From: Patel, Swati
To: Soura, Christian <ChristianSoura@gov.sc.gov>
Date: 1/9/2014 10:21:01 AM
Subject: FW: H 3101 amendment

Let me know when you have time to talk about the items I have highlighted which are part of Tom's amendment.
FYI - Most of this plan was published in The State today. http://www.thestate.com/2014/01/08/3196736/sc-senator-wants-to-take-nullification.html

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From: Tom Davis [mailto:TomDavis@scsenate.gov]
Sent: Tuesday, January 07, 2014 3:55 PM
To: Mike Hitchcock; Patel, Swati; 'reibold@scdhhs.com'; 'robertsb@scdhhs.com'; Farmer, Raymond
Cc: Tom Davis
Subject: H 3101 amendment
Importance: High

All,

Thanks for taking the time to meet with me today, singly and together, to discuss the strike-and-insert amendment to H 3101 that I am working on. We covered a lot of ground and, I think, made significant progress. This email summarizes my takeaways from those meetings and the steps that need to be taken going forward. I am copying my law firm's email in this correspondence; please make sure it is included in your reply to this email so that I receive your correspondence when I am back in Beaufort. And though they were not part of our meetings today, I am copying Kendall Buchanan and Gwen McGriff with this email since Ray advises they will be involved in the drafting process, insofar as the amendment concerns the DOI.

The amendment at this point will replace H 3101 in its entirety with the following eight sections:

1. ANTI-COMMANDEERING DIRECTIVE

This section should start with specific findings of fact regarding the restriction on the power of the federal government recognized by the United States Supreme Court in *Printz v. United States*, 521 U.S. 898 (1997): "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."

After the specific findings of fact that lay the foundation for South Carolina's authority, this section of the bill should then list certain ACA-implementing activities, primarily but not necessarily exclusively related to the enrollment of South Carolinians in the federally created medical exchange, that cannot be undertaken by an agency of this state, political subdivision of this state, or employee of an agency or political subdivision of this state acting in his or her official capacity, or by a corporation providing services on behalf of this state or a political subdivision of this state. Mike is going to prepare a first draft of this list, and Byron and Shealy are going to ensure that the proscriptions do not impair HHS' ability to comply with its Medicaid mandates.

Next, after the list of proscribed activities, this section of the bill will establish a permanent standing committee that will analyze the ACA as it is further implemented and as its regulations are further promulgated and make recommendations to the legislature on an annual basis as to what additional activities should be proscribed; in other words, the list of banned actions is not intended to be a static one, but one that is updated annually as the ACA becomes further understood.

2. REJECTION OF FEDERAL FUNDING FOR EXCHANGE ENROLLMENT (OR THAT IN ANY WAY IMPLEMENTS

THE ACA?)

This section of the bill should contain a blanket prohibition against any state-related entity or employee (as defined in the previous section) shall apply for or receive any grants from any Federal agency, nor perform any acts or functions, for purposes enrolling people in the federally created health exchange. Actually, I want to make the restriction broader than that and block all Federal grants seeking to implement the ACT, to the fullest extent possible without endangering HHS' discharge of its Medicaid obligations. Mike, please draft the language with this goal in mind. That said, however, I don't want there to be any question as to HHS' ability to discharge Medicaid obligations.

3. REJECTION OF ACA-AUTHORIZED EXPANSION OF MEDICAID

This section should codify our state's decision not to expand Medicaid, something along these lines: "*Notwithstanding any provision of law to the contrary, the state shall not establish, facilitate, implement or participate in the expansion of the Medicaid program pursuant to the Patient Protection and Affordable Care Act, Public Law 111-148." However,* I discussed with Swati about revising this language so that the proscription specifically pertains only to the Medicaid expansion now permitted by the ACA; in other words, making sure that the language would not be applicable to future congressional actions pertaining to Medicaid. Swati, please share your thoughts with Mike in this regard.

4. PROHIBITION REGARDING ESTABLISHMENT OF A STATE-CREATED ACA EXCHANGE

This section codifies the governor's decision to not establish a state-run exchange pursuant to the ACA. Something along these lines probably suffices:

(A) 'Health Care Exchange' means an American Health Benefit Exchange established by any state or political subdivision of a state, as provided for in the Patient Protection and Affordable Care Act of 2010.
(B) Neither South Carolina nor a political subdivision including, but not limited to, counties, municipalities, or special purpose districts of the State may establish a Health Care Exchange for the purchase of health insurance.

5. "ENCOURAGEMENT" TO ATTORNEY GENERAL

This section should start with the following findings of fact: South Carolina is one of the 34 states that have not created of state-run exchanges pursuant to the ACA; Section 1401 of the ACA provides that premium-assistance tax credits are available only when "the taxpayer is covered by a qualified health plan … that was enrolled in through an Exchange established by the State under Section 1311 of the Patient Protection and Affordable Care Act"; the ACA entitlements operate as the trigger for enforcement of the ACA's penalties against employers and individuals who fail to comply with the mandate requirements, that is, employer taxes are triggered when employees use the tax credit, individual taxes are triggered when the credit is available to them; as a consequence, mandates are unenforceable in states that decline to create an exchange; a final Internal Revenue Service rule issued on May 18, 2012 (77 Fed. Reg. 30,377), attempts to fix this problem by extending eligibility for tax credits and cost-sharing subsidies to those who purchase qualifying insurance plans in *federally* run exchanges, but that rule violates the plain text of the ACA, that is, the ACA is explicitly and deliberately written to deny subsidies to states that refuse to create the exchanges; by offering the subsidies in states that have not set up exchanges, the federal government is inflicting tax penalties on individuals and employers that goes beyond what the ACA allows.

