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ONE HUNDRED SEVENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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October 16, 2001

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The Honorable Thomas A. Scully
Administrator
Centers for Medicaid and Medicare Services
200 Independence Avenue, S.W., #314-G
Washington, D.C. 20201

Dear Administrator Scully:

We are writing to oppose the "further delay of effective date" of the final Medicaid managed care regulations published on January 19, 2001. We believe this delay is both bad policy and illegal.

The delay of the managed care regulations is bad policy because Medicaid recipients should not be required to wait any longer for these protections. The managed care provisions in the Balanced Budget Act were enacted with the understanding that in exchange for the authority to mandate enrollment of Medicaid recipients in managed care without a waiver, states would be required to comply with basic patient protections. Yet, over four years later, Medicaid beneficiaries are subject to mandatory enrollment, but are still waiting for HHS to effectuate patient protections.

Additionally, the proposed delay of the January final regulations, like the two earlier delays announced by the Centers for Medicare and Medicaid Services (CMS), is illegal. The Administrative Procedures Act (APA) requires agencies to publish notice and seek comment prior to implementing substantive rules. Courts have held that the effective date of a regulation is a substantive term of the regulation itself, therefore, the APA requires that the public be given prior notice and opportunity to comment before the effective date of a regulation can be changed. While there are some exceptions to this rule, none of the reasons offered by CMS for failing to give prior notice falls within those exceptions. Accordingly, the delay of the effective date of the regulation violates the APA and is illegal.

The final regulations published in January were the result of years of work and extensive public participation, and CMS should implement them without further delay. If, after a reasonable amount of experience operating under the January final regulations, CMS still believes that alterations are advisable, it should propose them at that time and give the public the required opportunity to comment on the proposed changes. In the meantime, beneficiaries should not continue to be deprived of the protections contemplated by Congress.

Sincerely,

John A. Arzoo

Timothy O'Keefe

Henry A. Waxman

Greg Kinnear

Eliot L. Engel

Frank Pallone, Jr.

Albert R. Upton

Fred Strickland

Lois Capps

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The Honorable Thomas A. Scully
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cc: The Honorable W. J. "Billy" Tauzin, Chairman
Committee on Energy and Commerce

The Honorable Michael Bilirakis, Chairman
Subcommittee on Health

Docket - re: CMS — 2001 — IFC Medicaid Managed Care: Further
Delay of Effective Date