DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
200 Independence Avenue SW
Washington, DC 20201

July 12, 2013

Gregory R. Francis
Lt. Governor/Commissioner
United States Virgin Islands
1131 King Street, Suite 101
Christiansted, St. Croix, Virgin Islands 00820

Dear Lieutenant Governor Francis,

Thank you for your May 7, 2013 letter expressing your concerns about implementing the guaranteed availability provision of the Affordable Care Act in the U.S. territories. We value our partnership with the territories, and we appreciate the opportunity to provide further clarification on our position concerning the applicability of the Affordable Care Act's market reforms to the territories.

HHS Position on Applicability of Title I of the Affordable Care Act to the Territories

The Department of Health and Human Services (HHS) has provided written guidance on two previous occasions to notify the territories about which provisions in title I of the Affordable Care Act apply to the territories. In letters dated July 29, 2010 and December 10, 2012, HHS clarified that the insurance market reforms in title XXVII of the Public Health Service Act (PHS Act), as amended by title I of the Affordable Care Act, apply to health insurance issuers in the territories because the definition of "State" in the PHS Act[1] includes territories. Other provisions in title I of the Affordable Care Act that are not incorporated into title XXVII of the PHS Act do not apply to the territories because those provisions rely on the definition of "State" in the Affordable Care Act,[2] which does not include territories.

The territories welcomed this clarification by HHS, and in fact, U.S. Virgin Islands Governor John P. de Jongh, Jr. wrote the Secretary to acknowledge and thank HHS for the clarification, and did not raise any objections to the applicability of the guaranteed availability requirement at that time.[3] To date, the territories and their residents have enjoyed the benefits of the applicable

[1] Section 2791(d)(14) of the Public Health Service Act, codified at 42 U.S.C. 300gg-91(d)(14), defines "State" as "each of the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands."
[2] Section 1304(d) of the Affordable Care Act provides that "in this title [Title I of the Affordable Care Act], the term 'State' means each of the 50 States and the District of Columbia."
[3] August 3, 2010 letter from Governor John P. de Jongh, Jr., U.S. Virgin Islands, acknowledging and thanking the Secretary for her July 29, 2010 letter wherein she clarified that the insurance reforms and other consumer

consumer protections in the Affordable Care Act. In addition, all five of the territories have taken advantage of the grant resources available to them under title I of the Affordable Care Act and have collectively received over $11 million in rate review grants[4] and over $1.2 million in Consumer Assistance Program grants.[5]

HHS's confirmation of the applicability of the market reforms in title I of the Affordable Care Act is consistent with the territories' own legal analysis and is responsive to the territories' multiple requests encouraging HHS to apply the market reforms to the territories. As you may recall, Governor de Jongh, Jr.[6] and Deputy Chief of Staff Berkowsky[7] of the U.S. Virgin Islands sent HHS letters requesting that HHS extend the benefits of health care reform to the territories "to the maximum extent permitted by law." These letters clearly stated that the market reforms in title I of the Affordable Care Act apply to the territories. We also received letters from Puerto Rico's Governor Fortuno[8] and Congressman Pierluisi[9] similarly asking HHS to clarify that the insurance market reforms in title I of the Affordable Care Act apply to the territories.

Territories' Request to Be Excluded from Guaranteed Availability Provision

Your letter requests that the U.S. territories "be excluded from the application of the Guaranteed Issue Provision of Affordable Care Act, except for those jurisdictions that implement a local mandate similar to the individual or employer mandate provision of Affordable Care Act."

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protections in title I of the Affordable Care Act that were enacted as amendments to the PHS Act apply to the territories.

[4] American Samoa ($1,000,000), Guam ($3,000,000), Northern Mariana Islands ($3,000,000), Puerto Rico ($3,000,000), and Virgin Islands ($1,000,000).

[5] American Samoa ($120,000), Guam ($149,880), Northern Mariana Islands ($200,000), Puerto Rico ($396,744), and Virgin Islands ($340,000).

[6] June 7, 2010 letter from Governor John P. de Jongh, Jr., U.S. Virgin Islands, expressing commitment to work with HHS to ensure that the benefits of health care reform, "to the maximum extent permitted by law," are extended to the territories, and stating, "[i]t is my position that the regulatory reforms and protections in Title I which are amendments to the Public Health Service Act, as discussed in the attached memorandum, do, in fact, apply to the Territories." This letter referenced and incorporated a June 2, 2010 legal memorandum by Winston & Strawn, LLP, which provided detailed legal analysis that the general insurance reforms and consumer protections in title I that amend the PHS Act apply to the territories, while the stand-alone provisions of title I that do not amend the PHS Act generally do not apply to the territories.

[7] June 2, 2010 letter from Pamela B. Berkowsky, Deputy Chief of Staff, U.S. Virgin Islands, requesting that HHS extend the benefits of health care reform, "to the maximum extent permitted by law," to the territories, and stating, "[i]n particular, we firmly believe that the consumer protections and other health insurance reforms in Title I of the Act which amend the Public Health Service Act apply to the Territories."

[8] July 21, 2010 letter from Governor Luis G. Fortuno, Puerto Rico, stating that he looks forward to working with HHS to apply the market reforms and consumer protections to Puerto Rico.

