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January 8, 2015

Honorable Sylvia Mathews Burwell
Secretary
U.S. Department of Health & Human Services
200 Independence Avenue S.W.
Washington, D.C. 20201

VIA EMAIL AND REGULAR U.S. MAIL

Re: Protest and reservation of rights regarding the Transitional Reinsurance tax as applied directly against the State of Ohio

Dear Secretary Burwell:

The tax being levied by the federal Department of Health and Human Services in connection with the Affordable Care Act's "Transitional Reinsurance Program" does not and constitutionally cannot apply to State governments and their instrumentalities. The executive branch of the federal government apparently takes a different view of the relationship between the federal government and the States, however, and purports to apply these tax assessments (called mandatory "reinsurance contributions") directly against State and local governments that operate self-insured group health care plans to care for government employees.

Therefore, as chief law officer and litigation counsel for the State of Ohio and its officers and departments, I write: (1) to urge that you reconsider this misguided and unprecedented assertion of federal power that threatens radically to alter the balance of authority between the federal government and the States; (2) to request that the federal government take no action to process these proposed assessments against the State of Ohio and its instrumentalities or to take control of or retain monies made available by the State or its departments through the paygov.com site under this protest and pursuant to federal demand; and (3) to advise you that should the federal government persist in its stated intent to process these assessments against the State and its departments, the State of Ohio intends to take all appropriate legal action to recoup such forced payments exacted from State entities.

We find no explicit statement in the Affordable Care Act that Congress intended to levy the Transitional Reinsurance taxes directly against the State and its instrumentalities; the relevant statutory sections do not extend their reach that broadly. We do not believe that Congress meant to do such violence to our constitutional structures and the checks and balances provided by our system of federalism and the Tenth Amendment. For the federal government to assert a power to tax the States directly, as the executive branch now purports to do in the form of "contributions" mandated from State self-insured government employee group health plans (as operated in our State, for example, by the Ohio Department of Administrative Services and others), would

violate fundamental constitutional principles that ordain and limit federal and State spheres of authority.

This claimed federal authority would be an affront to the structural protections of our United States Constitution even if the tax imposed on State entities were to be directed entirely to providing monies for federal transfer to designated insurance companies. This scheme is all the more blatant, however, because the federal administrative apparatus here is claiming power to tax the States even beyond assessments earmarked for reinsurance purposes, and admits to demanding additional monies destined for the general fund of the United States Treasury. Such “lagniappe” may have its precedents, but not as applied to the States within our federal constitutional structure.

Please provide assurance that the monies being made available by State entities including the Ohio Department of Administrative Services under the federal regulations assessing these taxes will not be taken from the State of Ohio or its departments or instrumentalities. If the federal government does collect these taxes from the State and its instrumentalities, please consider this letter a demand for immediate refund of all monies thus wrongfully taken from the State of Ohio and its State entities.

My staff would welcome the opportunity to speak with your legal representatives at their earliest convenience and would ask that they call my Senior Advisor Fred Nelson (614.728.4947) or State Solicitor Eric Murphy (614.995.2273) to discuss these issues within the next seven days. If we are wrong in our understanding that the federal Administration purports to apply these assessments directly against the States and their instrumentalities, please advise us of that fact promptly: we will be very appreciative if you can correct any misapprehension we have on that score. Thank you very much for what I hope will be your appropriate consideration of these critical concerns.

Very respectfully yours,

A handwritten signature in blue ink that reads "Mike DeWine". The signature is written in a cursive, flowing style.

Mike DeWine
Attorney General of the State of Ohio

cc: Honorable Eric H. Holder, Jr., U.S. Attorney General
Marilyn Tavenner, Administrator, Centers for Medicare & Medicaid Services
Honorable David P. Fornshell, Prosecuting Attorney, Warren County, Ohio