OBAMA-BIDEN TRANSITION PROJECT

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National Association of Attorneys General

Interim Briefing Paper from The National Association of Attorneys General

Prepared for: President-elect Barack Obama Transition Team

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
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BRIEFING PAPER PRESENTED BY NAAG TO PRESIDENT-ELECT OBAMA AND THE TRANSITION TEAM: EXECUTIVE SUMMARY

I: INTRODUCTION: OVERVIEW AND TOP PRIORITIES

The National Association of Attorneys General (NAAG) was founded to help Attorneys General fulfill the responsibilities of their office and to assist in the delivery of high quality legal services to the states and territorial jurisdictions. The Association fosters interstate cooperation on legal and law enforcement issues, conducts policy research and analysis of issues, conducts training, and facilitates communication between the states' chief legal officers and all levels of government. The Association also coordinates and facilitates on behalf of the State Attorneys General the implementation and enforcement of the Tobacco Master Settlement Agreement, which is valued at over 200 billion dollars. The Association's members are the Attorneys General of the 50 states and the District of Columbia, the territories of American Samoa, Guam, and the Virgin Islands, the Commonwealth of Northern Mariana Islands, and the chief legal officers of the Commonwealth of Puerto Rico (Secretary of Justice). The following are priority issues that NAAG is presenting to President-elect Obama and his transition team.

PREEMPTION

Resisting federal preemption of state laws, particularly as it relates to mortgage foreclosures, the credit crisis and the current economic situation.

COOPERATION

Increased cooperation between federal and state agencies

SUPPORT AND FUND GRANTS

Support and fund the many federally funded law enforcement and other grants

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2. **Greenhouse Gas Legislation**
3. **Cleanup of Federal Waste.**

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2. **The mortgage foreclosure crisis and federal and state cooperation**
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2. Water Law
3. Public Lands
4. Endangered Species Act
5. Nuclear Waste

NATIONAL ASSOCIATION OF MEDICAID FRAUD CONTROL UNITS

1. Resist reduction in federal matching rates
2. Require CMS to share "Best Price" per drug data with states

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The National Association of Attorneys General

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1. **Resist federal preemption of state laws, particularly as it relates to mortgage foreclosures, the credit crisis and the current economic situation**

State Attorneys General have traditionally resisted federal preemption of state laws, whether by Congress, the Courts or the Executive Branch. Rather, state Attorneys General have supported a more pure federalism, a dual sovereignty whereby state governments and the federal government each retain and actively exercise the powers and functions of government at the same time. For example, in the area of antitrust law, under the Clayton, Sherman and Hart-Scott-Rodino Acts, states may file suit in federal court for various reasons and there is no preemption for states to file suit under state antitrust laws. Similarly, the FTC's administrative rule in the enforcement of telemarketing allows state Attorneys General to file suit in federal courts after FTC waiver of jurisdiction. It is a strongly held belief of the state Attorneys General that this shared jurisdiction contemplates the greatest consumer protection for citizens.

Of particular importance to Attorneys General at this time is resisting federal preemption in the enforcement of state banking and mortgage foreclosure laws. Preemption of state regulation by federal administrative agencies lead to irresponsible lending and contributed significantly to the ongoing mortgage and credit disasters at the heart of the recent financial crisis. In the current, failing economy, with housing prices plunging and the number of foreclosures soaring, it is critical that state Attorneys General continue to be "56 cops on the beat," and be given the necessary regulatory authority to impose appropriate standards on lending institutions.

For example, state Attorneys General, in order to protect customers, recently reached agreement with Countrywide Home loans and Countrywide Financial Corporation in an $8.68 billion settlement for predatory lending practices. The Countrywide settlement was the largest predatory lending settlement in history. Also recently, Ameriquest settled for $295 million for predatory lending practices across the country and Household Finance agreed to pay $484 million for lending practices in the subprime market. State Attorneys General discourage attempts, either administratively or statutorily, to diminish this important role of enforcing state laws on behalf of citizens.

