State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

November 6, 2013

Via Certified Mail & Email

The Honorable Kathleen Sebelius
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201
Kathleen.Sebelius@hhs.gov

Re: A communication from the States of West Virginia, Alabama, Florida, Georgia, Kansas, Louisiana, Oklahoma, South Carolina, Texas, and Utah regarding the readiness of the new health insurance exchanges

Dear Secretary Sebelius:

As our states' chief legal officers with consumer protection responsibilities, we are concerned that the delays and other problems plaguing the rollout of the Affordable Care Act ("ACA") will result in significant harm to consumers. In light of the regulatory, technological, and security concerns expressed by opponents and advocates alike, it is clear that, at best, the law is not operating as intended. If these concerns are not addressed, consumers may pay a tax for failing to buy insurance primarily through a website that will not permit them to do so. We thus urge you to work with Congress and support legislative action to mitigate the ACA's systemic implementation problems.

Statutory and Regulatory Delays

Under the ACA, a series of statutory provisions were scheduled to be implemented simultaneously. However, you have delayed a number of key requirements meant to contribute to a highly interrelated policy framework. In February, you delayed until 2015 a consumer

protection provision that was to cap consumers' out-of-pocket costs at certain dollar amounts for individuals and families beginning in 2014. Likewise, the Small Business Health Options Program (SHOP) was intended to give small business employees a choice of plans beginning in 2014; yet, the employee choice provision was also delayed until 2015. As a result, small employers will be limited to choosing a single plan to cover all of their employees. Then, in late September, you announced that online enrollment for the federal SHOP exchange would be delayed altogether until November. Such delays are in addition to the many statutorily-mandated deadlines that your administration has missed.

Of particular concern is your decision to grant—without seeking legislative approval—a one year delay of the employer mandate, which the Act states "shall apply to months beginning after December 31, 2013." Patient Protection and Affordable Care Act, Pub. L. No. 111-148, March 23, 2010. It is clear from the statute that the employer mandate provision was meant to operate in tandem with several other statutory provisions, including the individual mandate. By requiring that employers maintain employee coverage, the law reduced the number of individuals susceptible to taxation under the individual mandate and minimized the number of individuals forced to purchase federally-subsidized coverage through the health insurance exchanges. Delaying this requirement while maintaining others significantly impacts the overall policy framework established by the law and ironically provides more favorable treatment to companies than individual citizens.

Technological Deficiencies

The above concerns were known even before the start of open enrollment on October 1. Now we are aware of additional technological deficiencies that make immediate legislative action even more critical. It is not only unfair but impractical to require that Americans purchase insurance—or lose their current coverage due to changes in the law—when the exchange website is almost completely unusable.

Indeed, the federal exchange website has made creating an account, the first step towards enrollment, extremely difficult. Consumers have faced error messages, blank screens, and long wait times. An October 17 Wall Street Journal article reported that only 10% of users who began to register on the exchange site during the first week of implementation were able to finish the process. Of the 209,000 users who began to register on Monday or Tuesday of the third week, just over one-quarter finished the process.

Even consumers who are able to complete the enrollment process face difficulties due to the inaccurate consumer data that insurers are receiving from the federal exchange. For example, insurers have reported errors such as duplicate enrollments, spouses reported as children, and missing data fields, among others. The problems have been so severe that some insurers have been forced to hire temporary workers to contact new customers and resolve the inaccuracies.

We seek to prevent having these issues lead to larger problems when individuals attempt to actually use their health insurance.

Significantly, the aforementioned problems relate only to the private insurance market. Medicaid applicants are also struggling with the consequences of technological deficiencies. For example, consumers are unable to enroll in Medicaid through the federal exchange because the exchange system is currently unable to transfer the applications to state agencies. The Obama Administration originally delayed this feature until November 1; but, according to an October 29 Politico article, this deadline too has been indefinitely delayed.

The raft of current known problems suggests that even more technological deficiencies may be revealed as consumers complete initial enrollment steps and move on to the more complicated aspects of purchasing insurance through the exchange.

Security Concerns

Perhaps most troubling are outstanding security concerns related to the ACA's technology and outreach personnel. The federal data hub, a key component of the exchange system, connects seven different government agencies and will have access to consumers' personal information, including social security numbers, employment information, birth dates, and tax returns. Such a massive consolidation of personal information necessitates strong, effective privacy safeguards.

However, according to a recent Reuters article, a September 27 government memorandum stated that the security of the exchange system was at "high risk" due to a lack of testing mere days before the start of open enrollment. Furthermore, some cyber security experts have identified a number of potential red flags in the federal exchange system. For example, according to an October 14 Christian Science Monitor article, the exchange website does not appear to use a feature that prevents third-party access to cookies stored on a user's personal computer. Thus, hackers could access cookies containing sensitive information such as income level and marital status. Some also claim that the lack of common security tools could invite cyber criminals to use automated systems to hack individual accounts.

Even more concerning are recent reports of security breaches. For example, after logging on to the federal exchange website, a North Carolina resident was granted access to downloadable eligibility letters that contained the personal information of two individuals from South Carolina. The apparent security flaw that led to this breach is alarming to say the least. Again, we urge you to support immediate legislative action to ensure that consumers are not forced to risk the security of their private information or pay a fine for failing to purchase insurance.

Similarly, outreach programs, including the navigator program, raise serious privacy concerns. The navigator program was created to provide individuals with funding to assist consumers in understanding their health insurance options and to facilitate enrollment in health insurance plans through the new exchanges. To this end, individual navigators may have access to significant personal information, including a consumer's name, date of birth, social security number, tax information, and protected health information. However, the federal standards for navigators provide inadequate consumer protections to prevent the stealing of personal information. Indeed, under federal regulations, navigators are not required to undergo any kind of background check before being hired.

While you have granted states some discretion to implement additional privacy safeguards, the final navigator rule was not released until July, less than three months before the start of open enrollment. This is not nearly enough time for states to assess potential security pitfalls and implement appropriate legislative and other remedies, as allowed under the final rule. Thus, if no action is taken, the ACA's implementation could have devastating consequences for consumer privacy.

Support Immediate Legislative Action

It is clear that implementation is not proceeding in a manner that best protects consumers' interests. Delays of key provisions have altered the law's policy framework. Technological glitches are preventing consumers from completing even initial steps in the exchange enrollment process and suggest that greater problems may be on the horizon. Security deficiencies could place Americans at risk for significant privacy violations. In light of these serious consumer protection concerns, we urge you to support immediate legislative action to mitigate the ACA's significant implementation problems.

We thank you in advance for your consideration of our concerns. Please feel free to contact us directly with any questions.

Sincerely,

Patrick Morrisey
West Virginia Attorney General

Pamela Jo Bondi
Florida Attorney General

Luther Strange
Alabama Attorney General

Samuel S. Olens
Georgia Attorney General

Derek Schmidt
Kansas Attorney General

Alan Wilson
South Carolina Attorney General

James D. "Buddy" Caldwell
Louisiana Attorney General

Greg Abbott
Texas Attorney General

E. Scott Pruitt
Oklahoma Attorney General

John Swallow
Utah Attorney General