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April 21, 2011

By Hand Delivery

Hon. Kathleen Sebelius
Secretary of Health and Human Services
United States Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Room 120F
Washington, DC 20201

Re: Continued Availability of Limited Scope Dental Benefits Outside State Exchanges under PPACA

Dear Secretary Sebelius:

On behalf of the National Association of Dental Plans ("NADP"), which is described briefly at the end of this letter, we are writing to ask you to confirm that limited scope dental benefits that are provided under a separate plan or policy may be used to provide the pediatric oral services component of the essential health benefits package (the "EHBP") for health insurance that is offered outside of an American Health Benefit Exchange or Small Business Health Options Exchange (an "Exchange") created under the Patient Protection and Affordable Care Act ("PPACA"), just as PPACA allows them to be used for that purpose on an Exchange.

As explained in the attached legal memorandum, we believe that limited scope dental plans and policies may be used for that purpose outside of an Exchange, and that the Department has the authority to confirm that. We respectfully request that the Department exercise that authority either before or at the same time as it issues guidance on the establishment of Exchanges, which we understand is expected some time this spring.

In your letter to Senator Debbie Stabenow on November 15, 2010, you explained that your "overarching goal" in implementing the insurance provisions of PPACA was to preserve the "beneficial components" of the market, and that in that regard you considered it important to "ensure robust competition inside and outside the Exchanges so that consumers may choose from a wide range of affordable and high-quality dental and medical plans." NADP could not agree more with those goals.

Today, roughly 97 percent of dental benefits are provided separately from medical coverage through stand-alone dental plans and policies designed and sold largely by dental companies or affiliates of health insurance issuers that specialize in these services. These specialists have developed the expertise necessary to provide the highest quality dental services – including meaningful benefits, robust provider networks, and cost efficiencies gained from experienced management. Without official confirmation that such plans and policies may be used to provide mandated pediatric oral services outside of an Exchange, NADP is concerned that, once the EHBP becomes operative beginning in 2014, individuals and employers will be required to purchase dental coverage outside the Exchange solely as part of a medical plan. This will disrupt the separate dental coverage that is purchased today by 1.65 million small groups covering 43.7 million Americans, including 22.9 million children. It will create inequities between the insurance coverage that is available to consumers inside and outside of an Exchange, and could harm consumers and small employers purchasing insurance outside of an Exchange by effectively denying them a highly efficient and popular option that they now enjoy. NADP believes that these results would be directly contrary to Congressional intent in enacting PPACA.

Thank you for your attention to this matter. We would be happy to discuss, at your convenience, any questions you have about this important issue.

Sincerely,

Kurt L.P. Lawson

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The **National Association of Dental Plans (NADP)** is representative and recognized resource for the dental benefits industry. As NADP's member dental plans provide dental benefits (dental HMOs, dental PPOs, discount dental plans and dental indemnity products) to more than 80 percent of the 166 million Americans with dental benefits, NADP is the largest national non-profit trade association representing this industry segment. NADP's members include major commercial carriers, regional and single-state companies as well as carriers organized as Delta and Blue Cross Blue Shield plans.

Enclosure

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MEMORANDUM

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FROM Kurt L.P. Lawson KLPL
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DATE April 21, 2011

SUBJECT Continued Availability of Limited Scope Dental Benefits Outside State Exchanges under PPACA

Background

Section 1302(b)(1)(J) of the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010 ("PPACA" or the "Act"), directs the Department of Health and Human Services (the "Department") to define an essential health benefits package ("EHBP") that includes "[p]ediatric services, including oral and vision care." Title I of PPACA contains three provisions relating to this requirement that address the treatment of plans that provide only dental benefits:

- PPACA § 1201 adds a new section 2707 to the Public Health Services Act (the "PHSA"). PHSA § 2707(a) states that "[a] health insurance issuer that offers health insurance coverage in the individual or small group market shall ensure that such coverage includes the [EHBP]." However, PHSA § 2707(d) states that "[t]his section shall not apply to a plan described in section 1302(d)(2)(B)(ii)(I)." As explained in more detail below, this almost certainly is a reference to PPACA § 1311(b)(2)(B)(ii) (relating to separate limited scope dental plans, sometimes referred to as "stand-alone dental benefits plans"). PHSA § 2707 becomes effective in 2014 and does not apply to grandfathered plans.

