

# The Council for Affordable Health Insurance



April 19, 2010

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Florida Office of Insurance Regulation  
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Guenther Ruch  
Vice Chair, NAIC Senior Issues Task Force  
Wisconsin Office of the Commissioner of Insurance  
125 South Webster Street  
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RE: NAIC Senior Issues Task Force Consideration of the Medicare Supplement Part A Deductible Waiver Program

Dear Ms. Senkewicz and Mr. Ruch:

It is our understanding that the NAIC Senior Issues Task Force (SITF) has invited interested parties to comment on the Draft SITF *State Alert* dated March 27, 2010 (draft Alert) addressing certain Medicare Supplement hospital network arrangements. We have taken the opportunity below to provide input on the draft.

The Council for Affordable Health Insurance (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 ("Medicare Supplement"), individual, small group, health savings account and senior markets.

As you know, the subject of the draft Alert is not a new issue for the SITF. For over two years now, the task force has conducted an ongoing review of a series of established, longstanding and entirely voluntary contractual arrangements (arrangements) between a number of Medigap carriers and networks of in-patient facilities that have agreed to waive some or all of the Medicare supplemental Part A deductible, resulting in premium savings to Medigap enrollees.

Our members believe that the Medicare supplemental Part A deductible waiver program offers a welcome opportunity for carriers to capture significant Part A claims costs savings, which are passed

along to plan enrollees. In fact, the proper application of the federal minimum loss ratio standards actually leads to reduced premium rates for *all* enrollees, not just those who obtain care at participating hospitals.

We understand that the SITF continues to express reservations about these contractual arrangements. But it is important to note that up until now, the task force has been principally focused on one central issue: whether or not the hospital arrangements in question violate Medigap benefit standardization requirements under federal law. Indeed, this was the sole issue raised in Bill Schiffbauer's six-page September 12, 2008 memorandum. That document constitutes the only substantive legal analysis on record at the NAIC in support of the SITF's contention that the arrangements violated federal standardization requirements. And even Mr. Schiffbauer's analysis was subsequently challenged by a counter legal analysis conducted by Darrel Grinstead, former Chief Counsel of the Health Care Financing Administration of the U.S. Department of Health and Human Services.

Faced with conflicting legal positions on the standardization question, the SITF initially decided not to pursue this matter, but rather to allow individual states to make their own determinations. When the issue resurfaced under new task force leadership last year, the SITF decided -- appropriately in our view -- to seek a legal opinion on the matter from the Centers for Medicare and Medicaid (CMS), the principal federal regulatory agency with primary jurisdiction over Medicare and Medigap plans.

You may recall that the primary, if not the only, legal concern raised by the SITF in its August 5, 2009 request to Acting Director Frizzera was the assertion that the hospital arrangements "do not meet the requirements of Medigap standardization."

As you know, CMS has now responded to the concerns raised by the SITF, and that response would appear to be conclusive. In her December 3, 2009 reply, Acting Administrator Charlene Frizzera reached the same conclusion that Mr. Grinstead and others had previously offered to the SITF: namely, that the federal standardization requirements under Section 1882(p) of the Social Security Act and section 9(c) of the NAIC model define standardization in terms of benefits, and benefits only. Therefore, federal law does not prohibit or otherwise restrict arrangements for the delivery of care, such as the voluntary hospital network contracts at issue here. In case there was any room for doubt, Ms. Frizzera finished her analysis of this question by concluding that "this particular network arrangement does *not* violate the standardization provisions" under federal law. (Emphasis added.) The significance of this conclusion cannot be overlooked: the principal regulator charged with federal enforcement of the Medigap statute has found that there is no violation of the standardization requirements therein. Now, however, it appears that the task force is considering a 50-state regulatory alert on *other* issues related to the network arrangements. A close reading of the draft Alert reveals that those issues fall roughly into one of three categories.

First, even though CMS specifically found that the arrangements *have no impact on Medigap benefits*, the draft asserts that they "are likely to have a negative impact on the *concept and goals* of Medigap [benefit] standardization and simplification." The draft Alert fails to explain what this negative impact could be, given the CMS finding that the arrangements have nothing to do with either benefit standardization or benefit simplification.

Second, the draft Alert contains the assertion that the arrangements are "inconsistent with the requirement that Medicare supplement policies may not be more restrictive than Original Medicare." But once again, it does not begin to explain how enrollees who retain the full array of Medicare hospital and provider choices and all the standard Medigap benefits are somehow constrained by coverage that is more restrictive than Medicare.

The third set of issues – relegated to a single sentence of the draft – appear to mostly center on policy questions, although to the extent they may, in fact, raise state legal issues, the individual states – and not the NAIC – are probably in the best position to sort them out.

But our primary concern with the current version of the draft Alert focuses principally on the way it characterizes the current legal status of the arrangements on the core issue of standardization. Specifically, we believe that it may mistakenly lead state insurance regulators to conclude that the contractual arrangements at issue are established and carried out “in a manner not intended by federal law.” This may be the view of the SITF, but it is not the position of the federal officials charged with enforcing that law.

In light of the CMS findings, we would urge the SITF to not only reference, but also include a copy of the CMS determination letter in any correspondence with state regulators on this issue. This will allow them to reach their own conclusions on this central federal law question.

We greatly appreciate the opportunity to provide input on an issue of significant importance to our members. Please do not hesitate to contact me if you have questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin Wrege". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kevin S. Wrege, Esq.