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2. Increased cooperation between federal and state agencies

State Attorneys General are also asking the new administration to improve and augment intergovernmental cooperation between the federal government and states, particularly in the area of law enforcement and intelligence sharing between the states and DOJ, ICE, FBI, DEA, ATF, TTB, CBP and other agencies. At this critical juncture in American history, with the problems of illegal immigration, drug trafficking, tobacco smuggling and terrorism, just to name a few, it is imperative that federal agencies and state Attorneys General work in consort to address these important issues.

There already exists a mechanism through which cooperation and coordination among federal, state and local law enforcement could be enhanced – the Executive Working Group on Prosecutorial Relations (EWG). The EWG comprises representatives of NAAG, NDAA and DOJ and meets approximately three times a year to discuss issues of mutual concern for state-federal-local law enforcement. The United States Attorney General usually attends these meetings and the agenda includes time for roundtable discussion among the participants on current pressing needs of law enforcement at the various levels. NAAG is respectfully requesting that the new administration make the EWG a greater priority and be given an enhanced and central role in the sharing of information between law enforcement agencies. The EWG should meet more frequently and a structure should be put in place to ensure follow-up on issues discussed and decisions made at meetings.

To understand the pressing issues specifically facing federal law enforcement, it is also suggested that NAAG secure participation in the meetings of the U.S. Attorney General's Advisory Committee of United States Attorneys (AGAC) which meets under the auspices of the Executive Office of U.S. Attorneys (EOUSA). If a NAAG representative could participate in an observer role at these meetings, perhaps both state and federal law enforcement would benefit by state's ability to recognize in advance pressing issues facing DOJ and emerging priorities leading to an enhanced ability of Attorneys General to engage DOJ in policy matters.

Also, in an effort to build and strengthen relationships between state and federal law enforcement agencies, it would be of significant benefit to engage more frequently in an employee-swapping program among the various agencies. Personnel from state agencies can spend time working at federal agencies and vice-versa. In time, staffs create lasting relationships and develop better communication through a greater appreciation of agency policies, procedures and protocols. A program to permit employees to engage in inter-agency transfers exists under the Intergovernmental Personnel Act allowing state and local agencies to enter into memorandums of agreement with federal agencies to exchange employees. This program that allows assignments to and from the states should be given greater priority and emphasis should be given to law enforcement agencies with an eye toward greater coordination and information sharing between the states and the federal government.

3. Support and fund the many federally funded law enforcement and crime victims compensation and other assistance grants

NAAG is respectfully requesting that a new administration focus on and support the many federally funded grant programs for law enforcement purposes, particularly a restoration of the Byrne/JAG grants that have been cut in recent years.

Law enforcement and justice professionals working in state and local agencies have for decades relied on a partnership with the Federal government for support of the Constitutional mandate "to ensure domestic tranquility".

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In recent years, the Federal government has been backing away from this critical partnership, endangering significant efforts to deal with challenging crime problems and to improve the quality of justice in America.

Byrne/JAG grants fund a variety of important programs in every state and territory, including multi-jurisdictional drug enforcement, treatment interventions, police training, technology improvements, crime prevention programs, and crime victims' assistance programs. Byrne/JAG is currently the only source of funding available for multi-jurisdictional drug enforcement, including methamphetamine initiatives, and is critical for drug courts, law enforcement information sharing, gang prevention, and prisoner reentry programs.

A recent 67% cut in the Byrne/JAG funding is forcing state law enforcement agencies to shut down multi-jurisdictional drug and gang task forces, lay off police and prosecutors, and cease to fund programs proven to assist drug-addicted citizens to again become productive members of society. With the economic downturn and a possible increase in crime due to a weakened economy, these cuts could not have come at a worse time. Additionally, significant budget problems still face state and/or territorial legislatures while there is an increase in heroin, prescription narcotic, and methamphetamine abuse in the states and territories.

NAAG respectfully requests of the new administration that it restore Byrne/JAG funding in FY 2009 so that local law enforcement can continue to protect the citizens of our states, territories and of this nation against drug abuse, crime and violence.

In addition NAAG seeks continued funding of the Victim Compensation and Victims of Crime Act grant program, and Violence Against Women Act grant programs and the association is requesting restoration and continued funding of state and territory child support enforcement programs.