- PPACA § 1302(b)(4)(F) states that, in exercising its authority to define the EHBP, the Department shall "provide that if a plan described in section 1311(b)(2)(B)(ii) (relating to stand-alone dental benefits plans) is offered through an Exchange, another health plan offered through such Exchange shall not fail to be treated as a qualified health plan solely because the plan does not offer coverage of benefits offered through the stand-alone plan that are otherwise required under [PPACA §]1302(b)](1)(J)."

- PPACA § 1311(d)(2)(B)(ii) states that "[e]ach Exchange within a State shall allow an issuer of a plan that only provides limited scope dental benefits meeting the requirements of section 9832(c)(2)(A) of the Internal Revenue Code of 1986 to offer the plan through the Exchange (either separately or in conjunction with a qualified health plan) if the plan provides pediatric dental benefits meeting the requirements of [PPACA §]1302(b)(1)(J))."

In a letter to Secretary Sebelius dated September 21, 2010, Senators Stabenow (D-MI) and Lincoln (D-AR) asked the Department to clarify that separate limited scope dental plans may be used outside of an

Exchange to provide the pediatric oral services component of the EHBP, just as they may be used inside of an Exchange. In a response dated November 15, 2010, the Secretary stated that she shared the Senators' concern about the affordability of dental insurance, and that the Department would strive to write regulations in this area "in a way that continues broad access to necessary medical treatment, including dental care," to the extent that is within the Department's authority.

Issue

Does the Department have the authority to allow separate limited scope dental plans and policies to be purchased outside of an American Health Benefit Exchange and/or a Small Business Health Options Exchange (an "Exchange") to provide the pediatric oral services component of the EHBP, just as they are allowed to be purchased inside of an Exchange?

Conclusion

The Department has the authority to allow separate limited scope dental plans and policies to be purchased outside of an Exchange to provide the pediatric oral services component of the EHBP, while other health plans provide the remainder of the EHBP, just as they are allowed to be purchased inside of an Exchange. Thus, the Department can treat a health insurance plan and a separate dental plan or policy offered outside of an Exchange as satisfying the requirement that all health insurance coverage offered in the small group and individual markets contain the EHBP, if the separate dental plan or policy covers the pediatric oral services component of the EHBP and the health insurance plan provides all other components of the EHBP.

Analysis

1. Department's Interpretive Authority Generally

The Department has considerable discretion to interpret the PHSA and PPACA in general, and the EHBP requirement in particular.

PHSA § 2792[1] authorizes the Department to "promulgate such regulations [including interim regulations] as may be necessary or appropriate to carry out the provisions of [the PHSA]." Although that section predates PPACA, the Department and the other agencies have relied on it, and the parallel provisions in the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act of 1974 ("ERISA"), repeatedly as authority for rulemaking under the Act.[2] A recent federal court decision emphasized the discretion inherent in this grant of authority.[3]

Furthermore, PPACA § 1302(b)(1) specifically authorizes and directs the Department to "define the

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[1] Added by section 104 of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

[2] See, e.g., 75 Fed. Reg. 34538, 34545 & 34566 (June 17, 2010).

[3] See Coalition for Parity, Inc. v. Sebelius, 709 F. Supp.2d 10, 20 (D.D.C. 2010) ("Congress used permissive language to confer discretion on the agencies to promulgate any interim final rules the Secretaries determine are appropriate. [citation omitted] 'When a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show deference to the agency's determination.").

essential health benefits" to be included in the EHBP. It requires the Department to include certain "general categories" of benefits, and lists pediatric oral services among those general categories. However, this requirement is "subject to" the limitations of PPACA § 1302(b)(2), which requires the Department to "ensure that the scope of the [EHBP] is equal to the scope of benefits provided under a typical employer plan, as determined by the [Department]." Underlining the seriousness of the equivalence requirement, PPACA § 1302(b)(2) also requires CMS's chief actuary to certify to Congress that the EHBP satisfies that requirement. Requiring every health insurance plan offered in a small group or individual market outside of an Exchange to cover pediatric oral services would violate this requirement since today roughly 97%[4] of dental benefits are provided separately from medical coverage through separate plans that are designed and sold largely by stand-alone dental companies or affiliates of health insurance issuers who specialize in these services.