[9] June 18, 2010 letter from Pedro R. Pierluisi, Member of Congress, Puerto Rico, urging HHS to "explicitly clarify in its regulations implementing these provisions [insurance market reforms in title I of the Affordable Care Act] that such provisions apply to the territories." The letter provides analysis supporting the conclusion that provisions of the Affordable Care Act that amend title XXVII of the PHSA "fully appl[y] to Puerto Rico," while the stand-alone provisions that do not amend existing law and that use the word "state," as defined in Section 1304 of the Affordable Care Act, exclude territories and likely do not apply to Puerto Rico. Congressman Pierluisi's letter also refers to an April 19, 2010 memorandum prepared, at his request, by the Congressional Research Service that came to the same conclusion.

We understand the concerns raised in your letter; however, under the interpretation we adopted at your urging, HHS does not have the authority to grant your request. HHS, at the request of and with full support from the territories, confirmed that the Affordable Care Act's market reform provisions that are incorporated into the PHS Act, including the guaranteed availability provision,[10] are applicable to the territories. Other provisions in the Affordable Care Act that are not codified in the PHS Act, such as the individual[11] and employer[12] minimum coverage requirements, are subject to the Affordable Care Act's limited definition of "State" and therefore do not apply to the territories. Given our above interpretation of the applicability of the PHS Act definition of state, HHS has no legal authority to exclude the territories from the guaranteed availability provision of the Affordable Care Act.

However meritorious your request might be, HHS is not authorized to choose which provisions of the PHS Act, as amended by the Affordable Care Act, might apply to the territories. HHS has no statutory authority to exclude the territories from any provision codified in title XXVII of the PHS Act or to selectively exempt the territories from certain provisions, unless specified by law.

Options Available to the Territories

Territories are free to establish their own individual or employer minimum coverage requirements if they are concerned about implementing the guaranteed availability requirement without mitigating the possibility of adverse selection through the minimum coverage requirements. Federal law does not prohibit a territory from creating its own individual minimum coverage or employer responsibility mandates similar to those required under sections 1501 and 1513 of the Affordable Care Act. This would facilitate a guaranteed availability provision in the manner indicated in your letter.

Territories also could seek legislative relief from Congress, which could enact legislation to create an exemption from the guaranteed availability provision or other changes as Congress deems appropriate.

Territories' Authority to Enforce the Market Reforms of the Affordable Care Act

As you know, states and territories are the primary regulators of health insurance issuers in their jurisdiction. Title XXVII of the PHS Act[13] assumes that states and territories will exercise primary enforcement authority over health insurance issuers in the group and individual markets to ensure compliance with health insurance market reforms. In the event that a state or territory notifies HHS that it does not have statutory authority to enforce or that it is not otherwise enforcing one or more of the provisions of title XXVII, or if HHS determines that the state or

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[10] Section 1201 of the Affordable Care Act, adding section 2702 of the Public Health Service Act, codified at 42 U.S.C. § 300gg-1.
[11] Section 1501 of the Affordable Care Act, codified at 42 U.S.C. § 18091.
[12] Section 1513 of the Affordable Care Act, codified at 26 U.S.C. § 4980H.
[13] Section 2723 of the Public Health Service Act, codified at 42 U.S.C. § 300gg-22, and implementing regulations at 45 C.F.R. Part 150.

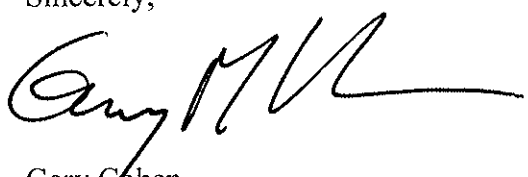
territory is not substantially enforcing the requirements, HHS has the responsibility to enforce these provisions in the state or territory.

In July of 2010, the Secretary wrote to the territories asking for an assessment from each territory on their ability to substantially enforce the Affordable Care Act consumer protections beginning on September 23, 2010. Based on subsequent information and/or additional conversations that have taken place, it is our understanding that the territories have the authority to enforce the consumer protections of the Affordable Care Act. As new requirements come into effect on or after January 1, 2014, we are again assessing the potential scope of our enforcement responsibility. Therefore, we are writing to ask you to assess your territory's laws and other territory-specific considerations in order to confirm that your territory continues to have the ability to substantially enforce these additional consumer protections beginning on January 1, 2014, including the guaranteed availability requirements.

Please confirm that your authority to enforce the new 2014 requirements is consistent with our previous understanding. If we do not receive this confirmation in the next 30 days, by August 12, 2013, we will assume that your territory continues to have the same enforcement authority for the 2014 reforms.

HHS looks forward to continuing to partner with the territories to ensure that the residents in the U.S. territories receive the benefits of the Affordable Care Act to the full extent of the law. A copy of this letter has also been sent to your cosigners. I look forward to hearing from you.

Sincerely,



Gary Cohen
Director, Center for Consumer Information and Insurance Oversight

cc: Governor Lolo Matalasi Moliga, American Samoa
National Governors Association
National Conference of State Legislatures
National Association of Insurance Commissioners