CARLOS CURBELO
26TH DISTRICT, FLORIDA

TRANSPORTATION AND
INFRASTRUCTURE COMMITTEE

EDUCATION AND THE
WORKFORCE COMMITTEE

SMALL BUSINESS COMMITTEE

Congress of the United States
House of Representatives
Washington, DC 20515–0926

1429 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225–2778

12851 SW 42ND STREET
SUITE 131
MIAMI, FL 33175
(305) 222–0160

January 28, 2016

The Honorable Jacob J. Lew
Secretary, Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

Dear Mr. Secretary:

I am writing to urge you to use your authority to provide temporary relief to Puerto Rico from the Affordable Care Act's (ACA's) Section 9010 fee on health insurance providers during this time of economic crisis in that Territory.

Per the statutory text, the ACA's individual mandate does not apply to residents of the Territories. Also, provisions establishing the Consumer Operated and Oriented Plan program, the Basic Health Program, and the Multi-State Plan program do not apply to the Territories because the law's definition of a "state" includes only "the 50 States and the District of Columbia."[1]

Since enactment, the Obama Administration has systematically revised or reinterpreted the application of various ACA provisions to move toward consistent and logical treatment of the Territories under the law. The Departments of Treasury (Treasury) and Health & Human Services (HHS) announced that Territories would be ineligible for Exchange Planning Grants offered under sections 1311 and 1323 of the ACA.[2]

In a later communication, HHS clarified that Territories that did not elect to establish their own State-based Exchange would be ineligible for a Federally-facilitated Exchange, a State Partnership Exchange, or a regional Exchange.[3] In the same communication, HHS additionally clarified that the section 1401 premium tax credit provision, the section 1501 minimum essential coverage provision, and the section 1513 employer responsibility provisions also do not apply to Territories.[4]

Following requests for clarification from providers and plans in the Territories, HHS subsequently announced that the insurance market reforms contained in Title I of the ACA "will not apply to individual or group health insurance issuers in the U.S. territories."[5] This announcement reversed an earlier interpretation to the contrary.[6]

---

[1] ACA § 1304(d). This is contrasted with certain other provisions of the ACA which amend the Public Health Service Act and therefore include within the definition of a "state." See P.H.S.A § 2791(d)(14).

[2] Letter from Kathleen Sebelius, Sec'y. of Health and Human Services, to Governors, pg. 1 (July 29, 2010).

[3] Letter from Kathleen Sebelius, Sec'y. of Health and Human Services, to Governors, pg. 5 (Dec. 10, 2010).

[4] Id. at pg. 3. The premium tax credit provision "likely" could apply to the tax code of a "mirror territory" that also elected to establish a State-based Exchange. Id. at pg. 4.

[5] Letter from Marilyn Tavenner, Administrator of the Centers for Medicare & Medicaid Services, to Angela Weyne, Puerto Rico Commissioner of Insurance, pg. 1 (July 16, 2014).

[6] Sebelius to Governors, pg. 2 (July 29, 2010).

Therefore, as it stands today, the Sec. 9010 fee is one of a limited number of ACA provisions still applicable to the Territories. The next logical step for the Obama Administration is to complete its work towards consistent ACA treatment of the Territories and use Treasury's discretionary authority is to provide relief from the Sec. 9010 fee. Otherwise it makes no sense to leave Puerto Rico and the Territories with the burdens on the Sec. 9010 fee.

Sec. 9010 imposes an annual "fee" on "each covered entity engaged in the business of providing health insurance."[7] A covered entity is any entity that provides health insurance for any United States health risk during each year, subject to certain exclusions.[8] Specifically, a covered entity includes any entity with net premiums written for United States health risks during the fee year.[9]

I understand that stakeholders from the Puerto Rico health care community have shared with your staff numerous legal memorandums demonstrating the discretionary authority of the Secretary of the Treasury to provide relief from the inconsistent application of the Sec. 9010 fee.

This includes utilizing your long-standing authority to provide "transitional relief" through a temporary suspension of collection of the Sec. 9010 fee. Alternatively, you may provide through regulation, on a prospective basis starting in 2016, that health coverage providers in the Territories are not subject to the fee. This could be done through regulation, interpreting the Sec. 9010 term "health insurance" to exclude coverage offered by an issuer located in a Territory. The reasonableness of this interpretation is supported by the precedent of interpreting "health insurance coverage" to exclude coverage offered by an issuer licensed by a Territory and subject to Territorial law. I respectfully urge you to consider options to provide much needed relief to Puerto Rico in a manner that does not place an undue burden on other health insurance issuers struggling to balance paying the fee while keeping health insurance affordable.

As you know, Congress saw fit to include in the 2016 Omnibus spending law a suspension of the Sec. 9010 fee in 2017, as well as a delay of the Cadillac tax in 2018 and 2019. However, the 2017 relief from the health insurance tax may come too late for Puerto Rico which is in the midst of an economic crisis today. Also, the delay of the Cadillac tax is of no benefit to employers and plans in Puerto Rico as the Commonwealth has no plans of such high value to trigger the tax.

Therefore, I respectfully urge you, in full accordance with all rules and regulations, to use the discretionary authority afforded to you to provide relief in 2016 from the Sec. 9010 fee to Puerto Rico and the Territories. In light of the ongoing crisis in Puerto Rico, the Administration and Congress should do all within its power to provide appropriate relief.

Sincerely,

Carlos Curbelo
Member of Congress

---

[7] ACA § 9010, codified at 26 U.S.C. 4001.
[8] ACA § 9010(c).
[9] See 26 C.F.R. § 57.2(b).