2. Department's Authority to Allow Dental Plans to Provide Dental Component of EHBP

According to the Supreme Court, when a court reviews an agency's formal interpretation of a statute that the agency administers, it must defer to any "reasonable" agency interpretation unless the court, "employing the traditional tools of statutory construction," determines that "Congress has directly spoken to the precise question at issue."[5] PPACA does not directly speak to the precise question of whether limited scope dental plans may be used outside of an Exchange to provide the pediatric oral services component of the EHBP – or, put another way, whether every health insurance plan outside of an Exchange must cover pediatric oral services if coverage for the pediatric oral services component of the EHBP is readily available from separate dental plans. Therefore the Department may use its regulatory authority described above to resolve this issue, and courts will be required to defer to its resolution as long as that resolution is reasonable.

a. Failure of PPACA to Speak Directly to Issue

PPACA § 1302(b)(4)(F) by its terms applies solely to plans offered through an Exchange. There is no similar express exception from the EHBP requirement for plans offered outside of an Exchange. However, the EHBP requirement for plans offered outside of an Exchange is not clear on its face, and can easily be interpreted to create a similar exception so that the market functions on a parallel basis both inside and outside the Exchange.

PHSA § 2707(d) exempts from the EHBP requirement for plans offered outside of an Exchange any "plan described in section 1302(d)(2)(B)(ii)(I)." The reference to "section 1302(d)(2)(B)(ii)(I)" does not make sense literally, because there is no section 1302(d)(2)(B)(ii)(I) in the PHSA or PPACA. Therefore, it needs to be interpreted. The most plausible interpretation is that it should be read as a reference to PPACA § 1311(d)(2)(B)(ii), which relates to a separate "plan that only provides limited scope dental benefits" and includes the pediatric oral services component of the EHBP.[6]

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[4] NADP/DDPA 2010 Dental Benefits Joint Report: Enrollment, October 2010, page 11, Dallas, Texas.

[5] Chevron U.S.A. Inc. v. Natural Resources Def. Council, 467 U.S. 837, 842-43 & 845 (1984).

[6] The title of a provision can be used as a guide to interpretation when the provision itself is ambiguous. See, e.g., Almendarez-Torres v. United States, 523 U.S. 224, 234 (1998); INS v. National Center for Immigrants' Rights, 502 U.S. 183, 189 (1991). PHSA § 2707(d) is entitled "Dental Only." There is a PPACA § 1302(d)(2)(B), but it relates to employer contributions to a health savings account, and it therefore seems like a poor fit. PPACA § 1311(d)(2)(B)(ii) seems like a

Assuming that PHSA § 2707(d) in fact refers to PPACA § 1311(d)(2)(B)(ii), PHSA § 2707(d) could be read narrowly as doing nothing more than excusing separate limited scope dental plans that include the pediatric oral services component of the EHBP from having to provide the rest of the EHBP. However, such a narrow reading would make PHSA § 2707(d) completely unnecessary: the Department concluded in June 2010 that the EHBP requirement does not apply at all to separate limited scope dental plans, because they are "excepted benefits" under the PHSA and the parallel provisions of the Code and ERISA.[7] Moreover, even if they were not exempt, such a narrow reading would risk making PHSA § 2707(d) irrelevant as a practical matter since it would require full-service health plans to provide duplicate coverage for pediatric oral services, meaning that significantly fewer people would purchase dental plans providing that coverage. Thus, such a narrow reading would violate a basic principle of statutory interpretation to construe statutes "so as to avoid rendering [any statutory language] superfluous."[8]

