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MEMORANDUM

November 26, 2014

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean and Walker LLP

Re: *House of Representatives files complaint against the Department of Health and Human Services and the Department of the Treasury regarding implementation of the Affordable Care Act*

On Thursday, November 21, 2014, the United States House of Representatives brought suit in the United States District Court for the District of Columbia against the Department of Health and Human Services, the Department of the Treasury, and their respective Secretaries. *U.S. House of Representatives v. Burwell*, No. 14-cv-01967 (D.D.C. Nov. 21, 2014). The House complaint alleges the Administration violated the Constitution and federal law in implementing the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010) (“ACA”).

The House challenges the Administration’s implementation of two provisions within the ACA: the cost-sharing reductions under Section 1402 of the Act, and the employer mandate. The House challenges the Administration’s payment of cost-sharing reductions to insurers, arguing that Congress has not appropriated the necessary funds. It also challenges the Administration’s decision to delay certain aspects of the employer mandate.

Cost-Sharing Reductions

Section 1402 of the ACA authorizes the federal government to make cost-sharing reduction payments to health care insurers on behalf of policyholders, covering costs such as deductibles and co-pays. The House alleges the Administration has provided payments to insurers for cost sharing reductions under Section 1402 of the Act from an account used to pay premium subsidies under Section 1401.

The House alleges that the Administration’s payments violate: the Constitution; 31 U.S.C. § 1324, limiting disbursements from the standing permanent appropriation for refunds under the Internal Revenue Code; the ACA; and the Administrative Procedure Act. The House requests both declaratory and injunctive relief regarding the Administration’s cost-sharing reduction payments.

According to the House, Congress must provide a permanent or temporary appropriation in addition to authorizing legislation in order for the Executive to properly expend public funds. The House claims the cost-sharing reductions under Section 1402 of the ACA require an additional temporary appropriation, and that the Administration's implementation of the provision effectively treats it as containing a permanent appropriation. The House contrasts the lack of appropriation language for the cost-sharing reductions with Congress's appropriation of funds for the Section 1401 premium subsidies.

Penalty under the Employer Mandate

Section 1513 of the ACA imposes a penalty on large employers that fail to offer full time employees affordable health insurance coverage (the "employer mandate"). By announcement, the Administration delayed the penalties' application until 2015, and then through regulation it delayed the penalties until 2016 for employers with between 50 and 100 full time employees. The regulation also provided "transition relief" by allowing employers to offer health insurance to only 70 percent of employees in 2015 and to 95 percent in 2016, rather than to all employees.

The House alleges the Administration violated the Constitution by unilaterally amending the employer mandate provision of the ACA. The House requests only declaratory relief regarding the employer mandate, and does not seek an injunction reversing the Administration's decision to delay implementation.

According to the House, the ACA required penalties to apply beginning December 31, 2013, and large employers to provide affordable health insurance coverage to all employees. The House argues the Administration was bound by statute to do so and could not lawfully delay implementation of the law.

For further information on the lawsuit, please contact Elliott Milhollin at (202) 822-8282 or emilhollin@hobbsstrauss.com or Geoff Strommer at (503) 242-1745 or gstrommer@hobbsstrauss.com.