II: ADDITIONAL PRIORITIES

ENVIRONMENT

1. Clean Energy Issues

a. President-elect Obama has stated that he supports clean energy and has defined some of his carbon reduction goals. The critical issues for state and territory attorneys general will be advocating for maximum protection to the health, safety and environment of their citizens by resisting preemption in the context of renewable fuel standards, funding for pilot projects, and state pollution control statutes.

b. The Federal Power Act includes provisions giving the Department of Energy and FERC authority to identify National Interest Electric Transmission Corridors where development can be allowed on an expedited basis. States are litigating the Department of Energy's interpretation of the (relatively new) legislation arguing that the agency has given itself much more discretion than the statute, NEPA, or the Administrative Procedure Act allow. State Attorneys General would look to an amendment to the statute or an administrative rule that is less broad.

2. Greenhouse Gas Legislation

a. The 111th Congress will likely pass legislation addressing greenhouse gases. Western states and the Eastern states have separate state compacts that cover these contaminants. However, states will likely agree that existing state laws and

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compacts should not be preempted, or should only be preempted to the extent that they are less stringent than new federal legislation. State Attorneys General respectfully request that the new Administration consult with State Attorneys General as it works with Congress to structure new federal statutory amendments.

b. If greenhouse gas legislation is passed, EPA will likely be tasked with promulgating regulations implementing it. The potential for overlapping requirements, gaps, contradictions and concerns over stringency of the rules exists at the regulatory level, and State Attorneys General respectfully request consultation with states as such rules are developed and promulgated.

3. Cleanup of Federal Waste

a. States have historically taken the lead in requiring the federal government to meet the same environmental standards as private parties, which has led to significant progress in federal cleanup of Cold War waste. Recently, however, cleanup projects at the Department of Energy are budget driven rather than being done in accordance with consent agreements between states, tribes and the federal government that should drive the budget. It is recommended that the Department of Defense and other federal agencies move more rapidly, in cooperation with states, in developing adequate cleanup plans, as required by federal law.

CONSUMER PROTECTION

1. Resist federal preemption of the traditional state role in consumer protection

a. Two federal agencies have sharply limited state authority over national banks and Congress has shown an increasing willingness to preempt states, which is to the detriment of consumer protection. The Office of the Comptroller of Currency (OCC, the chief regulator of national banks) and the Office of Thrift Supervision (OTS, which regulates thrifts, savings and loans) have preempted dozens of state laws designed to protect consumers, ensure fair lending, and maintain competition. In addition, these agencies contend that State Attorneys General are prohibited from enforcing even non-preempted state laws against federally-chartered national banks and their subsidiaries. State Attorneys General request of the new administration that they roll back these determinations.

b. The Food and Drug Administration recently asserted that its approval of a label for a drug impliedly preempts a state failure-to-warn claim. This preemption should be reversed.

c. The Federal Communications Commission recently asserted that states are preempted from regulating line items on wireless bills to the detriment of consumers and should be reversed.

2. The mortgage foreclosure crisis and federal and state cooperation

State Attorneys General have been in the forefront in working with servicers to modify mortgages for homeowners who face foreclosure. State Attorneys General urge the Federal Reserve Board to consider regulations to strengthen consumer protections under the Home Ownership and Equity Protection Act (HOEPA).

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3. Federal and state cooperation in the looming credit crisis

a. With the recent economic downturn, State Attorneys General will inevitably see a rise in consumer protection complaints involving debt collection, debt management, debt counseling, business opportunity scams, and others. State Attorneys General will need to work closely with their federal agency counterparts to address these consumer protection issues. Attorneys General recommend improved communication and cooperation with the Federal Trade Commission, the Federal Communications Commission, Food and Drug Administration, the U.S. Department of Justice, and U.S. Attorneys.

b. State Attorneys General recommend greater enforcement action by the federal government to break international fraud rings that target Americans.