After these findings, this section of the bill should strongly encourage the South Carolina Attorney General to take any and all actions that are available to support the civil suit being prosecuted by Oklahoma Attorney General Scott Pruitt against HHS Director Kathleen Sebelius (*Pruitt v. Sebelius*, Case No. CIV-11-030-RAW, in the United States District Court for the Eastern District of Oklahoma) to block the illegal tax credits, without which no penalty can be assessed.

6. LICENSURE AND REGULATON OF ACA "NAVIGATORS"

This section should start with findings of fact regarding the navigators, including something along the following lines: the ACA provided $67 million in federal grant money that went to local community groups to hire "navigators," whose job it is to help applicants through the process of applying for insurance; millions of federal dollars in navigator

grants are being awarded to groups which will have access to private information yet not require a single background check for their staff; the federal CMS recognizes the traditional responsibilities of the states' departments of insurance in the licensure and regulation of these navigators (see: General Guidance on Federally-facilitated Exchanges, p. 4, CMS 2012); the navigator standards in the exchange rule provide that a navigator must meet any licensing, certification or other standards prescribed by the state or exchange (see: 77 Fed. Reg. 18309, 18448, published March 27, 2012); in 1945 Congress adopted the McCarran-Ferguson Act which declared that states should regulate the business of insurance and affirmed that the continued regulation of the insurance industry by the states was in the public's best interest, and it passed the Gramm-Leach-Bliley Act in 1999 which acknowledged that states should regulate the business of insurance.

After these specific findings of fact, then language that protects South Carolinians from unscrupulous practices of navigators by:

- Prohibiting navigators from engaging in activities that require a producer license; providing advice concerning benefits, terms, and features of a particular health plan; recommending a particular plan or advising about which health pan to choose; or providing information related to non-exchange plans.
- Requiring navigators to pass a written exam; complete training and certification requirements; and obtain and maintain a surety bond for protection against wrongful acts, misrepresentation, or negligence of navigators; among other requirements.
- Establishing license renewal requirements, standards for navigator referrals, and grounds for probation.
- Applying the state's Unfair Insurance Trade Practices Act to navigators.

NOTE: In drafting the state regulations in regard to navigators, we should take into account the concerns with a Tennessee state regulation expressed set forth in a TRO issued on October 27, 2013, in a case captioned *Harrington v. Haslam*. In that case the federal court judge held the state regulation was overbroad and that it violated the navigators' right to free speech and association.

7. AUTHORITY OF THE STATE INSURANCE COMMISSIONER

This section should start with specific findings of fact in regard to the authority of our state's Insurance Commissioner, including those associated with being an effective rate review state. Ray, I will need your assistance and the assistance of Kendall and Gwen in this regard. The idea is to ensure that retain traditional state sovereignty regarding the sale of insurance within the state's borders, maybe using language along the following lines:

In the event a federally facilitated exchange is established for South Carolina, the commissioner shall retain authority with respect to insurance products sold in South Carolina on the federally-facilitated exchange to the maximum extent possible by law, including but not limited to producer and insurer licensing, form and rate approval, reinsurance and other risk-sharing mechanisms, network adequacy, industry assessments, internal grievance standards, external review, and unfair trade practices. The commissioner may adopt rules as necessary to perform the duties specified in this section and to protect against adverse selection by creating a level playing field between a federally facilitated exchange and the commercial health insurance market.

8. RESOLUTUION EXPRESSING "SENSE OF THE STATE" RE: THE ACA

Include within the amendment to H 3101 a concurrent resolution urging the governor to communicate with other states in the country and request that they join South Carolina in requesting that Congress repeal the ACA, and also pass legislation similar to this act within their own state legislatures, something along the following lines:

(A) Resolved that the Governor of the State of South Carolina be, and she is hereby authorized and requested to, communicate this Bill and Resolution to the Legislatures of the several States, to assure them that this State considers the Union was established for specified purposes, and particularly for those specified in the United States Constitution to be friendly to the peace, happiness, and prosperity of all the States; that faithful to that Constitution, according to the plain intent and meaning in which it was understood and accorded to by the several States, the State of South Carolina is sincerely anxious for its preservation; that it does also believe that to take from the States all the powers of self-government, and transfer them to a general and consolidated Government, without regard to the special

delegations and reservations solemnly agreed to by the States in that Constitution, is not for the peace, happiness or prosperity of the States; And that therefore, the State of South Carolina is determined, as it doubts not most of its co-States are, never to submit to un-delegated, and consequently unlimited, powers claimed to be possessed by any man or body of men.

(B) Resolved that the Governor of the State of South Carolina be, and she is hereby authorized and requested to, call on our co-States for an expression of their sentiments on the Patient Protection and Affordable Care Act of 2010 hereinabove specified, plainly declaring whether these acts are or are not authorized by the United States Constitution; that it is the position of the State of South Carolina that the Patient Protection and Affordable Care Act of 2010 amounts to an undisguised declaration that the Constitution is not meant to be the measure of the powers of the Federal Government, but that it will proceed in the exercise over the State of South Carolina and its co-States of all powers whatsoever; That our co-States will view this as seizing the rights of the States and consolidating them in the hands of the Federal Government with a power assumed to bind the States, but in all cases whatsoever, by laws made, not with their consent, but by others against their consent; That this would be to surrender the form of Government we have chosen, and to live under one deriving its powers from its own will, and not from our authority; and that the co-States recurring to their natural right, will concur with the State of South Carolina in declaring the Patient Protection and Affordable Care Act of 2010 void, and of no force, and will each unite with the State of South Carolina in requesting its immediate repeal, and also pass legislation similar to this act within their own State Legislatures.

Please review the above and let me know your thoughts. I would like to have a working draft of the strike-and-insert amendment by next Tuesday, if possible. Thanks again for your assistance.

Tom