal consultation process established under Medicaid program requirements, has particular applicability in this instance as section 1332 authorizes a “coordinated waiver process.” The Proposed Rule, at 31 CFR 33.102 and 45 CFR 155.1302 (section 1332(a)(5) of the ACA), permits States to submit “a single application to the Secretary for a waiver under section 1332 of the Affordable Care Act and a waiver under one or more of the existing waiver processes applicable under titles XVIII, XIX, and XXI of the Social Security Act, or under any other Federal law relating to the provision of health care items or services, provided that the application is consistent with the procedures described in the [Proposed Rules], the procedures for section 1115 demonstrations, if applicable, and the procedures under any other applicable Federal law under which the State seeks a waiver.”

Earlier this year, HHS issued guidance to States on tribal consultation with regard to implementation of Exchanges under the Affordable Care Act. HHS included the following language in its January 20, 2011 announcement for the second round of funding to States for the planning and implementation of Exchanges –

In the spirit of Executive Order 13175 the Secretary is anticipating requiring each State that has one or more federally recognized Tribe(s) located within its borders to provide documentation that it has (1) established a process of consultation with such Tribe(s) regarding the start up and ongoing operation of the Exchanges; (2) implemented that process; and (3) assurance that it will continue to conduct and document such Tribal consultations for Exchange matters... States are encouraged to review and adapt to procedures for State Medicaid consultation.¹¹

¹¹ HHS Office of Consumer Information and Oversight, Cooperative Agreement to Support Establishment of State-Operated Health Insurance Exchanges, Funding Opportunity Number: IE-HBE-11-004, January 20, 2011. (emphasis added)

Because of the heightened attention to tribal consultation requirements in recent years by HHS, States are familiar with these requirements¹² and have been required to comply with them.¹³

4. ACTION NEEDED.

4.1. Assessment of the Impact of a Proposed Waiver on American Indians and Alaska Natives. In section §155.1308(a)(2)(iv)(D)(4) of the Proposed Rule regarding “additional information”, add the following after paragraph (ii) –

(iii) A explanation of how the waiver will meet the requirements of sections 1332(b)(1)(A), (B) and (C) of the Affordable Care Act as they pertain to American Indian and Alaska Native residents of the State.

Adjust the numbering of subsequent paragraphs under §155.1308(a)(2)(iv)(D)(4).

4.2. Tribal Consultation. In § 33.112 of the Proposed Rule, add the following underlined sentences to paragraph (a)(2) –

(2) Such public notice and comment period shall include, for a State with one or more federally-recognized Indian tribes within its borders, a separate process for meaningful consultation with such tribes. The State shall provide documentation that it (1) established a process of consultation with such tribe(s) regarding the development of the waiver application; (2) implemented that process; and (3) gives assurances that it will continue to conduct and document such tribal consultations for waiver-related matters. States are encouraged to review and adapt procedures established to meet the requirements for tribal consultation under the State Medicaid program.

¹² CMS, Dear Medicaid Director Letter: ARRA Protections for Indians in Medicaid and CHIP, January 22, 2010. <https://www.cms.gov/smdl/downloads/SMD10001.PDF>

¹³ An October 1, 2010 Dear State Medicaid Directors letter from CMS to States indicated: “CMS cannot approve the [State Plan Amendment] until the required tribal consultation has occurred. To approve the SPA without the required consultation would violate Executive Order 13175 and the sec. 1902(a)(73) consultation requirements, as added by the Recovery Act.”