4. State Attorneys General are concerned about cuts in grant funding for consumer protection initiatives

a. The U.S. Department of Justice, Bureau of Justice Assistance has provided consumer protection training and enforcement grants and territory Attorneys General in the past. These grants were helpful to States and territories to help investigate possible consumer protection violations in areas such as telemarketing fraud, identity theft, and internet fraud, and should be continued.

ANTITRUST

Increased Federal and State Antitrust Enforcement: Recommendations to the new administration:

a. Appoint leadership for the DOJ Antitrust Division who will prioritize cooperation with the Federal Trade Commission and the states.

b. Reinstate past practices that encourage cooperation and foster efficient enforcement of the antitrust laws, such as sharing of investigatory materials with appropriate confidentiality protections.

c. Resist attempts to preempt or weaken state antitrust law. Federal antitrust law should be viewed as a complement to state law. Consistent with that approach, State Attorneys General respectfully request that the new administration oppose legislation that would seek exemption from antitrust regulation. In addition, the new administration should consider seeking legislative repeal of existing industry-specific exemptions such as those for insurance and railroads.

d. Ensure that antitrust law continues to serve the interests of consumers by:

   i. Supporting federal legislation to allow federal antitrust recovery by indirect purchasers while preserving existing state remedies effectively repealing the Supreme Court's decision in *Illinois Brick v. Illinois*.

   ii. Reinvigorating federal enforcement against vertical restraints that harm consumers, including enforcement against resale price fixing. In addition, support legislative overrule of the Supreme Court's decision in *Leegin v. PSKS*.

   iii. Reinvigorating support for healthcare antitrust enforcement by bringing enforcement actions when anticompetitive conduct seeks to prevent entry of rival generic drugs.

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1. **Plan for and fund statewide and territorial computer forensic labs**

   The backlog of digital forensic evidence remains one of the greatest challenges to state and territory efforts to address computer-facilitated crimes. The federal regional forensic laboratories do not fill the gap because they require states or territories to either donate personnel to work in the lab or pay lab processing fees in order to receive forensics services. Federal funding for statewide or territorial labs should be made available.

2. **Mandate data retention rules for Internet Service Providers and Remote Computing Services**

   This issue continues to be supported by states and federal law enforcement, with such officials as FBI Director Mueller testifying before Congress in support, but thus far no action has been taken. NAAG sent a letter to then-U.S. Attorney Gonzales requesting data retention rules. U.S. Attorney General Gonzales indicated that some action would be taken. No action has been taken and it is unlikely that AG Mukasey will address this issue during the reminder of his term, therefore this will likely be an issue for the Obama administration.

2. **Designate cybercrime attorneys in states and territories, and provide funding for training and equipment**

   Currently many ICAC task forces are housed in police departments and sheriff's offices and, as a result, much of the legal work is handled by local district attorney's offices which may lack the specialized training, experience or interest to properly handle a cybercrime investigation. The problem is often compounded by the fact that at the beginning of a cybercrime investigation, one may not know which prosecutorial area may ultimately have jurisdiction to prosecute the case, resulting in each area being unwilling to invest resources. Since the position often requires interstate legal process, a designated person should be cross-designates as both a Special Assistant Attorney General and Special Assistant United States Attorney General for reviewing search warrants and issuing investigative subpoenas, and prosecuting cybercrime cases. Federal funding should also be made available for training of cybercrime attorneys, investigators, and computer forensic personnel, and the provision of computer forensic equipment.

TOBACCO

1. **Addressing Internet Sales of Tobacco**

   The sale of cigarettes over the Internet has grown enormously, and virtually all of it is illegal for one reason or another, including failure to pay taxes or check for proper identification. These illegal sales allow youth access to tobacco products, cost the States hundreds of millions of lost tax dollars every year and are a potential avenue for terrorists to fund terrorist activities.

