Congress of the United States
Washington, DC 20515

October 9, 2014

The Honorable Marilyn Tavenner
Administrator
Centers for Medicare & Medicaid Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Administrator Tavenner:

We write regarding our concerns with the oversight of federal Medicaid dollars by the Centers for Medicare & Medicaid Services (CMS). In FY2012, Medicaid financed the delivery of primary and acute medical services as well as long-term services and supports to an estimated 57 million people, and cost states and the federal government $431 billion.[1] Today, federal taxpayers spend more general revenue on Medicaid than on Medicare, and the program covers more individuals than Medicare.[2] Thus, effective oversight by CMS has grown even more important.

Recent news developments have generated additional questions regarding whether CMS is conducting adequate oversight of federal Medicaid dollars—especially as it relates to interactions with exchanges. Oversight is critically needed, particularly since the Government Accountability Office has "designated Medicaid as a high-risk program due to its size, growth, diversity of programs, and concerns about the adequacy of fiscal oversight, which is necessary to prevent inappropriate program spending."[3] In fact, the most recent publicly reported error rate for Medicaid indicates that one in ten dollars in the program may be improperly spent.[4] Even more troubling, that estimate does not account for the fraud, waste, and abuse also present within the program.

We write to request more information on steps CMS may be taking to ensure that federal taxpayer dollars are adequately protected in the specific cases of Massachusetts and Puerto Rico.

First, we are deeply concerned that CMS allowed Massachusetts to use federal Medicaid funds to provide coverage to individuals who may not be eligible for Medicaid but were unable to secure coverage through the state's health care exchange due to technical problems. Many of the problems with Massachusetts' health exchange have been well-documented and serious

[1] According to data compiled by the Congressional Research Service.
[2] Centers for Medicare and Medicaid Services, http://medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Financing-and-Reimbursement/Downloads/medicaid-actuarial-report-2012.pdf
[3] The Government Accountability Office, http://www.gao.gov/highrisk/medicaid_program/why_did_study
[4] Centers for Medicare and Medicaid Services, http://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicaid-and-CHIP-Compliance/PERM/Downloads/2010_long_version.pdf

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concerns have been raised about tens of millions of dollars of wasteful, ineffective expenditures with little transparency and accountability.[5]

The problems with the exchange led to tens of thousands of individuals being caught in coverage limbo, and some facing temporary coverage.[6] Due to the inability of the Massachusetts exchange to complete eligibility determinations and fully process applications, CMS granted Massachusetts use of federal Medicaid funds to effectively warehouse some 100,000 to 200,000 individuals who have applied for coverage, but whose final coverage status has not been adjudicated, in the Medicaid program.[7]

We believe it an inappropriate use of federal Medicaid funds to temporarily enroll thousands of individuals in Medicaid, especially since CMS knows that many of these individuals are not eligible for Medicaid coverage. Additionally, there are serious questions regarding CMS' legal authority to take such action.

We estimate this has cost taxpayers $330 million more than may have been previously reported.[8] Even more concerning, under the authority CMS used, the state is not required to pay back federal taxpayers. At a time when some parts of Medicaid already have waiting lists,[9] enrolling thousands of individuals in Medicaid without verifying their eligibility is both a questionable use of federal authority for Medicaid expenditures and an unfair additional cost for taxpayers.

Second, we have been troubled to watch the economic and fiscal developments in Puerto Rico. As you know, Puerto Rico's bonds have been downgraded by Moody's and Fitch Ratings due to the territory's debt and pension obligations, as well as the adoption of a law that makes it easier for some state agencies to not pay their debts.[10] While it is not our intent to cause additional hardship to the Puerto Rican government as they work through their fiscal challenges, we do believe it is important to ensure that federal Medicaid dollars are appropriately stewarded.

The territories—including Puerto Rico— operate Medicaid programs under rules that differ from those applicable to the states and the District of Columbia. For example, the federal Medicaid funding to the states and the District of Columbia is open-ended, but the Medicaid programs in the territories are subject to annual federal spending caps. The Patient Protection and Affordable Care Act made two changes to Puerto Rico's Medicaid program:

1) The law increased the cap on federal Medicaid spending directed to the territories by $6.3 billion from July 1, 2011 and September 30, 2019, of which Puerto Rico has received $5.4 billion.

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[5] Letter to HHS Secretary Sebelius from Chairman Upton, Subcommittee Chairman Murphy, Chairman Emeritus Barton, Vice Chairman Blackburn, and Subcommittee Vice Chairman Burgess http://energycommerce.house.gov/letter/letter-hhs-regarding-state-run-health-care-exchanges

[6] Jess Bidgood, "Massachusetts Is Given Extension," *The New York Times,* February 13, 2014, available online at: http://goo.gl/poHGM8

[7] http://aspe.hhs.gov/health/reports/2014/MarketPlaceEnrollment/Mar2014/ib_2014mar_enrollment.pdf

[8] Calculation: Average per capita expenditure ($8,527 from MACPAC data) at 50/50 FMAP x estimated 154,000 people x 0.5 (half a year of costs since it is a 6 month window) = roughly $328,289,500

[9] Kaiser Family Foundation, http://kff.org/health-reform/state-indicator/waiting-lists-for-hcbs-waivers-2010/

[10] Melvin Backman, "Is Puerto Rico Going to Default?," CNN Money, July 2, 2014, available online: http://money.cnn.com/2014/07/02/investing/puerto-rico-downgrade/; Maria Armental, "Fitch Downgrades Puerto Rico Gneeral Obligation Bonds," July 9, 2014, available online at: http://online.wsj.com/articles/fitch-downgrades-puerto-rico-general-obligation-bonds-1404951069

2) The law increased the federal medical assistance percentage for the territories from 50 percent to 55 percent beginning in FY 2011.

