NAIC & The Center for Insurance Policy and Research
National Association of Insurance Commissioners

October 16, 2013

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

Dear Secretary Sebelius:

We write as the chief insurance regulators of our respective states and members of the National Association of Insurance Commissioners (NAIC) to provide you with the attached discussion paper regarding implementation of Title I of the Affordable Care Act (ACA) in the U.S. territories and to request flexibility in the implementation of these provisions in the territories.

The NAIC is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the United States.

As you are aware, the ACA explicitly exempts residents of the territories from the requirement to maintain minimum essential coverage, commonly known as the individual mandate. In addition, residents of the territories are not eligible for the premium tax credit or cost-sharing reductions that will be provided to residents of the states purchasing qualified health plans through Exchanges. If a territory chooses to establish an Exchange, it will receive a share of a $1 billion pool of funds with which to provide subsidies. A number of territories have conducted analyses of the feasibility of establishing Exchanges, including the sufficiency of the Exchange subsidy funds available to them, and have found that these funds will provide as little as 10% of the needed funding over the six year period for which they are available. Nevertheless, the Department of Health and Human Services (HHS) has determined that the market reforms of Title I will apply in the territories, despite considerable ambiguity in the statute on this point.

The NAIC has consistently made clear, in communications to Congress while the ACA was being considered and in communications with the administration throughout implementation, that maintenance of diverse risk pools is absolutely essential to the successful implementation of the market reforms, a position that the administration has also taken both before the ACA was passed and since. We are therefore deeply concerned that the Department's interpretation of how Title I applies in the territories is inconsistent with this important principle.

Without an individual mandate or sufficient subsidies, we share the concern expressed by the territories' insurance regulators that adverse selection is likely to occur when the market reforms go into effect and that it will threaten the affordability and availability of health insurance for territorial residents. As you will see in the paper, we have learned that all insurers who had been offering individual market health insurance coverage in the U.S. Virgin Islands have now withdrawn from that market so that health insurance coverage is no longer available to many residents of that territory. Insurance regulators in other territories have similarly been informed by health insurers that they would also cease offering coverage in their individual or small group markets if the market reforms are implemented without an individual mandate or subsidies. Though we fully understand that the territories have the authority to impose their own individual mandates and to provide subsidies out of their own funds, we must note that these are not particularly realistic alternatives given the fact that these subsidies would require very significant and unaffordable increases in the territories' budgets. In the case of the U.S. Virgin Islands, such subsidies could require an increase to the territory's budget of as much as 36 percent.

While each of the territories has taken the position that these reforms provide important consumer protections and fully support them in principle, they have not been given the same tools as the states to successfully implement these important protections and many do not believe that they can successfully implement them without those tools. In order to prevent the unintended, adverse effects noted above, we urge you to carefully review the attached report and to provide the territories with the flexibility that they need to determine whether and how the market reforms should be applied, in light of the statute's ambiguity regarding whether these provisions should apply. Some territories will likely choose to implement these reforms immediately, while others may choose to delay applicability or phase-in some or all of the market reforms.

We believe that ample authority exists for the Department to take this action to ensure that coverage is as widely available and affordable as possible in the territories, in light of prior actions by HHS to delay applicability of other provisions, such as the employer mandate, exchange quality improvement requirements, and prohibitions against discrimination in favor of highly compensated employees, due to difficulties in immediately putting them into place. We look forward to working with you to successfully implement the ACA in the territories as we have worked together on implementation of many other provisions of the statute.

Sincerely,

James J. Donelon
NAIC President
Louisiana Insurance Commissioner

Adam Hamm
NAIC President-Elect
North Dakota Insurance Commissioner

Monica J. Lindeen
NAIC Vice President
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Enclosure

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