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The new Administration can help reduce these illegal sales in at least two ways:

a. Make tobacco non-mailable

The State Attorneys General have obtained agreements from the major common carriers (UPS, DHL, FedEx) to restrict their consumer shipments of tobacco products. Consequently, out of necessity, operators of Internet tobacco sites now ship nearly all their product through the United States Postal Service (USPS), making the USPS the largest carrier of contraband goods in the country. The USPS has done nothing to discourage this practice, and has even testified against legislation that would prohibit it from accepting tobacco for shipment to consumers. We urge the Obama administration to effect a change in USPS's position on this issue.

b. Support passage of the PACT Act

The "Prevent All Cigarette Trafficking Act of 2007" (PACT Act) would combat the growing problem of illegal Internet sales by creating tools that would significantly strengthen the ability of law enforcement, at both the State and federal levels, to help end (a) organized criminal operations that evade taxes, (b) illegal tobacco products entering the stream of commerce and winding up in the hands of children, and (c) such activity funding other illegal activity, including terrorism. We expect this legislation to be introduced again in the 111th Congress, and we respectfully request that the new Administration work with Congress and the Attorneys General to affect passage of this important legislation, and move quickly to promulgate necessary regulations.

2. Increased communication and coordination among federal agencies with tobacco responsibilities

Tobacco regulation and enforcement are split between different federal departments and agencies, including ATF and FBI (under DOJ), TTB (under Treasury), ICE and CBP (under Homeland Security), and the FSA (under Agriculture). No agency has tobacco as its primary responsibility, and the split in ATF and Customs that occurred as a result of the post-September 11th restructuring unintentionally contributed to the difficulties of communicating and coordinating between the various agencies. To provide just one example, taxpayer confidentiality concerns have hampered USDA's ability to coordinate with CBP and TTB in collecting tobacco quota buy-out payments due from importers of tobacco products, and have also made it difficult for DOJ to enforce such obligations against those importers that default. We urge the Administration to promote greater communication and coordination among these agencies, and between these agencies and the States.

3. Increased federal enforcement

Tobacco smuggling is on the rise. The past decade has seen large increases in federal and state taxation of tobacco products, and the regulatory and enforcement structures have not kept pace. Because the illegal tobacco trade can generate vast revenues with relatively light penalties for those that are caught, tobacco is increasingly the choice for organized crime and even for the financing of terrorism.

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We urge the Administration to increase federal enforcement efforts by:

a. making enforcement of laws regulating or taxing tobacco a greater priority at ATF (currently spending only 2% of its budget on tobacco enforcement)
b. putting into effect the regulations necessary to effect the amendments made to the Contraband Cigarette Trafficking Act (18 U.S.C. Chapter 114) in 2006
c. supporting legal and regulatory changes necessary to give TTB greater flexibility in revoking Tobacco Manufacturing permits and Tobacco Importing permits from persons who violate federal and state law, as well as the ability to prevent such persons from obtaining permits in the first place
d. giving TTB the Agents necessary to carry out its enforcement responsibilities
e. making the prosecution of violations of existing laws on tobacco a higher priority at DOJ, and encouraging prosecutors to seek criminal sanctions where possible
f. making tobacco law enforcement a greater priority for ICE

SUPREME COURT ISSUES

The states and the U.S. Solicitor General are often on the same side of Supreme Court cases, especially in criminal matters. As a consequence, members of the Solicitor General's office participate in many NAAG moot courts and often speak with NAAG staff and state attorneys regarding pending cases.

Among the upcoming cases in the Supreme Court of particular importance to the states are:

1. ***District Attorney's Office v. Osborne*** (whether an inmate has a due process right to obtain access to biological evidence so that the inmate can conduct a DNA test that might prove his innocence)

2. ***Vermont v. Brillon*** (whether the Vermont Supreme Court erred in holding that an indigent defendant's speedy trial rights were violated even though the continuances and delays were caused by his public defenders)

3. ***Rivera v. Illinois*** (whether the erroneous denial of a criminal defendant's peremptory challenge that resulted in the challenged juror being seated requires automatic reversal of a conviction)

4. ***Hawaii v. Office of Hawaiian Affairs*** (whether a 1993 Joint Resolution of Congress that acknowledged and apologized for the 1893 overthrow of the Kingdom of Hawaii strips the State of Hawaii of its authority under its admissions act to sell or dispose of 1.2 million acres of trust land).

