



NATIONAL CONFERENCE *of* STATE LEGISLATURES

*The Forum for America's Ideas*

December 26, 2012

Ms. Marilyn Tavenner  
Acting Administrator  
Centers for Medicare and Medicaid Services  
U.S. Department of Health and Human Services  
Attention: CMS-9980-P  
P.O. Box 8010  
Baltimore, Maryland 21244-8010

**Terie T. Norelli**  
*Speaker*  
*New Hampshire House*  
*President, NCSL*

**Patsy Spaw**  
*Secretary of the Texas Senate*  
*Staff Chair, NCSL*

**William Pound**  
*Executive Director*

Dear Acting Administrator Tavenner:

On behalf of the National Conference of State Legislatures (NCSL), I am submitting comments on the Patient Protection and Affordable Care Act Notice of Proposed Rulemaking (NPRM) regarding Standards Related to the Essential Health Benefits, Actuarial Value and Accreditation published in the *Federal Register* on November 26, 2012. In our comments submitted earlier this year in response to the *Essential Health Benefits Bulletin* released by the Center for Consumer Information and Insurance Oversight, NCSL expressed appreciation and support for your efforts to accelerate the regulatory process by providing some initial guidance on the process of establishing the essential health benefit packages for the American Health Benefit Exchanges. NCSL was particularly supportive of the decision to focus on state-based benefit plans instead of one national plan. We also supported the decision to permit the inclusion of existing state mandated benefits into their essential benefit package without incurring additional costs. Finally, we noted that the *Bulletin* was more of a concept paper than official guidance and that additional information was needed to guide state lawmaker's decision-making.

NCSL continues to support state-based solutions and supports the additional state flexibility provided for in this NPRM, but this NPRM was not timely. States were asked to submit their final Essential Benefit Benchmark plans prior to the publishing of official federal guidance. Many of the policy changes made between the publishing of the *Bulletin* and the publishing of the NPRM are not controversial and perhaps could have been communicated to states months ago. The 30-day comment period and the requirement for states to make any changes to their essential benefit packages on the day comments are due did not permit states and their constituents ample time to review the new guidance. HHS has emphasized the importance of states providing an open and transparent process for the implementation of the American Health Benefit Exchanges and an opportunity for public engagement. NCSL urges you to aggressively improve your regulatory efforts to assist us in providing opportunities for lawmakers and the people they represent to participate in the implementation of this major national health care initiative.

NCSL looks forward to working with you and your staff on the American Health Benefit Exchanges and other provisions of the Patient Protection and Affordable Care Act. NCSL's comments on the NPRM are included in this letter. If you have any questions or need additional information, I can be reached by phone at 202-624-8689 or by e-mail at [joy.wilson@ncsl.org](mailto:joy.wilson@ncsl.org).

Sincerely,

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**COMMENTS OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES  
PATIENT PROTECTION AND AFFORDABLE CARE ACT; STANDARDS RELATED TO ESSENTIAL HEALTH  
BENEFITS, ACTUARIAL VALUE, AND ACCREDITATION; PROPOSED RULE**

**B. Part 155 – Exchange Establishment Standards and Other Related Standards Under the Affordable Care Act**

**State Required Benefits**

**State Required Benefits** – NCSL strongly supports the provision in the NPRM that proposes to permit states to include state mandated benefits enacted on or before December 31, 2011 in their Essential Health Benefit package without incurring additional costs. This proposal replaces previous policy that excluded state mandated benefits that were enacted last year, but not included in a health benefit package offered in the state this year. States would have incurred additional costs to maintain those state mandated benefits.

**Cost Calculation for Additional Coverage** – NCSL agrees that given the new policy to include state mandated benefits enacted on or prior to December 31, 2011, state exposure to additional coverage costs is likely to be minimal. However, the cost calculation process proposed in the rule seems cumbersome. We urge you to work closely with states that have experience in calculating the costs of mandated benefits and to develop a simpler, but appropriate process for inclusion in a final rule.

