

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

**RANDEL K. JOHNSON**  
SENIOR VICE PRESIDENT  
LABOR, IMMIGRATION & EMPLOYEE  
BENEFITS

1615 H STREET, N.W.  
WASHINGTON, D.C. 20062  
202/463-5448 • 202/463-3194 FAX

September 9, 2011

Steve Larsen  
Deputy Administrator and Director  
Center for Consumer Information and Insurance Oversight  
Centers for Medicare & Medicaid Services,  
U.S. Department of Health and Human Services

Dear Mr. Larsen,

The U.S. Chamber of Commerce (the Chamber) and our member companies want a health care system in which quality health care is readily available at an affordable price. The Chamber has also long advocated for transparency of price, quality and information. We remain hopeful that state-based exchanges will provide additional affordable coverage options that Americans can assess based on readily available price and quality information.

While the primary functions and many criteria and requirements for the establishment of the exchanges are defined by Subtitle D under Title I of the Patient Protection and Affordable Care Act (PPACA)<sup>1</sup>, much of the framework is yet to be determined. One critical issue which must be clarified involves the current Medicare Secondary Payer (MSP) rule and how it will be applied to plans operating in the exchange with respect to individuals with end stage renal disease (ESRD). Because of the legislative process and the lack of a conference report, this issue – along with others – was unintentionally left slightly unclear. However, the intent of the law is clear as is the best fiscal and policy position on this issue: the Medicare Secondary Payer rule should be applied consistently inside and outside the exchange for individuals with ESRD.

There are numerous compelling fiscal arguments that support consistently applying the MSP rule to plans inside and outside the exchange. For example, applying current MSP law to group health plans in an exchange with respect to ESRD will save \$1.3B over the next 10 years. Permitting individuals with the option of remaining in subsidized exchange plans until Medicare coverage is primary will save an additional \$3.7 billion over the next 10 years. By providing that individuals with ESRD may retain their private group health plan as primary coverage for 30 months before Medicare assumes this responsibility, MSP has been a key component of the successful 40-year public-private partnership to care for individuals with ESRD. The exchanges should be designed to ensure that this partnership continues which will provide significant

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<sup>1</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148 Title I Subtitle D, 124 Stat 119 (2010).

savings for the Medicare program and protect the ability of individuals with ESRD to access the private coverage on which they rely for assistance with out-of-pocket costs.

In addition to these important financial considerations, there are several critical policy reasons for doing so as well. Two of the main promises of health reform were to ensure first, that people could retain coverage of their choice and second, that individuals could no longer be excluded from health coverage solely because of a pre-existing condition. In other words, the intent of the ACA was to maximize and protect consumer choice. However, failure to apply MSP consistently would effectively eliminate consumer choice for a subset of individuals solely because they have ESRD. These individuals would lose the plans they currently enjoy and be banned from participating in the exchanges solely because they are unfortunate to have developed ESRD.

Therefore, we urge you to clarify that the MSP law will consistently apply to group health plans in and out of the exchanges in order to ensure that individuals with ESRD in qualified health plans have the same protections as those in group health plans outside the exchanges.

Specifically, we urge you to address this issue in the exchange regulations in four ways:

- Clarify that current Medicare Secondary Payer protection for individuals with ESRD apply to qualified health plans offered in the exchange;
- Allow individuals with ESRD to access exchange subsidized coverage if they do not file an application for Medicare benefits;
- Require qualified health plans to offer a sufficient choice of providers for individuals with ESRD; and
- Ensure through certification criteria that qualified health plans cannot employ risk-avoidance techniques to drop individuals with ESRD.

Thank you for your continued diligence, outreach and hard work in promulgating regulations to allow states to effectively implement and create exchanges. We look forward to continuing to work with you on this and other issues.

Thank you,

A handwritten signature in black ink, appearing to read "Randel K. Johnson", with a stylized flourish at the end.

Randel K. Johnson

Cc: Secretary Kathleen Sebelius