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

Dear Secretary Sebelius:

On June 28, the United States Supreme Court issued its opinion in National Federation of Independent Business v. Sebelius, 132 S.Ct. 2566, 2012 WL 2427810, 2012 U.S. LEXIS 4876 ("NFIB"). The Court addressed the constitutionality of two provisions of the Patient Protection and Affordable Care Act ("PPACA"): the so-called individual mandate and the required Medicaid Expansion. Despite upholding the individual mandate as a tax, states are now confronted with a series of critical choices. These choices carry with them consequences that will impact states for years to come.

States need to make informed choices; however, to date, the Department of Health and Human Services (DHHS) and more specifically, the Centers for Medicare and Medicaid Services (CMS) have been slow in providing Pennsylvania and other states with detailed and necessary information on numerous key issues relating to the implementation of the PPACA. In light of the NFIB opinion, an even greater number of questions remain unanswered relating to the optional Medicaid expansion and its impact on exchanges and other provisions of PPACA.

As Secretary of the Pennsylvania Department of Public Welfare (DPW), I am ultimately responsible for making recommendations to the Governor for him to make informed decisions related to the NFIB and PPACA. In order to accomplish this, detailed and timely information and substantive responses from the federal government on the many outstanding issues relating to health care reform implementation are imperative.

On July 10, the Republican Governor's Association sent a letter to President Obama listing some of these outstanding questions. To date, the response received lacks any substantive information, including the essential clarity needed by states to make substantial fiscal and policy decisions related to Medicaid expansion. I, like many of my counterparts in other states continue to have strong concerns that the unfunded state mandates associated with PPACA carry significant costs that will have to be paid for by state taxpayers, which place unsustainable burdens on state budgets. In Pennsylvania, the Medicaid program is crowding out expenditures in other areas such as transportation, education and other important public services. Public assistance costs account for more than 40 percent of the Commonwealth's budget, and Medicaid is approximately 75 percent of that cost. Equally troubling is that there are just 2.2 privately employed persons in the Commonwealth for every one on public assistance, a trend that continues to get worse. Clearly this is not a sustainable trend for Pennsylvania or any other state. Further, although the goals of the PPACA with respect to expanding coverage are laudable, the PPACA accomplishes this through the creation of a new entitlement structure and reliance on an overburdened Medicaid program. This expansion of government programs and bureaucracy is not the answer to improving affordability and accessibility to health care in Pennsylvania.
In order to adequately evaluate the options related to the PPACA, substantive information must be provided, given the potential impact it may have on the health care system in Pennsylvania. In order to assist us with this undoubtedly difficult task, I respectfully request that you provide detailed responses to the following questions in an expedited manner. Although this is not an exhaustive list, it captures currently recognized questions and primary concerns confronting the Commonwealth. Prompt and detailed responses by your agency to the questions and requests set forth below will help us begin the process of determining the impact of the NFIB decision and PPACA on Pennsylvania.

1. The preamble to the final exchange establishment rule includes approximately 100 references to “future” or “forthcoming” guidance or rulemaking. Please provide a detailed timeline of when each of these documents will be released.

2. If a state decides to pursue either a Partnership Federally-Facilitated Exchange (FFE) or state-based exchange, would implementation of either of those options dictate that the state also must expand its Medicaid program in accordance with PPACA? In an FFE or Partnership FFE, will a state still be provided the opportunity to decide whether the exchange conducts an assessment or a determination for Medicaid eligibility?

3. What procedures will an FFE or a Partnership FFE use for assessing and communicating eligibility for Medicaid in a state that does not elect to expand Medicaid coverage?

4. The proposed methodology for modified adjusted gross income (MAGI) being advanced by DHHS will result in families with high incomes being made eligible for Medicaid or free CHIP (to give but one example, a family business may have significant net operating loss carryover that results in a negative reported taxable income). Does DHHS plan to revise its methodology to ensure that these programs (and their limited taxpayer funding) remain available for those individuals most in need, and only for those individuals?

5. Will a state be allowed to use a Premium Assistance Program/Health Insurance Premium Payment Program to pay for CHIP or Medicaid eligible children to be added to a parent’s health insurance policy purchased through an exchange?

