



November 24, 2015

The Honorable Tom Reeder
Casper, WY

Dear Representative Reeder:

I understand that the State of Wyoming is once again considering opting into Medicaid expansion under the terms of the Affordable Care Act (ACA). I also understand that there is some confusion as to whether Wyoming could mitigate future risk by putting a “trigger” into state law that would allow or require Wyoming to exit from the expansion in the future. Such a trigger is not effective against contrary and controlling federal statutes as a matter of law, and will not prevent the Secretary of Health and Human Services from withholding ALL federal funds as she is expressly authorized to do under federal law. Relying on a trigger or unenforceable promises made by the current administration that purport to allow states to exit Medicaid expansion assumes an unnecessary level of risk—one which could leave Wyoming assuming billions of dollars in liabilities.

In *National Federation of Independent Business v. Sebelius* (a challenge against the federal government that Wyoming joined), the United States Supreme Court ruled that the federal government cannot condition all existing Medicaid funding upon a state’s decision as to whether to expand Medicaid under the ACA. However, the Court made clear that once a state chose to expand Medicaid, the state would be bound by federal law—including provisions allowing the Secretary to withdraw all Medicaid dollars if a state fails to provide coverage for the expansion population. Specifically, the Court said: “Today’s holding does not affect the continued application of § 1396c to the existing Medicaid program. Nor does it affect the Secretary’s ability to withdraw funds provided under the Affordable Care Act if a State that has chosen to participate in the expansion fails to comply with the requirements of that Act.” *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2607 (2012).

The section of the law referred to by the Court—42 U.S.C. § 1396c— provides the authority for the Secretary to stop all Medicaid payments (including pre-expansion dollars) for failure to meet the obligations the states assume by increasing the mandatory coverage population by expanding Medicaid. Any trigger provision under state law would fail in a legal challenge against this controlling federal statute.

Other sources relied upon to support the theory that a state may exit Medicaid expansion are letters issued by the Department of Health and Human Services, or a “Q&A” document. But these sources, which do not constitute administrative rules, are not legally controlling. The Supreme Court has been clear that in challenges involving federal spending programs (like Medicaid), it is the federal statute, which in this case grants the authority to the Secretary to withhold funds for failure to meet the requirements of a Medicaid state plan, that controls the court’s inquiry.

Furthermore, any dispute will likely arise when a future Secretary is office. The non-binding statements of the current Secretary or her staff therefore are not helpful in predicting with confidence what a future Secretary would do, even if the dispute does not make it to court.

In addition to the legal barrier to exiting expansion, there will undoubtedly be significant political barriers. The decision to curtail what will have become an entitlement program, removing thousands of recipients from Medicaid rolls, will necessarily be difficult to execute. Any trigger therefore begins to look illusory in political execution.

If a deal looks too good to be true, then it probably is. Taking the federal Medicaid expansion money while relying on a so-called trigger to relieve the state of the obligations of the law not only looks too good to be true—it *is* too good to be true. If Wyoming accepts Medicaid expansion, then trigger or no, any future attempt to exit from the expanded program will be at the discretion of the Secretary of HHS, who can withhold all Medicaid funds for failure to comply with the requirement to provide benefits to what would be a mandatory population. To take a chance that a future Secretary will simply not impose authorized financial penalties is a multi-billion dollar gamble, and one not worth making for a program with dubious outcomes.

Should you have any further questions, please do not hesitate to contact me at Robert@buckeyeinstitute.org. I am also happy to testify on this question, if you would find further comments to be useful.

Sincerely,

Robert Alt
President & CEO