**C. Part 156 – Health Insurance Issuer Standards Under the Affordable Care Act, Including Standards Related to Exchanges**

**Subpart A – General Provisions**

**Benchmark Plans**

**Definitions** – NCSL supports the proposal to officially differentiate the plans state select as their official benchmark plans from the plans that ultimately become the plans that meet all of the statutory requirements set forth in the Affordable Care Act. The NPRM proposes to call the state benchmark plans which in most cases must be supplemented with additional coverage to meet all of the statutory requirements the “base benchmark plan” and the final benchmark plan that meets all of the statutory requirements the “EHB-benchmark plan.”

**Subpart B – EHB Package**

**State Selection of Benchmark (§156.100) – Application to the U.S. Territories** – The NPRM recognizes the special circumstances of the U.S. territories given their smaller size and the unique nature of their health insurance markets and seeks comment as to whether the default base benchmark plan process that will apply to the 50 states and the District of Columbia is appropriate for the territories. Given the very aggressive time frame for exchange implementation, we urge a more rigorous effort, including technical assistance, to address any problems you may anticipate related to the benchmark plans in the territories.

**Determination of EHB for Multi-State Plans (§156.105)** – The NPRM simply proposes that the Office of Personnel Management (OPM) should set the benchmark standards for multi-state plans in the regulation it publishes regarding the implementation of the Multi-State Plan Program (MSPP). NCSL is concerned about the lack of coordination between OPM and HHS and the states regarding the overall implementation of the American Health Benefit Exchanges. Certainly lack of coordination on benefits can lead to adverse selection which could undermine the overall exchange effort.

**Benchmark Plan Standards (§156.110)** – NCSL strongly supports the inclusion of Children’s Health Insurance Program (CHIP) vision and dental plans in addition to the federal FEDVIP vision and dental plans to supplement base-benchmark plans that need supplemental coverage for pediatric vision and dental coverage. This is another example of existing state programs that are popular and successful and should have been included early on.

**Provision of EHB/Habilitative Services (§156.110(f) and §156-115(a)(4))** - The NPRM proposes to allow states to define the “habilitative benefit” if the benefit is not included in existing state plans. States may alternatively authorize plans to define the benefit. This is one of the statutorily required benefits and has been a topic of discussion since the issuance of the *Bulletin* last December. If HHS had no plans to issue additional guidance, but instead wanted states to experiment on defining the benefit, states should have received more notice and an opportunity to work with state experts on developing a habilitative benefit that might be tailored to state needs. As noted in the NPRM: “We believe this alternative approach would provide a valuable window of opportunity for review and development of policy in this area and welcome comments on this proposed approach.” We believe it would have been even more meaningful had the opportunity been presented to states sooner.

**Prescription Drug Benefits (§156.120)** – NCSL supports the proposal to ensure that plan enrollees have access to clinically appropriate drugs to meet their health care needs. At the same time, NCSL urges you to provide sufficient flexibility to allow plans to implement effective programs to provide comprehensive cost-effective coverage.

**Prohibition on Discrimination (§156.125)** – NCSL supports the proposal in the NPRM to allow states to monitor and identify discriminatory benefit designs. The proposed rule also notes that currently the Medicare Advantage Program cost-sharing designs are subjected to an analysis to identify potentially discriminatory benefit design. It would be appropriate for HHS to share its experience in this area and to offer technical assistance to states to avoid 50 states reinventing the wheel on effective ways to identify discriminatory benefit designs and to when appropriate replace them with benefit designs that are fair for all plan beneficiaries.

**Cost-Sharing Requirements (§156.130)** – The NPRM proposes to prohibit including beneficiary cost-sharing attributable to out-of-network care from counting towards the beneficiary’s cost-sharing limit. This seems appropriate when a beneficiary chooses to receive out-of-network services when network services are available. An exception might be appropriate when the **plan approves out-of-network care** in special circumstances where the plan does not have the service/provider under contract. We urge you to consider an exception, similar to the exception that is proposed related to out-of-network emergency room services.

## Federalism

**Enforcement of Affordable Care Act Insurance Provisions** – The NPRM notes that states will continue to regulate health insurance and that state laws will be preempted only when they “prevent the application of federal law” or if a state elects not to enforce the federal law. Is HHS anticipating a review process to address enforcement issues? When and how will that be shared with states?

**State Government Implementers of the Affordable Care Act** - The NPRM mentions weekly calls with intergovernmental partners. These calls are useful and NCSL urges you to continue them and to use them to discuss emerging issues as well as the issues of the moment.