

# The Council for Affordable Health Insurance



May 7, 2009

Mary Beth Senkewicz  
Chair, NAIC Senior Issues Task Force  
Florida Office of Insurance Regulation  
Edwin Larson Bld.  
200 E. Gains St., Ste. 312  
Tallahassee, FL 32399

Guenther Ruch  
Vice Chair, NAIC Senior Issues Task Force  
Wisconsin Office of the Commissioner of Insurance  
125 South Webster Street  
Madison, Wisconsin 53703-3474

RE: NAIC Senior Issues Task Force Consideration of the Medicare Supplement Part A Deductible Waiver Program

Dear Ms. Senkowitz and Mr. Ruch:

The Council for Affordable Health Insurance or CAHI is a national research and advocacy organization devoted to market-based health care reforms that preserve freedom of choice for individuals and encourage a competitive health insurance market. CAHI members include health insurers, physicians, actuaries, agents and small business owners. Our member companies are active in the Medicare supplemental (“Medigap”), individual, small group, health savings account and senior markets.

As you know, over the last several months the NAIC Senior Issues Task Force (the Task Force) has conducted an informal review of a series of longstanding contractual arrangements between a number of Medigap carriers and select hospitals whereby hospitals agree to waive some or all of the Medicare supplemental Part A deductible, resulting in premium savings to Medigap enrollees. Specifically, the Task Force has questioned whether these arrangements violate Medigap standardization requirements.

Our members believe that the Medicare supplemental Part A waiver program (the program) not only does not violate any of the standardization requirements under federal law, but that it offers a welcome opportunity for Medigap carriers to capture significant Part A claims costs savings. As a result of federal minimum loss ratio standards, these savings are passed along in the form of reduced premiums to *all* Medigap enrollees, not just those who obtain care at participating hospitals.

As you know, the contractual arrangements that make these premium savings possible were the subject of considerable discussion at a public Task Force hearing held during the NAIC Fall 2008 meetings last September. At that session, former Department of Health and Human Services General Counsel Darrel

J. Grinstead offered his legal opinion that the program does not violate Medigap standardization requirements under Section 1882 of the Social Security Act (the Act), the federal statute governing the issuance of Medigap policies. (Mr. Grinstead's September 23, 2008 letter to former Senior Issues Task Force Chair Sean Dilweg in support of this position is posted on the NAIC website at [www.naic.org/documents/committees\\_b\\_senior\\_issues\\_comment\\_grinstead.pdf](http://www.naic.org/documents/committees_b_senior_issues_comment_grinstead.pdf).) Drawing upon a draft memo he previously prepared, Attorney William Schiffbauer offered the opposing view that the waiver program does violate standardization requirements under the Act.

At the conclusion of these comments – and these were the only two interested parties to offer input – the Task Force Chair expressed concern, but declined to take further action, reflecting an apparent lack of consensus on the legal issues discussed at that meeting. No further action was taken at the NAIC Winter 2008 Task Force meeting. To date, we are unaware of any additional pertinent legal analysis that has been prepared by or presented to the Task Force.

At the NAIC Spring 2009 meeting, Task Force leadership reiterated legal concerns about the program from earlier meetings and, for the first time – and without further legal input – the Chair proposed not only that the Task Force ask the federal Centers for Medicare and Medicaid Services (CMS) for a legal opinion on the issue of whether the program meets Medigap standardization requirements under federal law, but that it would also advise both CMS and state insurance regulators *that the program does indeed violate federal law*. What followed could only be described as a limited discussion on the proposal, including an observation from one Task Force member that such a request could result in a CMS finding that the program does *not*, in fact, violate federal law.

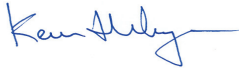
Our members have no objection to a Task Force request that CMS issue a legal opinion on this issue. In fact, given the divergent legal perspectives offered to the Task Force to date, we think it may help clarify important federal law questions that remain the subject of conflicting interpretation. We do have concerns, however, that Task Force staff has been directed to prepare a draft letter to CMS which presents a set of legal arguments leading to the *conclusion* that the program, according to the Task Force, fails to comply with federal law. (A related bulletin relaying a similar message is apparently being prepared for distribution to all 50 state insurance regulators.)

We have three major concerns about these efforts. First, we recognize that both of you have expressed your own concerns as to whether the program violates standardization under the Act. Yet, in light of the entire Task Force record on this matter -- including Mr. Grinstead's contrary testimony last September -- we question the basis on which the current Chair has apparently reached the legal conclusion that this longstanding program has and continues to operate in violation of federal law. Second, we question whether and to what extent Task Force members have reached an informed consensus on this issue. Finally, we recognize that it may be entirely appropriate – and ultimately informative – for the Task Force to obtain a CMS legal opinion on the federal statute that that agency is tasked with enforcing. But it is another thing altogether to tailor that request – and a separate bulletin to the states – in a light that represents the Task Force having reached *its own set of conclusions* on what we view as the complex and highly disputed legal issues involved herein.

In light of these considerations, we would urge you not to prejudge the unresolved legal issues that have been raised prior to submitting an objective request to CMS for its opinion on these important legal questions.

Thank you very much for your attention to this matter and for the opportunity you have afforded to offer comments. If you have any questions, please do not hesitate to contact me at 202-625-1787 or [kwrege@cahi.org](mailto:kwrege@cahi.org).

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin Wrege".

Kevin Wrege, Esq.

Cc: The Honorable Sandy Praeger, Chairperson, B Committee  
Members of the Senior Issues Task Force

