

July 6, 2010

Commissioner Alfred W. Gross, Chair, Financial Condition (E) Committee,
Mr. Lou Felice, Chair, Health Reform Solvency Impact (E) Subgroup,
Members of the E Committee

RE: NAIC Life and Accident & Health Blank, Supplemental Health Care Exhibit

VIA ELECTRONIC MAIL

Dear Commissioner Gross, Mr. Felice, and Commissioners:

Your Consumer Representatives to the NAIC, representing millions of patients, consumers and workers, are writing to respond to comments submitted by WellPoint, Inc. in response to the Medical Loss Ratio NAIC Life and Accident & Health Blank under consideration by this committee.

For two months the Health Reform Solvency Impact (E) Subgroup, ably headed by Mr. Lou Felice, has met weekly or twice weekly by conference call, laboring over the creation of a blank to implement the medical loss ratio requirements of section 2718 of the Public Health Services Act, added by Section 1001 of the ACA. Representatives of consumer groups, insurers, and other interested parties have spent hours participating in these conference calls and many more hours drafting comments on the issues that have been addressed by these conference calls. This laborious, transparent, participatory process has produced the document that you have before you today. Each issue that is resolved by this document was debated during that process, with all sides of the issues being full aired, verbally and often in writing. At the last meeting of the subgroup on June 30, Subgroup Chair Felice noted that there were a handful of issues still left open for further comment and asked that consumers, insurers, or other interested parties submit comments on this limited set of issues only for today's meeting.

Wellpoint, Inc has chosen to ignore Mr. Felice's instructions and yesterday submitted 29 pages of comments to this Committee, asking this Committee to tear up and discard the entire work product of the Subgroup, starting all over again with a fresh slate to define the activities covered by section 2718. These comments were substantially submitted to the Subgroup in May. Since then I have found only one other set of comments submitted by Wellpoint, which did not to my knowledge otherwise participate actively in the Subgroup process, apparently believing that it could convince this Committee at this late date to throw out the Subgroup's work and start over again.

Indeed, Wellpoint is effectively asking this Committee to tear up and discard section 2718 of the PHSA and to ignore what Congress intended to accomplish by enacting this section. As we noted in our comments, Congress intended to insure that consumers received 80 or 85 percent of their premiums back in clinical health care services and in expenditures for activities that improve quality of care. Wellpoint argues that what section 2718 says instead is that anything that insurers do that could possibly be of any

value to their consumers or to society should be shoehorned into a distorted definition of “quality improvement” and be charged off to consumers as their share of the medical loss ratio formula. Utilization review, fraud prevention, the costs of administering wellness programs, network development, as well as everything that insurers are required to do under federal or state law, are, to their mind, quality improvement activities.

Most, if not all of these activities were actively debated in the Subgroup process. The Subgroup recognized early on that there are many valuable things that insurers do, but that Congress did not intend that all of these activities to be credited against the consumers’ 80 or 85 percent in the MLR process. Rather the Subgroup focused in on the definitions of quality improvement found in the ACA, specifically in sections 2717 of the PHSA and section 1311 of PPACA, in which Congress identified the quality of care improvement activities of insurers. The Subgroup defined these activities expansively, and indeed added to them as the process went on, responding to the arguments of the insurers who chose to participate in the process. In the end it reached a compromise, including activities to which consumers objected but excluding some activities that insurers believed should have been included. Throughout the guiding star of the Subgroup was the ACA itself, which the Subgroup attempted faithfully to implement.

We have filed many comments with the Subgroup over the past two months responding in detail to most of the arguments that Wellpoint has once again put on the table. If this Committee is to give Wellpoint’s comments credence, we urge you to go back and read our comments. We would also be happy to respond to Wellpoint’s comments on the definition of quality again point by point, but we obviously cannot do so in the few hours left between now and tomorrow’s meeting. We would also be happy to respond further to Wellpoint’s position on aggregation, which is contrary to the language of 2718 and section 2791 of the PHSA and has been rejected by both the Subgroup and by Steven Ostlund’s PPACA Actuarial Subgroup of the AHWG.

We will respond to one of Wellpoint’s arguments, however; that involving the exclusion of federal taxes on investment income. Section 2718(a) recognizes three categories of expenditures:

- (1) on reimbursement for clinical services provided to enrollees under such coverage;*
- (2) for activities that improve health care quality; and*
- (3) on all other non-claims costs, . . . and excluding Federal and State taxes and licensing or regulatory fees.*

Obviously the latter category includes cost containment expenses, which Wellpoint claims are not mentioned in section 2718.

Section 2718 requires that insurers pay rebates to consumers:

if the ratio of the amount of premium revenue expended by the issuer on costs described in paragraphs (1) and (2) of subsection (a) to the total amount of premium revenue (excluding Federal and State taxes and licensing or regulatory fees and after accounting for payments or receipts for risk adjustment, risk corridors, and reinsurance under sections 1341, 1342, and 1343 of the Patient Protection and Affordable Care Act.) is below the statutory limit of 80 or 85 percent.

Wellpoint argues that it should be able to exclude from the denominator all federal taxes it pays, including taxes on investment income. The statute, however, refers to federal and state taxes as excluded from “premium revenue.” This assumes, of course, that these taxes are taxes on premium revenue, otherwise they could not be excluded from it. Nowhere in the formula is investment income recognized, a significant oversight. As Wellpoint’s exhibit demonstrates, investment income is an important source of insurer revenue that is apparently available to insurers under the formula to spend as they choose. To subtract taxes on investment income from the denominator, however, could conceivably mean that the numerator would be larger than the denominator, since it brings into play a factor not otherwise considered in the formula, an interpretation Congress could not have possibly intended. It would not only give insurers full control over their investment income, but also allow them to reduce the premium income they spend for their enrollees.

Wellpoint argues that a literal reading of the statute compels subtracting all federal taxes from the denominator, including taxes on investment income. It is curious that Wellpoint should here argue for a literal interpretation of the statute, as throughout this process insurers have argued against literally interpreting the statute. Nowhere does 2718 mention contract reserves, durational reserves, credibility, or many other issues that the Actuarial Subgroup has been struggling with. If the NAIC is bound by a literal interpretation of the statute, all consideration of these issues must go as well. But literally, section 2718 intends that federal taxes be excluded from premium revenue. Taxes that are not paid on premium revenue cannot be excluded from it. By its interpretation, if Wellpoint paid federal income taxes on a completely unrelated line of insurance, indeed a completely unrelated line of business, it could claim the taxes against the denominator. This cannot be what Congress intended.

We urge this Committee to adopt the carefully and conscientiously drafted blank and definitions crafted by the Subgroup and to not at this late date reopen all of the issues it has resolved

Sincerely,

Timothy Jost