6. The MAGI criteria used by the Internal Revenue Service (IRS) for its calculation of eligibility for Advanced Premium Tax Credit (APTC) and Cost Sharing Reduction (CSR) is different from CMS’ MAGI criteria to be used for Medicaid and CHIP eligibility determinations. Will the IRS, Center for Consumer Information and Insurance Oversight (CCIIO), and CMS be comparing the methodologies and either aligning them into a single approach or providing states with a template to be used for each specific type of MAGI determination?
7. In Administrator Tavenner’s July 13, 2012 letter to the Republican Governor’s Association, she indicates that states do not need to declare whether they are expanding Medicaid eligibility or operating their own exchange in order to receive enhanced funding for information technology systems changes. It also indicates that a state would not have to return any funding if it later decides to take either step. The letter indicates that further guidance will be forthcoming. When will the guidance on this issue be released?

8. Will Pennsylvania be required to convert its income counting methodology to MAGI for purposes of determining eligibility if we decide not to expand to the optional adult coverage group?

9. Will states be permitted to use IRS data for eligibility determinations for public programs other than Medicaid, CHIP and APTC/CSR in a state-based exchange? In a Partnership FFE? If so, what will the financial consequences of that use be for the state?

10. Is there a deadline for Pennsylvania to decide whether it will participate in the Medicaid expansion? When may we expect to receive updated guidance on Medicaid expansion or at the very least a list of Medicaid provisions that would still apply to states that opt not to expand?

11. Would Pennsylvania be permitted to expand eligibility to 100% of the Federal Poverty Level (FPL) or other levels less than 133% of FPL for the optional adult coverage group? If so, will the enhanced Federal Medical Assistance Percentage (FMAP) rate be available?

12. Would Pennsylvania have the option to expand eligibility for the optional adult coverage group after 2014? Will the enhanced FMAP continue to be available?

13. When does CMS expect to issue guidance on the Basic Health Plan program and alternative benefit packages for the optional adult coverage group? Will the guidance address amount, duration and scope of services required as well as clarify the differences between current mandatory and optional coverage for existing categorically eligible populations?

14. Is the expansion for children 6-19 to 133% of FPL still required, or is this provision now optional? If optional, what would be the enhanced FMAP rate should Pennsylvania opt to engage in this expansion?

15. Is the extension of Medicaid coverage to foster youths under 26 still required, or is this provision optional? If optional, what would be the enhanced FMAP rate should Pennsylvania opt to engage in this expansion?

16. Would Pennsylvania be required to proactively submit a state plan amendment prior to January 2014 to identify whether or not they will or will not expand eligibility to the optional adult coverage group? If so, when will CMS provide guidance on the format and process for submission and review?
17. Will CMS provide Pennsylvania and other states with the option to encourage personal responsibility through increased alternative cost sharing amounts and accountability provisions, i.e., high deductible plans and health savings accounts, for the Medicaid expansion population?

18. When will CMS provide official confirmation that Pennsylvania will be considered a “non-expansion state” for purposes of the PPACA and will receive the full FMAP available for newly eligibles?

19. Are states still subject to the Maintenance of Effort (MOE) requirements relating to eligibility level, methods and procedures for the current categories of coverage? What, if any, penalty is there for non-compliance?

20. Assuming the MOE remains in effect, is it still DHHS’ position that a state risks losing all of its Federal Medicaid funding if it changes its procedures, even where the change is intended to assure that only individuals who meet existing eligibility criteria receive Medicaid benefits?

21. Assuming the MOE remains in effect, is it still DHHS’ position that Pennsylvania would not be able to enforce the work requirement provisions currently included in Federal Medicaid law?

I anticipate that we will have additional questions for your agency as we continue our analysis and thoughtful deliberations; however, the questions above represent a cross-section of the material information Pennsylvania (and other states) still need in order to make informed decisions. We are committed to implementing health reform solutions that work for Pennsylvania – a one-size-fits-all Washington solution is not acceptable. While our implementation efforts will continue to move forward with purpose, I assure you that we will not act in haste and in so doing sacrifice a careful and deliberate evaluation of all options and solutions. Pennsylvania’s focus remains on getting healthcare reform done right, not just done quickly. In the meantime, Pennsylvania will continue to work, with deliberate speed, towards achieving meaningful and sustainable health care solutions in our state.

Sincerely,

Gary D. Alexander  
Secretary