A narrow reading of PHSA § 2707(d) could have a similar effect on PPACA § 1301(a)(1)(C)(iii). That section requires an issuer that offers a qualified health plan within an Exchange to agree to charge the same premium rate when the plan is offered outside of an Exchange. If one or more separate dental plans offer the pediatric oral services component of the EHBP on the same Exchange, PPACA § 1302(b)(4)(F) allows the qualified health plan to forego offering those services, and reduce premiums accordingly. If the plan cannot do the same thing outside the Exchange, i.e., if it must offer the pediatric oral services component of the EHBP even if customers already have access to those services, it will be financially difficult for it to charge the same premiums outside of the Exchange in order to comply with PPACA § 1301(a)(1)(C)(iii). Allowing the plan to charge additional premiums outside of the Exchange for the dental coverage also would make little sense because that would mean consumers that preferred to purchase dental coverage separately would be charged twice for the same coverage.

To avoid making PHSA § 2707(d) superfluous and potentially making it difficult for plans to comply with PPACA § 1302(b)(4)(F), PHSA § 2707(d) must be read as having some significance beyond limited scope dental plans themselves. The most plausible alternative would be to interpret the reference in that section to a "plan described in section 1302(d)(2)(B)(ii)(I)" to refer to coverage that is offered by such a plan. That interpretation would exempt health insurance plans from having to offer the pediatric oral services component of the EHBP, as long as separate limited scope dental plans do, in fact, offer those services in the same market.

b. Ability of Department to Create Exceptions

Even if Congress generally intended that each health insurance plan separately satisfy the EHBP outside of an Exchange, it did not prohibit the Department from carving out exceptions, particularly if

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much better fit. The consolidated version of the PHSA (reflecting the changes made by PPACA) that was created by the House Legislative Counsel's office suggests that the reference to "section 1302(d)(2)(B)(ii)(I)" should be read as a reference to PPACA § 1302(d)(2)(B)(ii), but that too does not make sense because there is no such section in PPACA.

[7] See 75 Fed. Reg. at 34539 ("the exceptions of ERISA section 732 and Code section 9831 . . . for excepted benefits, remain in effect" and will be applied under the PHSA to maintain consistency in the administration of the three statutes, as required by HIPAA § 104); cf. Memorandum of Understanding ("MOU"), 64 Fed. Reg. 70163 (Dec. 15, 1999) (establishing rules to ensure that the IRS, Department of Labor and HHS administer and interpret HIPAA consistently).

[8] See Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

that would make the EHBP more consistent with that provided under a typical employer-sponsored group health plan. As noted above, the requirement to include pediatric oral services in the EHBP is subject to a separate requirement that the EHBP be "equal to the scope of benefits provided under a typical employer plan, as determined by the Secretary," and requiring every health insurance plan offered in a small group or individual market to cover pediatric oral services would violate this mandate under current market conditions.

PPACA § 1302(b)(4)(F) directly supports the Department's authority to create such an exception. As noted above, it exempts health plans from the requirement to provide the pediatric oral services component of the EHBP if they are offered by a separate limited scope dental plan. It expressly states that this exemption is to be created pursuant to the Department's exercise of its authority to define the EHBP. That indicates that the Department has the authority to create such exemptions pursuant to that authority, and does not, logically, rule out the creation of similar exemptions outside of an Exchange. In short, PPACA § 1302(b)(4)(F) was intended to be "exemplary, not exclusive."[9]

3. Reasonableness of Department's Exercise of Authority

Assuming that PPACA did not speak directly to the issue of including pediatric oral services in every health insurance plan outside of an Exchange, the question then becomes whether the Department's decision not to require such comprehensive coverage would be "reasonable." According to the Supreme Court, that does not require that it be "the only possible interpretation, nor even the interpretation deemed most reasonable by the courts," but only that it not be "arbitrary, capricious, or manifestly contrary to the statute."[10]