In addition to the Medicaid funding, the statute specified that Puerto Rico receive $925 million for their exchange. More recently, the administration issued a letter which effectively exempted Puerto Rico from complying with substantial insurance changes in the law.[11] As CMS noted at the time, "because this interpretation applies prospectively, territories will not have to pay back to the federal government any grants that have been spent by the territories as of the date of this letter." [12] However, CMS noted that any funds not expended by that date are expected to be refunded.

Overall, the economic news out of Puerto Rico raises very serious questions about the territory's ability and intent to honor commitments it has made to appropriately steward federal dollars. We believe that, even in these challenging times, Puerto Rico has a fiduciary responsibility to federal taxpayers to ensure monies are only expended for allowable purposes. Upholding this responsibility can be a challenging task even in good times, yet it becomes even more important in times of greater risk and uncertainty.

Therefore, in the interest of providing federal taxpayers with appropriate transparency and accountability, we request you provide answers to the following questions related to your agency's decisions:

1) At a time when some parts of Medicaid already have waiting lists, why did CMS believe it was acceptable to use federal Medicaid funds to cover individuals whose eligibility could not be determined due to problems with Massachusetts' health care exchange?

2) A recent news report noted that Massachusetts will be requesting an extension of the authority to use Medicaid dollars to provide temporary coverage for exchange applicants.[13] What is the status of this request? What would CMS do if other states seek similar arrangements to use federal Medicaid funds to deal with problems with their exchanges?

3) It is our understanding that CMS relied on the Secretary's temporary expenditure authority to grant Massachusetts use of federal Medicaid funds for otherwise non-eligible individuals. Please provide:
    i. The statutory legal citation for this authority.
    ii. CMS' precedent for allowing commercial market applicants to receive Medicaid coverage.
    iii. CMS' current legal understanding of the scope, duration, and applicability standards of the Secretary's temporary expenditure authority.

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[11] Centers for Medicare and Medicaid Services, http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Weyne.pdf
[12] Centers for Medicare and Medicaid Services, http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Weyne.pdf
[13] Jessica Bartlett, "State Requests Extension For Expiring Health Insurance Program," *Boston Business Journal*, September 11, 2014. Available online at: http://www.bizjournals.com/boston/blog/health-care/2014/09/state-requests-extension-for-expiring-health.html?page=all

4) When will the individuals currently on Medicaid and in coverage limbo in Massachusetts finally know what their coverage status is? Will CMS commit to publicly releasing the number of individuals who were qualified for the Exchange, qualified for Medicaid, and not qualified for assistance at all?

5) The *Boston Globe* recently reported that the otherwise non-eligible individuals who have been temporarily enrolled in Medicaid are negatively impacting the financial stability of managed care plans to which they are assigned.[14] What steps is CMS taking to mitigate the untoward effect on plans caused by individuals who are only temporarily eligible for Medicaid coverage?

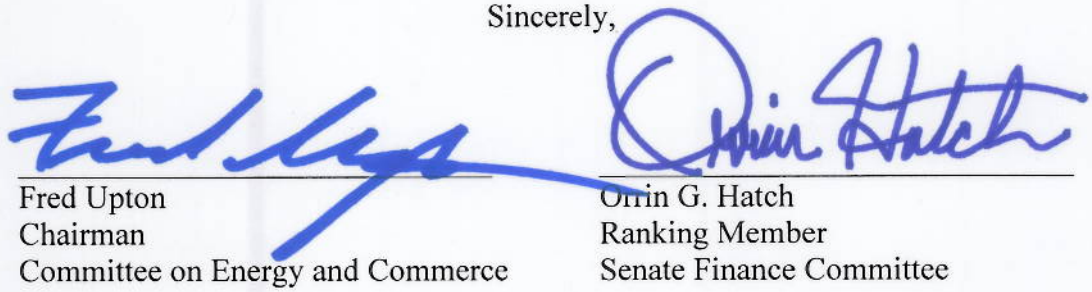
6) Has CMS determined what amount of exchange grant monies provided to Puerto Rico were unspent as of July 16, 2014, and therefore owed to CMS, based on the letter to the Commissioner of Insurance in Puerto Rico?[15] Has CMS been repaid?

7) Have Medicaid expenditures in Puerto Rico remained under the spending cap established by federal statute?

8) Because Puerto Rico does not have a federal Medicaid Fraud Control Unit, the administration has noted the program could be especially susceptible to waste, fraud, and abuse. Accordingly, what steps has CMS taken in conjunction with Puerto Rico's Medicaid program managers and CMS contractors to review the appropriateness of the territory's Medicaid expenditures on behalf of its 1.6 million beneficiaries?[16] What steps have been taken in conjunction with the territory and CMS contractors to minimize program vulnerabilities?

Thank you for your attention to this important matter. We respectfully request your response within six weeks of receiving this letter. Should you have any questions regarding this letter, please contact, Josh Trent of the House Energy and Commerce Committee (202) 225-5754 or Kim Brandt of the Senate Finance Committee at (202) 224-4515.

Sincerely,



Fred Upton
Chairman
Committee on Energy and Commerce

Orrin G. Hatch
Ranking Member
Senate Finance Committee

[14] Robert Weisman, "Medicaid Insurers Prodding Mass. On Funds," *The Boston Globe,* August 20, 2014. Available online at: http://www.bostonglobe.com/business/2014/08/19/medicaid-insurers-losing-tens-millions-from-high-cost-drug-influx-new-enrollees/iRTX3ucMaX2N3AMccv55jM/story.html
[15] Centers for Medicare and Medicaid Services, http://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Weyne.pdf
[16] Centers for Medicare and Medicaid Services, https://www.medicaid.pr.gov/