CORRECTIONS

Review the Prison Litigation Reform Act (PLRA) to correct the flaws that continue to leave the door open to frivolous litigation. Current criticism of PLRA can be addressed without defeating the spirit of the law and without sacrificing the benefits it provides to the courts, the citizens and the prison population. This would include resolving exhaustion questions early on it litigation, ensuring that injunctive relief is narrowly drawn, adding explicit statements regarding physical injury requirements, and resolving the disproportionate fees to relief obtained.

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Ensure that U.S. Trade Representative's Office recognizes the importance of collaboration with state and local entities in promoting trade issues, while ensuring that trade agreements do not impinge on the established police and regulatory authority of those entities. Review reports of Inter-Governmental Policy Advisory Committee for recommendations in those areas and take steps to implement them.

REGIONAL ISSUES: CONFERENCE OF WESTERN ATTORNEYS GENERAL

Attorneys General also have primary regional issues in common and in order to preserve and protect regional interests, regional associations exist for Eastern, Western, Northern and Southern Attorneys General. The Conference of Western Attorneys General (CWAG) is preparing a separate briefing paper for the new department heads and NAAG supports them in their efforts.

Priority: Fight Against Mexican Drug Cartels

CWAGs top priority is to assist in the effort to train its counter-parts in Mexico to fight the drug cartels that are involved in drug smuggling, human trafficking, weapon smuggling and money laundering activities in the United States. CWAG has partnered with the United States Agency for International Development, NAAG and the Council of State Governments in a multi-prong approach to assist the Mexican federal Attorney General's Office and the 34 Mexican State Attorneys General in implementing judicial reforms throughout Mexico. CWAG has served as host for visiting teams of police investigators who receive intensive investigatory training and trial court testimony preparation instruction. NAAG provides a trial advocacy academy which will instruct Mexican prosecutors in oral advocacy techniques and courtroom skills necessary for the judicial reforms Mexico is undergoing. NAAG supports this important law enforcement effort and endorses CWAG's decision to make this issue a top priority and urges the new administration to continue the support of Mexico in its ongoing effort to fight crime that impacts the citizens of the United States.

Other matters of primary interest to Western Attorneys General include:

1. **Indian Law**
    a. Taking land into trust
    b. Law enforcement in Indian country
    c. Internet cigarette sales
    d. Class II gaming machines under IGRA
    e. Secretarial procedures to place gaming compacts into effect when the State raises 11th Amendment defense

2. **Water Law**
    a. EPA inter-basin transfer rule
    b. Reserved water rights settlement funding

3. **Public Lands**
    a. Forest fire suppression
    b. Federal-state land exchanges to address checkerboard
    c. Road rights-of-way

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4. Endangered Species Act
   a. Cooperative agreements for States to participate in conservation efforts
   b. Species re-introduction cooperation

5. **Storage of Nuclear Waste**

NATIONAL ASSOCIATION OF MEDICAID FRAUD CONTROL UNITS

1. **Resist reduction in federal matching rates**

   Previous Administrations have submitted proposals to Congress to reduce the federal matching rate for the state Medicaid Fraud Control Units (MFCU's) from 75 percent to 50 percent. Each time, Congress has strongly rejected the proposal.
   The funding for MFCU's is included with Medicaid administrative activities and since this portion of the Medicaid budget does not directly affect health care services, it is generally the first part of the program that is looked to for a reduction. Most states would be unable to pick up the additional 25 percent and would suffer not only a substantial loss of personnel but also experience a severe impediment to the work of the MFCU"s.

2. **Require CMS to share "Best Price" per drug data with states**

   Pharmaceutical manufacturers are required to report their "Best Price" per drug to CMS under the Medicaid Rebate statute. This data is used in determining the rebates paid from mfr's to Medicaid programs. CMS presently refuses to share this information with states investigating whether mfr's have accurately reported Best Price – thus making investigations in this area extremely difficult. It is arguable that 42 U.S.C. § 1396r-8(b)(D)(iv) allows CMS to share this data. CMS must share the data pursuant to the law, or the law needs amending to guarantee that state MFCU's can get the data.