COVINGTON

COVINGTON & BURLING LLP

BEIJING SAN FRANCISCO
BRUSSELS SEOUL
LONDON SHANGHAI
NEW YORK SILICON VALLEY
SAN DIEGO WASHINGTON

1201 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20004-2401
T 202.662.6000
F 202.662.6291
www.cov.com

May 30, 2013

Anthony E. Keck, Director
Department of Health and Human Services
P. O. Box 8206
Columbia, SC 29202-8206

Dear Tony,

You have asked for an opinion as to whether provisions of H3101 ("South Carolina Freedom of Health Care Protection") jeopardize some or all of the federal funding that would otherwise be paid to South Carolina as federal financial participation (FFP) in the Medicaid program. For the reasons set forth below, depending on how certain provisions of H3101 are construed, we believe there is that risk.

Section 1-1-1910(A) of the Act provides that "[n]o agency of the State, officer or employee of this State, acting on behalf of the state, may engage in an activity that aids any agency in the enforcement of those provisions of the Patient Protection and Affordable Care Act of 2010 and any subsequent federal act that amends the Patient Protection and Affordable Care Act of 2010 that exceed the authority of the United States Constitution."

The Patient Protection and Affordable Care Act ("ACA") imposes many mandates related to State Medicaid programs. The most significant of these -- the expansion to previously uncovered individuals up to 133% of the federal poverty level -- was determined to be unconstitutional by the U.S. Supreme Court in *National Federation of Independent Business v. Sebelius*, 567 U.S. ___ (2012), 132 S. Ct. 2566 (2012). Therefore, the provision of H3101 would prohibit any agency or officer of the State from engaging in any activity regarding the Medicaid expansion.

The ACA imposes many additional requirements on Medicaid, including the conversion to "Modified Adjusted Gross Income" for determining eligibility, coverage of a new group of former foster children up to age 26, covering new benefits such as tobacco cessation, new rules regarding hospice care for children, increased payments for primary care, etc. None of these mandates is addressed by the Supreme Court's decision in the *National Federation of Independent Business* case, and those mandates remain mandatory. If the State fails to comply with them, it is subject to a loss of federal funds under Section 1904 of the Social Security Act, 42 U.S.C. § 1396c. That section provides that if the Secretary, after reasonable notice and opportunity for hearing, finds that a State is not in compliance with its state plan or that the plan fails to comply substantially with any required Medicaid provision, "further payments will not be

made to the State" until the Secretary is satisfied that there is no longer a failure to comply. The Secretary also has discretion, under this section, to limit FFP "to categories under or parts of the State plan not affected by" the failure to comply.

Although the Court's holding in *National Federation of Independent Business* concluded that the Secretary could not exercise this penalty against a State that declined to implement the Medicaid expansion, its reasoning would not apply to any of the other mandates. The Court found that the expansion was not the type of routine amendment to Title XIX with which States must comply. It was a "shift in kind, not merely degree." Specifically, the court pointed to the fact that the expansion population went beyond the categories traditionally covered by Medicaid, provided a different benefit package, and was subject to a different match rate. We do not believe that reasoning would apply to any of the other Medicaid mandates such that the Secretary would not be able to exercise her authority to withhold FFP under Section 1904 if the State failed to comply.

Apart from the Medicaid expansion, it is not clear to us that the language in H3101 would prohibit a state agency or officer from implementing most of the other Medicaid-related aspects of the ACA. The bill appears to prohibit action only on those provision of the Act "that exceed the authority of the United States Constitution." For the reasons stated above, we do not believe the Medicaid provisions (other than the expansion) would be found to be unconstitutional. Moreover, the focus of the Act appears to be on the establishment of Health Care Exchanges, the purchase of insurance through exchanges, and the payment of the penalty associated with the individual mandate, not its Medicaid provisions.

However, we are concerned that the H3101 might prevent a state agency or officer from implementing certain Medicaid provisions that are intended to coordinate activities between Medicaid and an exchange. Specifically, Section 1943 of the Social Security provides that "[a]s a condition of the State plan under this title and receipt of any Federal financial assistance," a State must establish procedures for enrollment simplification and coordination with Health Insurance Exchanges. 42 U.S.C. § 1396w-3. The rules implementing this provision are substantial. 57 Fed. Reg. at 17143 (March 23, 2012). To the extent that H3101 takes the position that Health Insurance Exchanges "exceed the authority of the United States Constitution," then the prohibition against any state agency or officer "engag[ing] in an activity that aids any agency in the enforcement" of those provisions could be read as preventing the State Medicaid agency from participating in the coordinated eligibility and enrollment called for under Title XIX. Under both Section 1904 and Section 1943, failure to comply with these provisions would put at risk some or all of the federal financial participation that the State receives for Medicaid. Please note that while under Section 1904 a State is entitled to a hearing

and opportunity to respond before any FFP is withheld, the same does not appear to be true under Section 1943.

Please let me know if you have any questions regarding the above.

Sincerely,

Caroline M. Brown