

Congress of the United States
Washington, DC 20515

March 29, 2016

Ms. Sara Rosenbaum
Chair
Medicaid and CHIP Payment and Access Commission
1800 M Street NW
Suite 650 South
Washington, DC 20036

Dear Ms. Rosenbaum,

Thank you for your response to the February 3, 2016, letter you sent in response to a number of issues and concerns raised by Congressional Committee leaders in a January letter to MACPAC leadership.¹ We are pleased to hear that MACPAC will be looking closely at the conflict of interest policies of the Congressional Budget Office as MACPAC considers specific policies it may adopt.

In light of MACPAC's upcoming meeting on March 31, 2016, we want to follow-up with you to further raise lingering issues for you and other the Commissioners to address. In raising these ongoing concerns, it is our goal to encourage a candid dialogue about what steps are needed to ensure MACPAC is sufficiently transparent and accountable to Congress. In that spirit of collaboration, we will outline specific areas where additional action is required by MACPAC.

General Conflicts of Interest

We appreciate that you agreed MACPAC could adopt “a policy requiring that Commissioners declare any actual or apparent conflict of interest (financial or otherwise) on any specific issue that is the focus of [their] research, deliberations, or votes.” We were glad to hear MACPAC “will add a conflict of interest standard and procedure to [your] processand will post this standard so that it is available to the public.”

We understand the aim is for MACPAC Commissioners to review an initial policy in March and finalize a policy later this spring. This is a necessary first step, but further action may be needed to sufficiently address our concerns. To help position MACPAC for long-term success:

- Will you provide us with the specific conflict of interest policies MACPAC is considering adopting, as well as the specific timeframes for adoption?

¹ MACPAC response: <https://www.macpac.gov/publication/response-to-letter-from-chairmen-upton-and-pitts/>.
Upton/Pitts letter: <https://energycommerce.house.gov/news-center/letters/letters-gao-and-macpac-regarding-macpac-appointments>.

- Will the Commissioners discussions and votes related to adopting these conflict of interest policies be held in a public meeting?

Involvement in Partisan Activities and Advocacy

We were pleased to learn that all MACPAC staff are required to annually report associations with outside organizations and “activities.” Based on your letter, we understand MACPAC staff “may not be directly involved in partisan political activities or advocacy on behalf of political causes related to MACPAC business, in order to avoid the perception that they may be biased.” This is a sensible requirement.

However, we note that MACPAC appears to hold Commissioners to a less rigorous standard than to which it holds its staff. Partisan political activity or advocacy by Commissioners could significantly hamper MACPAC’s credibility and independence – even though MACPAC currently has prohibitions on such activities for its employees. Consequently, it appears more needs to be done to ensure Commissioners are held to the same standard. We encourage MACPAC to take further steps to adopt a policy which would hold Commissioners to the same standards in place for staff. To that end, we would appreciate responses to the following questions:

- Will MACPAC adopt conflict of interest policies that, at a minimum, hold its Commissioners to the same standards and seriousness which it requires of staff? If so, what is the timeframe and specific action steps for doing so?
- Will you please explain in detail what constitutes “advocacy and political activity” that staff are currently prohibited from participating in and what activities will be prohibited for Commissioners?
- Will the Commissioners’ discussions and votes related to adopting these conflict of interest policies be held in a public meeting?

Participation in Litigation

We believe further action is needed to add specificity regarding what policies and procedures MACPAC may adopt to avoid conflicts among its Commissioners regarding their participation in litigation involving state or federal health care programs. The response to our letter indicated “there may come a time when a Commissioner may recuse himself or herself on a particular vote or recommendation, because he or she simply feels unable to be independent and impartial.” Relying on the self-attestation of a Commissioner who may be conflicted is inadequate.

We remain concerned that the decision to add one’s name to an amicus brief in support of a position against the House of Representatives did not, in your judgement, constitute the “type of activity that merits recusal.” MACPAC should adopt more objective criteria for evaluating conflicts for Commissioners, including instituting a formal process that would prospectively inform Commissioners’ actions going forward.

We do not distinguish between potential conflicts individuals may have in his or her role as a Commissioner compared with his or her role as the MACPAC Chair. Any member of any Congressional advisory entity created and funded by Congress comes with a fiduciary duty to avoid taking a position on a legal dispute between a house of Congress and the Administration.

With respect to your participation in the amicus brief in question, we note there are notable policy interactions between individuals in Medicaid and individuals in the Exchange—so changes to current law could potentially impact the Medicaid program, the Exchanges, or both—as your research has shown.² MACPAC’s statute also requires the Commission to examine the “interaction of Medicaid and CHIP payment policies with health care delivery,” and the Commission has specifically examined a range of issues related to Medicaid and the Exchange.³

For MACPAC to be viewed as useful and credible in policy research and analysis, Congress needs have confidence in the objectivity of MACPAC’s process and products. In the interest of resolving ongoing concerns, we would appreciate responses to the following questions:

- Will you please explain what policies the Commission will adopt to address the concern of Commissioners avoiding conflicts of interest regarding legal cases or advocacy work related to state or federal health care programs? Please also provide a timeframe for addressing this issue.
- In the interest of being candid and transparent with Congress and MACPAC Commissioners and staff, please explain with what restrictions MACPAC will place on its Commissioners involvement in future legal advocacy work regarding Exchanges, Medicaid or CHIP?

As we have previously noted, we believe Congress benefits from objective, thoughtful, data-driven analysis to help make deliberative improvements to the Medicaid program. However, for Congress to be able to trust the work of MACPAC, additional steps are needed to ensure the Commission is adequately positioned to provide balanced, independent, objective, meaningful information to improve the program.

Given the importance of this issue, we respectfully request you reply in writing within 30 days of the receipt of this letter. If you have any questions, please contact Josh Trent of the House Committee on Energy and Commerce staff at 202-225-2927 or Kim Brandt of the Senate Finance Committee staff at 202-224-4515.

² <https://ssascholars.uchicago.edu/ihpp/content/sara-rosenbaum>.

³ <https://www.macpac.gov/publication/march-2015-report-to-congress-on-medicaid-and-chip/>,
<https://www.macpac.gov/publication/ch-3-issues-in-pregnancy-coverage-under-medicaid-and-exchange-plans/>.

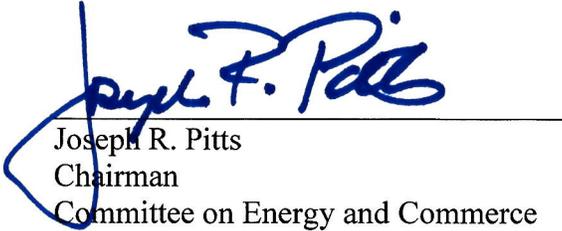
Sincerely,



Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives



Orrin G. Hatch
Chairman
Committee on Finance
U.S. Senate



Joseph R. Pitts
Chairman
Committee on Energy and Commerce
Subcommittee on Health
U.S. House of Representatives

cc: Marsha Gold, ScD, Vice Chair
Anne L. Schwartz, PhD, Executive Director
MACPAC Commissioners