Such a decision by the Department clearly would satisfy this standard. As explained above, it would avoid making PHSA § 2707(d) superfluous and potentially making it difficult for plans to comply with PPACA § 1302(b)(4)(F). In addition, Congress and the Administration have repeatedly stated their desire to allow individuals and businesses to keep the insurance policies they have if they like them. Also, a major goal of health reform was to "lower health insurance premiums."[11] Neither purpose would be served by forcing pediatric oral services to be covered outside of an Exchange by full-service health insurers rather than separate limited scope dental plans as the great majority of them are now. Over time, the dental plan industry has developed deep expertise in providing dental coverage, including robust provider networks and cost efficiencies gained from experienced management. Requiring a significant slice of that coverage to be provided, instead, by traditional, full-service health plans would disrupt an efficient, well-functioning market.

Furthermore, recognizing an exception from the EHBP requirement for this coverage inside of an Exchange but not outside would lead to differences between coverage and potentially premiums inside and outside of Exchanges, make coverage inside Exchanges potentially more attractive, and otherwise

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[9] See NationsBank v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995).

[10] See Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1505 (2009); Chevron, 467 U.S. at 844.

[11] See PPACA § 1501(a)(2)(J).

undercut the goal of making Exchanges seamless extensions of existing markets.[12]

4. Department's Enforcement Authority

Even if PPACA did speak directly to the issue of including pediatric oral services in every health insurance plan outside of an Exchange regardless of the availability of those services from limited scope dental plans, and required them to be included nonetheless, the Department could decline to enforce the requirement either temporarily or permanently in the interest of furthering the overall purposes of the PPACA. As noted above, these purposes include allowing individuals and businesses to keep insurance arrangements they like, avoiding unnecessary increases in premiums, and avoiding differences between coverage inside and outside of Exchanges. The Department and the other agencies charged with implementing PPACA have exercised that discretion in other situations, including recognizing exceptions from the PHSA for retiree-only plans to parallel those in the Code and ERISA, and delaying the effective date of new nondiscrimination requirements.[13]

Summary

In conclusion, the Department can interpret PPACA to allow separate limited scope dental plans to be used outside of an Exchange to provide the pediatric oral services component of the EHBP, while other health plans provide the remainder of the EHBP, just as they are allowed to be used inside of an Exchange. A contrary interpretation is not required by the statute and would risk making some sections of the statute superfluous or ineffective. Furthermore, any other interpretation would contradict Congressional intent to make the scope of the EHBP equal to the scope of benefits provided under a typical employer plan, allow individuals and businesses to keep insurance arrangements they like, avoid unnecessary increases in premiums, and avoid differences between coverage and premiums inside and outside of Exchanges.

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[12] See, e.g., PPACA § 1301(a)(1)(C)(iii), discussed supra in Section 2.a; PPACA § 1312(c) (health insurance issuer must consider enrollees in all health plans offered on the individual market, and all enrollees in all health plans offered on the small group market, to be members of same risk pools); PPACA § 1312(d)(1) ("Nothing in this title shall be construed to prohibit . . . a qualified individual from enrolling in, or a qualified employer from selecting for its employees, a health plan offered outside of an Exchange."); PPACA § 1312(d)(3)(A) ("Nothing in this title shall be construed to restrict the choice of a qualified individual . . . to participate in an Exchange.").

[13] 75 Fed. Reg. at 34540 (because treating plans differently under the PHSA "would create confusion with respect to the obligations of issuers that do not distinguish whether a group health plan is subject to ERISA or the PHS Act, and in light of the MOU, the Department of Health and Human Services (HHS) does not intend to use its resources to enforce the requirements of HIPAA or [PPACA] with respect to nonfederal governmental retiree-only plans or with respect to excepted benefits provided by nonfederal governmental plans."); IRS Notice 2011-1, 2011-2 I.R.B. 251 ("Because regulatory guidance is essential to the operation of the statutory provisions, the Treasury Department and the IRS, as well as the Departments of Labor and [HHS] . . . have determined that compliance with § 2716 should not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance of general applicability has been issued.").